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MEMORANDUM

TO: THE EDITOR

DATE: OCTOBER 12, 2010

FROM: FRANK FALEN

RE: BLM RANGELAND REFORM REGULATIONS - DEALING WITH THE SURCHARGE

Dear Editor:

The purpose of this letter is to give BLM grazing permittees a legal solution to a potentially expensive problem – the BLM grazing fee surcharge.

Prior to Babbitt's Rangeland Reform '94 regulations, Bureau of Land Management ("BLM") permittees were required to own or control the livestock they grazed on federal lands. During Rangeland Reform, the regulations were changed to require that the permittee own the livestock or pay a fee surcharge. In most cases, that surcharge will make the grazing fee approximately \$5.00 per Animal Unit Month ("AUM").

The BLM grazing fee surcharge affects a lot more ranchers than those who run leased cattle. Rather the surcharge may apply to a permittee who: (1) owns or leases base property, but runs livestock owned by another; (2) has any form of livestock lease or bailment agreement (with a few possible exceptions); (3) runs cattle for another on a per head or gain basis; or, (4) owns some portion, but not all, of the livestock.

In most cases, the BLM has notified permittees who are subject to the surcharge. However, the lack of notice is not an exemption. If the livestock and the permit are not owned under the same name, the surcharge may apply. Thus, permittees should make certain of their status in order to avoid future liability.

While the surcharge sounds like a way to "price" ranchers off the BLM lands, many ranchers can avoid the surcharge by amending their business structure. The key is that the owner of the livestock must have a "legal interest" in the entity that owns the grazing permit. Thus, statutory business entities such as corporations, partnerships or

limited liability companies (“LLCs”) can be created that bring the permittee into compliance to avoid the surcharge. For example, a rancher who runs livestock owned by a partner can avoid the surcharge by creating an LLC that leases the base property. If the partner who owns the cattle is also a member of the LLC, the surcharge can be avoided.

As ranchers review ways to avoid paying the grazing fee surcharge, there are several important considerations. First, the method selected must be legal. The best way to ensure legality is to explain, in writing, exactly what you plan to do and then obtain a written response from the BLM stating that the surcharge will not apply. If a rancher has not received the BLM’s concurrence and the BLM later determines that the permittee has illegally avoided the surcharge, the BLM can cancel the grazing permit. In addition, the permittee and the livestock owner may face charges of defrauding the government, which is a felony punishable by substantial fines and imprisonment.

Many permittees have rigged up bills of sale, brand transfer and creative finance plans to avoid the surcharge. In most cases, this will not work because title is not legally transferred. Unfortunately, the BLM is generally aware of those permittees and can move to cancel those permits whenever it chooses.

A belief that the agency lacks proof of a violation is dangerous. The agency needs only to prove the allegations to the agency’s satisfaction before taking punitive action. In addition, the BLM has already seen all the “tricks” and are better at proving the ownership requirements have been violated than the permittees are at showing otherwise.

Second, the changes in business form can result in tax liabilities, especially if assets are transferred from a corporation. Thus, it is important to consult a professional before creating a new entity. The use of an LLC to avoid the surcharge will work for most people. An LLC has liability advantages of a corporation and tax status of a corporation. In addition, an LLC is easily created and can be tailored for the specific needs of the parties involved.

Third, consider whether the base property for the BLM permit is also base property for a state or Forest Service grazing permit or lease. Ironically, a set up that avoids the BLM surcharge may violate Forest Service or state grazing regulations. These issues are usually easy to address, but failure to do so can result in suspension of those permits.

The bottom line is this, with a little advance planning, it is possible to avoid being “priced off” the federal lands by the surcharge regulations. Should you have any questions, please do not hesitate to contact me.