the preceding year should not be allowed to graze livestock at the levels allowed by a decision that is under appeal. This provision is consistent with the basic concept of subpart 4160 and 43 CFR 4.21 that the decision of the authorized officer will be put into effect unless a stay is granted. The Department intends that this concept apply consistently throughout the rules pertaining to livestock grazing.

Subpart 4170—Penalties

Section 4170.1–1 Penalty for Violations

The proposed rule would have been amended to provide for a penalty for unauthorized leasing and subleasing in the amount of two times the private grazing land lease rate for the 17 western States as supplied annually by the National Agricultural Statistics Service, plus all reasonable expenses incurred by the United States in detecting, investigating, and resolving the violation. This penalty would have been more consistent with the penalties provided for unauthorized use and simpler to administer than the penalty provided in the existing rules. This would have facilitated consistent application of the provisions by BLM. The Department has adopted the provision as proposed, with minor clarifying changes. The Department received few comments on this section. Some suggested that penalties should be based on public land AUM values, not private land values. Others stated that the rate suggested in the proposal was punitive. The concept of assessing penalties upon ''value of forage'' removed is not new. Under PRIA and the existing Federal grazing fee formula (from 1985 to present), BLM has assessed penalties for unauthorized use on that basis.

Others stated that using twice the average private rate of all 17 states would be a bargain in some cases, or that BLM should use the private rate for each area. The Department agrees that the private rate for each State should be used to calculate the fee. The final language of the rule is revised to clarify this point.

Some commenters stated that violations should not be penalized unless they were willful. One common comment suggested that penalties should apply to other public land users, not just grazing permittees. Others suggested that the authorized officer should have the authority to cancel a lease or permit, but not be required to do so.

Regarding commenters' concerns about willful violations, the penalties discussed in this section apply specifically to unauthorized leasing and subleasing. Leasing or subleasing agreements are oral or written contractual arrangements between permittees or lessees and third parties, even though the grazing privileges obtained by Federal permittees or lessees is not transferrable or assignable without approval. Such arrangements are willful actions. The authorized officer must produce competent evidence to support a finding that the permittee has in fact violated § 4140.1(a)(6). This section does not alter the procedural rights of permittees under this part. It merely establishes the penalty for unauthorized grazing of livestock owned by persons other than the permittee or lessee or their sons and daughters as provided in this part. It does not apply to authorized base property leases or subleases or authorized pasturing agreements. Other penalties set forth elsewhere in these rules do pertain to public land users who enter public lands without authorization and remove publicly-owned assets or damage public lands.

Some commenters suggested that payment of expenses should be limited to specific legal costs, and that payment of salaries of Federal personnel should not be included. Others stated that none of the statutes listed by BLM provide for revocation of permits as a permissible penalty. The Secretary has adequate legal authority to provide for penalties for such violations. The penalties adopted in this section are fair and consistent with other similar programs, and contribute to BLM's effective enforcement of the grazing program. Pricing Federal forage at market rates can be a very effective deterrent to the use of unauthorized grazing of livestock owned by persons other than the permittee or lessee except for sons and daughters of permittees and lessees.

A typical comment discussed the fact that the proposal imposes the same penalty for unauthorized subleasing as for willful trespass, and suggested that this was excessive since the livestock involved with the subleasing were probably included in an existing authorized permit and therefore a permittee subject to a penalty for subleasing would have paid the grazing fee for authorized use plus the penalty. The Department believes that individuals who have violated the subleasing provisions should be penalized to the same extent as those who have trespassed. In some cases, trespass violations determined to be repeated and willful will result in a penalty of three times the private grazing land lease rate, plus administrative expenses. Experience in resolving cases of livestock trespass has shown a need for a gradient of penalties that can be specific for certain nonwillful, willful, and repeated willful offenses. In the Department's determination, unauthorized pasturing or other unauthorized subleasing will constitute a willful violation of the rules pertaining to grazing and will be discouraged by the penalty of twice the private rate plus administrative expenses. Should such violations be repeated, other enforcement mechanisms are available.

Others stated that the proposal does not take into account use upon intermingled private land maintenance of improvements, or suggested that some sort of penalty should be available to the authorized officer to penalize a permittee, short of cancelling a permit. Differing land ownership patterns could make these provisions more difficult to enforce. However, the provisions adopted do provide for authorizing grazing of public lands by livestock owned by persons other than the permittee or lessee. Penalties for violations of the subleasing or pasturing provisions would be limited to the public land forage AUMs consumed. The authorized officer does have discretion to use lesser sanctions than permit cancellation when warranted.

Others asserted that the penalties were not serious enough to be effective, and suggested that there should be a debarment provision. The penalty established in the final rule is intended to serve as a strong deterrent to unauthorized pasturing of livestock owned by other than permittees, lessees, or their sons or daughters. Setting the penalty at two times the private grazing land lease rate plus administrative expenses will ensure that there is no financial impetus for committing such a violation, i.e. an effective penalty must result in a cost greater than the reward. The provisions adopted today ensure this by using the private land rate, which in itself should generally exceed the cost of public land forage, and then doubling that figure. Administrative costs to be added to the penalty merely serve as a further disincentive to violate the provision and highlight the expenses to the public that result from the detection and resolution of violations of the provisions.

In accordance with the above discussion, the Department has decided to adopt the provision as proposed, with a few changes. The phrase ''for the 17 western States'' is revised to ''in each State'' and is moved to modify the phrase ''required to pay'' to provide a penalty that is tied to the private land