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April 27, 2009

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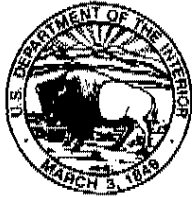
From: Andrew S. Pearlstein 
Administrative Law Judge

Subject: Western Watershed Project v. BLM, WY-01-2008-1

Message: Please see attached Order Granting Summary Judgment.

9 pages to follow excluding this cover.
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April 27, 2009

WESTERN WATERSHEDS PROJECT,)	WY-01-2008-1
Appellant)	
)	Appeal of Assistant Field Manager's
v.)	Notice of Proposed Decision dated
)	February 28, 2008, issued to Hampton
BUREAU OF LAND MANAGEMENT,)	Sheep Company, involving the Denver
Respondent)	Jake and Lost Creek Allotments,
)	Worland Field Office, Wyoming

Order Granting Summary Judgment

The Western Watersheds Project ("WWP") has appealed the above captioned February 8, 2008 Decision by the Worland Field Office of the Bureau of Land Management ("BLM"), renewing the grazing permit for the Hampton Sheep Company for the Denver Jake Draw and Lost Creek Allotments (the "Decision"). This order addresses the parties' respective motions for summary judgment relating to that Decision. This order grants summary judgment to WWP, and remands the Decision to BLM for further review consistent with these rulings.

Factual and Procedural Background

The Denver Jake Draw Allotment consists of 11,496 acres, 93% of which is public land, located about 5 miles southeast of Worland, Wyoming. Elevations range from 4300 to 4400 feet. The most prevalent vegetative communities are dominated by bluebunch wheatgrass, Wyoming big sagebrush, cheatgrass and other grasses, and salt shrub. The Denver Jake Draw Allotment is in a desert valley, receiving about 8 inches of precipitation annually. It provides habitat for sage grouse, pronghorn antelope, and other wildlife.

The Lost Creek Allotment is located some 40 miles southeast of the Denver Jake Draw Allotment, 16 miles south of the Big Trails, on the southwest slopes of the Big Horn Mountains. It consists of 1875 acres of which only 34 acres, or 2%, consists

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of public land. It lies at elevations over 7000 feet, and receives 15 to 19 inches of precipitation annually. The Lost Creek Allotment is characterized by mountain soils and vegetation, including Wyoming big sagebrush.

The previous grazing permit for both allotments, held by the Hampton Sheep Company ("Hampton"), expired on January 7, 2008. Under that permit, Hampton was authorized to run up to 1054 sheep and 75 cattle on the Denver Jake Draw Allotment from November 16 to May 18 each year, for a total active use of 1358 AUMs. However, Hampton used an average of only 689 AUMs per year on this allotment over the past 24 years. Sheep were authorized to graze from November 16 until May 18 of the following year. Cattle were authorized to graze from November 16 to February 28, then again from April 15 to May 15. The expiring permit allowed Hampton to run 10 cattle on the Lost Creek Allotment for the month of July, for a total of 10 AUMs on public land.¹

In 2007, before the permit expired, Hampton applied for a permit renewal for a new 10-year term in which it requested to convert a portion of its sheep AUMs to cattle AUMs in the Denver Jake Draw Allotment. In its review of Hampton's application, BLM completed an Environmental Assessment ("EA") on January 30, 2008. The EA analyzed four alternatives: (1) leaving the current permit in effect; (2) shifting some use from sheep to cattle as requested by Hampton; (3) moderately reducing overall grazing use in accord with a 1984 vegetation survey; and (4) no grazing.

In its February 28, 2008 Decision, BLM proposed adopting Alternative 2, shifting some use from sheep to cattle on the Denver Jake Draw Allotment, with no change in the authorized AUMs. With the EA, BLM issued a Finding of No Significant Impact under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. Under the new permit, Hampton could run up to 718 sheep and 100 cattle on the Denver Jake Draw Allotment from November 16 to May 18, resulting in the same active use level as the previous permit, 1358 AUMs. The Lost Creek allotment

¹ However, a term in the previous permit, apparently in recognition of the tiny proportion of public land on the Lost Creek Allotment, does not restrict livestock numbers or times on that allotment so long as use of public lands is consistent with the Wyoming Standards for Healthy Rangelands.

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was accorded permitted use of 10 AUMs on the basis of 551 sheep from 7/1 to 11/15.² In accord with guidelines in the Washakie Planning Area Resource Management Plan, approved September 1988 (Washakie RMP), the Decision limited utilization of key forage plant species to a maximum of 50% of the current year's production.

