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**SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY**

WESTERN WATERSHEDS PROJECT,)	
)	
Plaintiff,)	No. _____
)	
vs.)	COMPLAINT FOR DECLARATORY
)	AND INJUNCTIVE RELIEF AND
WASHINGTON DEPARTMENT OF FISH)	PETITION FOR JUDICIAL REVIEW
AND WILDLIFE, and JENNIFER QUAN,)	(APA); OR ALTERNATIVE PETITION
WDFW Lands Division Manager,)	FOR WRIT OF PROHIBITION
)	
Defendant.)	
)	

INTRODUCTION

1. This action challenges the April 9, 2009 decision by Defendants Washington Department of Fish and Wildlife, and its Lands Division Manager Jennifer Quan (collectively, “WDFW”), approving a permit to graze domestic livestock in the Pintler area of the Asotin Wildlife Area (“Permit”). Attachment A. The Permit allows up to 400 Animal Unit Months¹ of domestic livestock to graze on a portion of the Wildlife Area from April 1, 2009 to June 15, 2011. Livestock grazing in eastern Washington’s arid environment has significant environmental effects—especially on wildlife habitat—as documented by a large body of science as well as the

¹ An Animal Unit Month is a cow with a calf under the age of 6 months, grazing for a period of thirty days.

1 Department’s own biologists. However, WDFW failed and refused to prepare any environmental
2 analysis of this action, as required by the Washington State Environmental Policy Act (“SEPA”).
3 Additionally, issuance of the Permit is arbitrary and capricious because WDFW ignored its own
4 scientists, disregarded impacts to special status species, including state threatened species, and
5 acted contrary to its own regulations and mission.

6 2. Plaintiff seeks declaratory relief pursuant to RCW Ch. 7.24; judicial review and
7 reversal pursuant to the Washington Administrative Procedure Act (“APA”), RCW Ch. 34.05;
8 and/or issuance of a writ of prohibition pursuant to RCW 7.16.290, holding that WDFW acted
9 unlawfully in approving the Permit, and prohibiting WDFW from implementing the unlawful
10 Permit.

11 **PARTIES**

12 3. Plaintiff WESTERN WATERSHEDS PROJECT (“WWP”) is a non-profit
13 membership conservation organization, which is dedicated to protecting and conserving the
14 public lands and natural resources of watersheds in the American West. WWP’s mailing address
15 is P.O. Box 1770, Hailey, Idaho, 83333. WWP, as an organization and on behalf of its 1,400-plus
16 members – approximately 50 of whom live in Washington – is concerned with and active in
17 seeking to protect and improve the wildlife, riparian areas, water quality, fisheries, and other
18 natural resources and ecological values of watersheds throughout the West, including in the State
19 of Washington. WWP is also active in monitoring ecological conditions on public lands; in
20 reviewing and commenting upon agency grazing and other resource decisions; and in publicizing
21 the adverse ecological effects of grazing in this region. WWP and its members regularly visit and
22 use the WDFW state lands affected by the challenged Permit for numerous personal and
23 professional reasons, including for camping, nature study, hiking, photography, and other

1 recreational and aesthetic pursuits. WDFW's issuance of the Permit prejudices WWP's
2 cognizable interests in the public resources that will be harmed by the permitted activity. WWP's
3 interests are intended to be protected by the SEPA procedures as described below. A ruling by
4 this court requiring WDFW to properly apply SEPA to the issued Permit will redress WWP's
5 grievances.

6 4. Defendant WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
7 ("WDFW") is an agency of the State of Washington, and located at 600 Capitol Way North,
8 Olympia, Washington, 98501-1091. The legislature has established the statutory mandates that
9 WDFW "shall preserve, protect, perpetuate, and manage the wildlife" of the state; and "conserve
10 the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the
11 resource." RCW 77.04.012.

12 5. Defendant JENNIFER QUAN ("Quan") is the Lands Division Manager of
13 WDFW, and her office is also located at 600 Capitol Way North, Olympia, Washington, 98501-
14 1091. Quan approved and signed the challenged Permit on behalf WDFW; and is sued solely in
15 her official capacity.