WWP appealed the Decision on April 4, 2008, with a Statement of Reasons and Petition for Stay. In an order dated May 16, 2008, I denied WWP's petition for a stay of the BLM decision on the basis that WWP had not shown any relative harm from granting or denying or the stay. The level of authorized grazing use and other terms and conditions would remain the same even if a stay were granted, and WWP had not shown any increased harm from the conversion of some use from sheep to cattle.

The parties then attempted to resolve this proceeding through a negotiated settlement. Those efforts failed, however, and in a conference call with the judge, the parties agreed to proceed by means of each filing respective motions for summary judgment. WWP indicated it would waive potential factual issues for hearing and focus its motion on BLM's alleged lack of compliance with the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq* (NEPA) in its issuance of the February 8, 2008 Decision on the DJD and Lost Creek Allotments. The parties each filed motions for summary judgment on or about January 14, 2009, and responses on or about February 9, 2009. BLM also filed a motion to strike portions of WWP's motion and attachments that it alleged raised factual issues and were outside the agreed scope of the legal bases for seeking summary judgment.

Discussion

The Interior Board of Land Appeals ("IBLA") has followed the procedure authorized in the federal courts by holding that summary judgment may be granted upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. Rule 56(c). In considering a motion for summary judgment, all factual inferences and conflicts must be resolved in the light most favorable to the non-moving party. *Larson v. BLM*,

² Also in recognition of the mere 2% public land on the Lost Creek Allotment, the stated use may be varied by the permittee. The remainder of these rulings will therefore focus only on the Denver Jake Draw Allotment unless otherwise specified.

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129 IBLA 250 (1997); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A summary judgment motion filed under F.R.C.P. Rule 56 may be decided on the basis of the pleadings, documentary evidence, affidavits, and other evidence admissible or usable at trial. *Celotex, supra*, 477 U.S. at 324.

- BLM's Motion to Strike

Applying the principles for deciding motions for summary judgment is a bit complicated in this case, however, where both parties have filed such motions. If a genuine issue of material fact is found, summary judgment could not be granted to either party, since disputed facts could not then be resolved in favor of either party. In this case, however, WWP has agreed, although informally, to focus its motion on BLM's NEPA compliance and the administrative record of this case, and to waive potential factual disputes. BLM therefore moved to strike portions of WWP's motion and attachments that appeared to focus primarily on factual or other bases for altering the BLM Decision, such as factual allegations related to alleged violations of the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* BLM also moved to strike a series of attachments to WWP's motion consisting of photographs, maps, and scientific articles concerning such matters as sage grouse habitat and sagebrush ecology.

To some extent, many of WWP's arguments and attachments that raise potential factual issues could also be related to issues concerning BLM's NEPA compliance or other matters within the administrative record. Rather than strike portions of WWP's motion and attachments, those portions that raise potential disputed issues of fact will be considered resolved in favor of BLM's position to the extent they implicate issues outside NEPA compliance or the administrative record of BLM's Decision on the Denver Jake Draw allotment.

BLM's NEPA Compliance

The IBLA has often considered the standards BLM must meet in order to comply with NEPA, and those an appellant must meet in order to show that BLM did not do so.

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NEPA requires consideration of potential impacts of a proposed action in an environmental impact statement (EIS) if that action is a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A BLM decision approving an action based on an EA and FONSI, rather than an EIS, generally will be affirmed if BLM has taken a "hard look" at the proposal being addressed and identified relevant areas of environmental concern so that it could make an informed determination as to whether the proposal's impacts are insignificant or will be reduced to insignificance by the adoption of appropriate mitigation measures. *Oregon Chapter of the Sierra Club*, 172 IBLA 27, 46-47 (2007). . . . To prevail on appeal, appellants must demonstrate by a preponderance of the evidence that the EA does not support the FONSI because the EA contains either an error of law or a demonstrable error of fact, or fails to consider a substantial environmental question of material significance. *Wilderness Watch*, 176 IBLA 75, 87 (2008) and cases cited therein.

Escalante Wilderness Project, et al. v. BLM, 176 IBLA 300, 303 (2009).

The Council on Environmental Quality ("CEQ") regulations implementing NEPA define an EA as a concise document that serves to "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). Further, an EA "[s]hall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). These requirements for the contents of an EA are echoed in the Department's NEPA regulations at 43 C.F.R. § 46.310(a).

A site-specific EA may appropriately be "tiered" to a previously completed programmatic EIS that covers a larger area or a broader range of proposed actions. *See* 40 C.F.R. §§ 1508.28, 1502.20. "A NEPA document that tiers to another broader NEPA document in accordance with 40 CFR 1508.28 must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions." 43 C.F.R. § 46.140. In this case, BLM tiered its EA supporting the Decision to the Washakie RMP, issued in September 1988. It remains to be seen, however, whether those documents actually did take a "hard

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look" at the proposed action, appropriately considered the alternatives, adequately justified the need for the action, and sufficiently considered substantial environmental questions of material significance.