16 **JURISDICTION AND VENUE**

17 6. This Court has jurisdiction under RCW Chapter 7.24 (Declaratory and Injunctive
18 Relief); RCW 34.050.570(4) (Washington APA); RCW 43.21C.075 (SEPA); RCW 7.16.290
19 (writ of prohibition); and the inherent power of the judiciary under Article IV, Section 6 of the
20 Washington Constitution.

21 7. Venue is proper in the Superior Court of Thurston County pursuant to RCW
22 4.92.010 and RCW 35.05.514.

1 **STATEMENT OF FACTS**

2 **Overview of the Wildlife Area**

3 8. The Asotin Wildlife Area is located in the southeastern corner of the state,
4 approximately 20 miles southwest of Clarkston. Portions of the Wildlife Area abut the Umatilla
5 National Forest. It is part of the larger Blue Mountain Wildlife Area Complex, which
6 encompasses over 60,000 acres in southeastern Washington.

7 9. The Wildlife Area is characterized by steep canyons with slopes of up to 60%.

8 10. The Wildlife Area is largely within the Asotin Creek watershed. Asotin Creek
9 flows into the Snake River at the town of Asotin. Asotin Creek is important habitat for several
10 species of fish listed under the federal Endangered Species Act, including Snake River steelhead,
11 bull trout, and Chinook salmon. Asotin Creek and many of its tributaries, including Pintler
12 Creek, are designated critical habitat for steelhead. The Pintler area includes Pintler Creek and
13 the lower portions of Ayers Gulch and Kelly Creek. The State of Washington designated the
14 Asotin Creek drainage as a “wild steelhead refuge.” Small populations of both spring/summer
15 and fall Chinook salmon also occupy Asotin Creek.

16 11. The Wildlife Area is also home to many species of wildlife, including bighorn
17 sheep, sharp-tailed grouse, mountain quail, elk, and deer. Mountain quail is a highly imperiled
18 bird that has been extirpated from Washington. Before extirpation, the last known population in
19 eastern Washington existed in Asotin County, and WDFW has attempted to reintroduce the
20 species onto the Wildlife Area.

21 12. The Wildlife Area is home to several species of rare plants, including Rollin’s
22 biscuitroot (a state threatened species), a large population of Spalding’s catchfly (a federal and
23 state threatened species), and the Nez Perce mariposa lily.

1 13. The Area is governed by WDFW’s Blue Mountains Wildlife Area Complex
2 Management Plan (2006). The plan sets forth numerous goals and objectives for the complex.

3 14. The Management Plan sets as its primary goals to “preserve habitat and species
4 diversity for both fish and wildlife resources, maintain ecologically healthy populations of game
5 and non-game species, protect and restore native plant communities, and provide diverse
6 opportunities for the public to encounter, utilize, and appreciate wildlife and wild areas.”
7 Management Plan at 2.

8 **Efforts to Reintroduce Grazing to the Asotin Wildlife Area Complex**

9 15. WDFW first signed an MOU with the Washington Cattlemen’s Association
10 (“WCA”), a livestock industry group devoted to “representing and defending the interests of
11 Washington State’s Cattlemen,” on November 10, 2005. The WDFW subsequently renewed the
12 MOU on January 9, 2008. WWP is challenging WDFW’s decision to enter into and renew that
13 MOU in another action pending before this Court, No. 08-2-00276-1.

14 16. The stated purpose of the MOU is to “facilitate the establishment of several pilot-
15 grazing [sic] projects” by opening WDFW lands to livestock grazing, some of which have not
16 been grazed for many years. According to the MOU, WCA “is interested in expanding
17 opportunities for cattlemen to use public land for livestock grazing.”

18 17. Following the signing of the first MOU, WDFW identified two sites on the Asotin
19 Wildlife Area on which to commence livestock grazing, the Pintler Creek and Smoothing Iron
20 areas.

21 18. WDFW first issued a permit authorizing grazing on the Pintler Creek area on
22 April 24, 2006. The 2006 permit was a “crossing permit” authorizing grazing on WDFW land
23

1 from April 15 to April 30, 2006; this permit was not approved by WDFW's district biologists or
2 the Fish and Wildlife Commission.

3 19. WDFW then issued a two-year permit on April 2, 2007, authorizing grazing from
4 April 1, 2007 to March 31, 2009.

5 20. No SEPA analysis was conducted on either prior permit.

6 21. Prior to 2006, livestock grazing had not been permitted on the Pintler Creek area
7 since at least 1990.

8 22. The Management Plan and other documents identified the Pilot Project as a three
9 year venture. Management Plan at 82–82. However, grazing on the Pintler Creek area has
10 already occurred for three years, and the Permit challenged in this action extends grazing for
11 another three years.

12 23. On April 9, 2009, WDFW issued a Permit for another three years. No public
13 bidding was conducted; the permittee was selected by the WCA. No public comments were
14 taken nor was any public notice given.

15 24. The permittee has not paid, and again does not pay under the challenged Permit,
16 any fee for the privilege of grazing WDFW public land.

17 25. Along with the Permit, WDFW issued a 2009 Pilot Grazing Plan (“Grazing
18 Plan”).

19 26. The Grazing Plan states that its two goals for the grazing of the Pintler Creek area
20 are to: (1) “Improve conditions for deer while maintaining or enhancing ecological integrity,”
21 and (2) “Support an operationally and economically viable livestock grazing operation.”

22 27. The Grazing Plan sets “utilization targets” to govern the livestock grazing,
23 including:

- a. For areas within 100 yards of stock water or salt, 60% use of key grasses
- b. For sites dominated by cheatgrass, no maximum utilization target.
- c. For riparian areas, 35% use.
- d. For all other sites, 40–50% use of key grasses depending on the season.

Livestock Grazing Impacts

28. The Pilot Grazing project has proceeded for the past three years at significant environmental, financial, and human cost.

29. Livestock grazing can seriously degrade fish habitat through reducing riparian vegetation and causing bank destabilization, excessive sedimentation, and increased stream temperatures. Direct effects to steelhead can occur when livestock enter streams to drink or cross a stream. Livestock can directly trample redds (spawning nests), which may kill a large percentage of the embryos. When livestock wade in a creek, they startle or harass juvenile fish away from cover, which causes the fish to waste energy. For these reasons, biologists recommend not permitting livestock to have direct access to salmon streams, particularly during spawning season and when eggs or embryos are in the stream.

30. Livestock grazing also creates adverse impacts on the ecosystem as a whole by removing riparian vegetation, destabilizing stream banks, widening stream channels, lowering water tables, reducing pool frequency, increasing soil erosion, and altering water quality.

31. Specifically, on the Asotin Wildlife Area, the Pilot Project grazing has caused significant, harmful impacts on fish and wildlife. These harms include: livestock directly trampling in occupied federally-listed salmonid habitat and critical habitat; livestock repeatedly exceeding allowable use standards; livestock usage creating a landslide depositing sediment into

1 Asotin Creek; and livestock denuding many areas into bare ground. WDFW has never analyzed
2 these impacts under SEPA.

3 32. WDFW has constructed very large amounts of fencing and spring developments
4 to facilitate the Pilot Project grazing. For example, in the Pintler Creek area alone, WDFW has
5 constructed almost five miles of fence. Both fencing and spring developments are harmful to
6 wildlife. WDFW has never analyzed the environmental impacts of these developments under
7 SEPA.

8 33. The livestock grazing has increased the spread of noxious weeds in the Wildlife
9 Area, which has caused WDFW to increase application of herbicides. WDFW has never
10 analyzed these impacts under SEPA.

11 34. WDFW's own professional biologists have consistently expressed grave concerns
12 regarding the adverse impacts of the Pilot Project livestock grazing on native fish and wildlife, as
13 documented in numerous memoranda, letters, and emails. The opinions and advice of WDFW's
14 scientists have been largely ignored by WDFW managers.

15 35. In a 2007 Pilot Grazing Project Status Report, WDFW reported that \$75,852 in
16 direct costs were incurred in 2006 and 2007, and that the legislature appropriated \$300,000 for
17 the Pilot Project in 2008 and 2009. WDFW biologists noted that these cost estimates were
18 substantial underestimates.

19 36. Two severe injuries have resulted from building fencing for the Pilot Grazing
20 Project. In 2007 a worker was injured while working on livestock fencing in the Pintler Creek
21 area. In 2008 another worker was paralyzed in the Wildlife Area while working on livestock
22 fencing.

1 37. By approving the Permit as alleged herein, WDFW has violated SEPA’s mandate
2 that it must prepare a detailed Environmental Impact Statement (“EIS”) to assess environmental
3 impacts of a “major action significantly affecting the quality of the environment,” or at the very
4 least to prepare a checklist and threshold determination in order to decide whether an EIS should
5 be prepared to inform the permitting decision. RCW 43.21C(2)(c); WAC 197-11-310 to 330.
6 Instead of taking such steps, WDFW erroneously asserts that the Permit falls into a SEPA
7 categorical exemption that applies to issuance of new grazing leases where the state has leased
8 the land for grazing within the previous ten years. WAC 197-11-800(24)(a).

9 38. WDFW has further violated SEPA by: failing to consult with pertinent public
10 agencies, in violation of RCW 43.21C.030(2)(d); failing to study and develop alternatives as
11 required by RCW 43.21C.030(2)(e); failing to utilize ecological information in the planning and
12 development of the MOU, in violation of RCW 43.21C.030(2)(h); failing to conduct any public
13 bidding on the Permit; and failing to issue any public notices or conduct any public hearings
14 regarding the Permit, even though the agency met multiple times with the WCA and grazing
15 interests prior to signing the Permit.

16 39. Furthermore, the Permit is arbitrary and capricious pursuant to the APA, for
17 reasons including, but not limited to, WDFW’s violation of its livestock grazing regulations at
18 WAC 232-12-181; its violation of its own statutory mandate to provide “for the greatest
19 protection of [fish and wildlife] species and stocks” (RCW 43.300.005); its violation of its own
20 governing Management Plan; and its determination to ignore its own biologists’ warnings
21 regarding the environmental harms of grazing, particularly to federally and state protected
22 wildlife.
23

1 40. Unless the relief prayed for herein is granted, WDFW will continue to permit
2 harmful livestock grazing on the Pintler area of the Asotin Wildlife Area to proceed, in violation
3 of SEPA and other requirements of law, and causing irreparable harm to Plaintiffs' interests and
4 to the wildlife values and habitats of the State of Washington.

5 **CLAIMS FOR RELIEF**

6 41. Pursuant to RCW Chapter 7.24, Plaintiffs ask the Court to enter declaratory relief
7 holding that WDFW's actions in approving and signing the Permit were unlawful, including
8 because it violates SEPA (RCW Ch. 43.21C), its regulations (WAC Ch. 197-11), other WDFW
9 regulations, and the statutory mandate that WDFW must "preserve, protect, perpetuate, and
10 manage the wildlife" of the state; and "conserve the wildlife . . . in a manner that does not impair
11 the resource." RCW 77.04.012. Plaintiff further requests the Court enjoin WDFW from
12 implementing the unlawful Permit.

13 42. In addition or in the alternative, Plaintiff seeks judicial review pursuant to the
14 Washington APA, RCW 34.05.510 *et seq.*, and ask the Court to hold that: WDFW violated
15 SEPA and its regulations when issuing the Permit; and WDFW issuance of the Permit was
16 arbitrary and capricious and outside the agency's authority because it violated applicable law and
17 regulation, because it is violated its own governing Management Plan, and because it ignored its
18 own scientists. Plaintiff thus asks the Court to set aside and reverse the Permit as being arbitrary,
19 capricious, and contrary to law as set forth herein.

20 43. In the alternative, Plaintiff seeks a writ of prohibition from this Court pursuant to
21 RCW 7.16.290 and the Washington Constitution, holding that WDFW acted unlawfully in
22 approving the Permit in violation of its mandatory duties under law, including SEPA and its
23 regulatory requirements, WDFW regulations at WAC 232-12-181, the governing Management

1 Plan, and in disregard of the agency's own scientists, and prohibiting WDFW from
2 implementing said Permit.

3 **REQUEST FOR RELIEF**

4 WHEREFORE, plaintiff respectfully prays that the court grant the following relief:

5 A. Order, declare and adjudge that defendants acted unlawfully in approving the
6 Permit, and reversing the same as being unlawful;

7 B. Enjoin and/or prohibit defendants from implementing the unlawful Permit;

8 C. Award plaintiff its litigation costs and reasonable attorney fees under the
9 Washington Equal Access to Justice Act, RCW 4.84, or other applicable law; and/or

10 D. Enter such other and further equitable relief as the court determines to be just and
11 necessary to remedy the defendants' violations of law and protect plaintiff's and the public's
12 interests.

13 Dated this 7th day of May, 2009.

14 Respectfully submitted,

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16 _____
17 Toby Thaler, WSBA #8318
18 Attorney for Plaintiff
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1 **Verification**

2 The plaintiffs through their counsel Toby Thaler, certifies that they have read the
3 foregoing first amended complaint and that to the best of their knowledge, information,
4 and belief, formed after an inquiry reasonable under the circumstances, and upon
5 advice of counsel, the complaint: (1) is well grounded in fact; (2) is warranted by
6 existing law; and (3) is not interposed for any improper purpose, such as to harass or to
7 cause unnecessary delay or needless increase in the cost of litigation.

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9 _____
10 Toby Thaler, WSBA #8318
11 Attorney for Plaintiff

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Attachment A
Permit

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

or 's follow JQ

GRAZING PERMIT

THIS PERMIT is between the WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, hereinafter referred to as "WDFW", and Tom Hendrickson, hereinafter referred to as "THE PERMITTEE" whose mailing address is 7095 Asotin Creek Road, Asotin, WA 99402.

WDFW grants this permit to the undersigned Permittee, subject to the following mutually agreed terms and conditions:

Also see attached grazing plan and Memorandum of Understanding (MOU) between WDFW and Washington Cattlemen's Association (WCA).

1. TERM: The term of this permit shall be 3 grazing season commencing April 1, 2009 and terminating June 15, 2011.

2. LAND DESCRIPTION:

Township 9N, Range 45E, W.M.
Sections 1, 11, 12, 13, 14, 15, 23 and 24

Township 9N, Range 46E, W.M.
Sections 6, 7, 17, 18, 19 and 30

Said description is located in Asotin County and contains 4,280 acres more or less. (See attached grazing plan).

3. DEFINITIONS:

a. Animal Unit (AU):

- (1) Bull..... 1 AU
- (2) Cow with calf under age 6 months..... 1 AU
- (3) Animal age 6 months to yearling..... .6 AU
- (4) Horse..... 1.25 AU

NOTE: A cow with a calf under age 6 months when entering the range will be counted as one Animal Unit (AU) during that grazing period, regardless of age of the calf when the cow and calf are removed.

b. Animal Unit Month (AUM): One AU, as defined above, grazing on the land for a period of thirty days.

4. AUM ALLOTMENT: The AUM allotment per year shall be no more than 400 AUMs. This allotment may be changed as proved in paragraph 7.

5. AUM FEE: As provided in the MOU between WDFW and WCA, there will be no grazing fee during the term of this permit.

6. GRAZING PLAN: A grazing management plan to which the permit is subject is attached as Exhibit A and incorporated by reference into this permit as if recited herein.

7. CHANGE IN SIZE OF AREA AND CHANGE IN NUMBER OF AUM'S IN ALLOTMENT: WDFW reserves the right to alter and change the provisions of the grazing use plan to include reduction in acres of pasture available and number of AUMs authorized when WDFW determines that such changes are required to benefit fish or wildlife management or public hunting and other recreational uses.

8. HB 1309 ECOSYSTEM STANDARD: This permit is subject to and complies with HB 1309 Ecosystem Standards as required on State owned agricultural and grazing land. A copy of said document is attached and by reference hereto is made part of this permit.


9. CASH BONUS BID CREDIT: If Permittee in acquiring or renewing this permit paid a cash bonus bid and in the event WDFW, as provided in paragraph 7, reduces the total number of AUMs of grazing permitted during the term of this permit and such reduction exceeds five per cent (5%) of said total AUMs, a credit of an equal percentage of the cash bonus bid shall be applied toward the grazing fees due for the last year this permit is in effect. Such a credit will not apply as a result of Permittee's failure to utilize all or part of the total AUMs permitted. The same credit procedure shall apply in the event WDFW cancels the permit as provided in paragraph 10, except in case of cancellation for noncompliance or cancellation by Permittee, in which case the cash bonus bid shall become forfeited as liquidated damages, without further process.

10. CANCELLATION OF PERMIT: WDFW reserves the right to cancel this permit entirely in the event the area described in this permit is included in a use plan determined by WDFW to be a higher and better use. Such cancellation shall be in writing and shall state the reason for cancellation. Notice shall be given as far in advance of cancellation as possible, and not less than ninety (90) days. In the event of the Permittee's noncompliance with any term or condition of this permit, it may be canceled by WDFW by written notification, and all investment in improvement projects made by the Permittee, as provided in paragraph 12 shall become forfeit as

liquidated damages, without further process.

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- 11. MONTHLY REPORT OF NUMBER OF AU'S ON PERMITTED AREA:** Permittee shall report at the end of thirty (30) days, or calendar month, to WDFW the number of Animal Units (AU's) grazed on the permitted area and the expected use for the next thirty (30) days. A report need not be submitted for those 30-day periods or calendar months cattle are not grazed on the area. Sufficient copies of a form to conveniently make this report will be supplied by WDFW.
- 12. RANGE IMPROVEMENT PROJECTS BY PERMITTEE:** Range improvements, such as seeding, water developments, fertilization, etc., may be agreed upon and performed by the Permittee only with written approval of WDFW. Written approval shall be attached to this permit and become a part hereof, and shall contain a description and/or plan of the approved project, a schedule of performance, a statement of cost and plan of crediting Permittee for his share of costs during the term of this permit.
- 13. MAJOR AND MINOR FENCE REPAIR:**
- a. Major repair of a fence consists of complete replacement by WDFW when WDFW's examination of existing posts, wire and tension braces, and any other devices used in the fence, reveals that replacement is warranted. Said replacement will be accomplished within a reasonable period of time consistent with Permittee's use of the land and WDFW's operations. The Permittee is expected to inform and consult with WDFW regularly as to general fence condition and particularly when, in the Permittee's experience, replacement appears necessary.
- b. Minor fence maintenance shall be the responsibility of the Permittee. As is usual and customary in the industry, the Permittee is expected to inspect and make minor repairs on a regular basis to assure the fences will contain and control his livestock.
- 14. RESERVATION OF USE:** All lands covered by this permit shall at all times remain open to the public for lawful hunting and fishing and other recreational uses.
- 15. NO ASSIGNMENT OF PERMIT:** This permit, or the rights and privileges granted herein, shall not be assigned, transferred or sublet, in whole or in part.
- 16. LIABILITY:** The Permittee shall not hold WDFW, its employees, agents, successors or assigns, liable for any damages or injuries caused by the Permittee's exercise of the rights herein granted and the Permittee further agrees to indemnify and hold harmless WDFW and its agents and employees, successors and assigns from damages or claims of damages by whomsoever made and of any nature whatsoever arising out of or in any manner connected with the Permittee's exercise or failure to exercise the rights herein described.
- 17. VENUE:** In the event of a lawsuit involving this permit, jurisdiction and venue shall be proper only in the State of Washington, Thurston County Superior Court.
- 18. SEVERABILITY:** If any covenant or provision of this permit shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision, or part thereof, which in itself is valid if such remainder conforms to the terms and requirements of applicable law and the intent of this permit.
- 19. ENTIRE AGREEMENT/INTERGRATION:** This document contains the entire agreement between the parties, and no statement, promise, representation, inducement or agreement made by WDFW or its agents or employees that is not contained in this written agreement shall be valid, binding or enforceable. By signature below, the parties warrant that they have read and understood the agreement and agrees to be bound its terms.

4-08-09
Date


Tom Hendrickson, Permittee

4-09-09
Date

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

Jennifer Guan, Lands Division Manager