The EA in this case states that BLM has not completed a Wyoming Rangeland Standards Conformance Review for the Denver Jake Draw Allotment. The EA further notes that "low intensity" allotment monitoring was conducted on the Allotment in seven out of 10 years since 1997, the last in 2007. However, no monitoring results are presented in the EA or elsewhere in the administrative record. The EA does cite a 1997 lotic riparian-proper-functioning condition ("PFC") assessment for the East Fork of Nowater Creek, an ephemeral stream flowing through the Denver Jake Draw Allotment, which determined it was non-functioning condition primarily due to the lack of riparian vegetation. The EA also notes significant infestations of noxious weeds on the Allotment. The EA reports that virtually the entire Allotment is prime sage grouse breeding and brood rearing habitat, as well as big game habitat.

In the absence of a rangeland health assessment, the EA at least implies that BLM believes that the Denver Jake Draw Allotment is not currently meeting the Wyoming Standards for Rangeland Health. The EA states that "[o]verall rangeland health should improve under this alternative, allowing the allotments to progress towards meeting the Standards for Rangeland Health." EA at 10. This and similar statements indicate that the Allotment is not currently meeting the standards for rangeland health, and therefore needs improvement to do so.

If the Allotment is not meeting the Standards for Rangeland Health, or is at best in marginal status, the EA does not give adequate consideration to Alternative 3, which would moderately reduce AUMs from 1358 to 1033. This amount of use is based on a 1984 vegetation inventory that determined that the available forage on the federal land on the Denver Jake Draw Allotment was 1033 AUMs. There is no information in the EA or elsewhere in the administrative record of the Decision to indicate that this carrying capacity has increased since 1984. Rather, the anecdotal evidence in the EA concerning the poor condition of riparian areas, infestations of noxious weeds, and increased oil and gas development, indicate at best a static trend. The EA mentions these factors and other environmental effects but does not substantively discuss their actual impacts, especially in relation to the high value wildlife habitat present throughout the entire Allotment.

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Further in this vein, the EA does not include any substantial discussion of why it selected an alternative that increases authorized livestock use some 30% over the only established survey of livestock carrying capacity on the Allotment. The EA notes that expected impacts of Alternative 3 would be less than those for Alternatives 1 and 2, and that BLM expects that rangeland conditions on the Allotment would improve at a faster rate under this lighter use alternative. While the EA points out that the Decision's grazing system (Alternative 2) allows for partial rest during the latter part of each growing season, that still does not address the total number of AUMs allowed to be consumed. The EA does not give any reason for authorizing a greater level of use than shown was available by BLM's own vegetation inventory.

Thus, on its face, the EA fails to satisfy the requirements in the grazing regulations that permitted use be limited to the amount of forage available for livestock grazing as established in a relevant land use plan, or that authorized grazing use not exceed the carrying capacity of the allotment. 43 C.F.R. §§ 4110.2-2(a), 4130.3-1(a). Although the EA also states that "[o]verall rangeland health should improve under this alternative [the Decision]," there is no explanation of how this could result from authorizing grazing use at a level greater than the inventoried carrying capacity. This omission, especially in view of the absence of a current rangeland health assessment, constitutes a demonstrable error of fact and a failure to consider an environmental question of material significance, requiring remand of the Decision to BLM to conduct a supplemental NEPA review to address this issue.

The Decision to continue permitted use at a higher level of AUMs than the established carrying capacity of the Allotment is especially curious in view of the fact that the permittee, Hampton, has not used anywhere near that number of AUMs over the past 24 years. The EA states that, over that period, Hampton has stocked at an average level of only 689 AUMs. The EA does not include any discussion of why the permittee needs or wants authorized grazing use nearly double the level of its actual average grazing use on the Allotment. The EA thus also does not meet the requirement of including a brief discussion of the need for the proposed action, at the requested level of forage use, as required by the NEPA regulations at 40 C.F.R. § 1508.9(b) and 43 C.F.R. § 46.310(a)(2). The probable inferred fact that rangeland conditions have not improved at this much lower level of actual AUM use provides

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a buttressing reason to require BLM to further explain its Decision to permit a continued higher level of authorized grazing use.

WWP raises additional arguments centered on BLM's alleged failure to take a "hard look" at environmental impacts of the proposed action, which generally raise issues of fact that are at least potentially disputed by BLM. The main issues in this category include the effects of the Decision on sage grouse, effects on big game winter habitat, cumulative effects focusing on oil and gas development, and the sufficiency of mitigation measures. To a large degree, the EA's discussion of these issues is quite cursory. The Washakie RMP is now over 20 years old and was not included in the administrative record, so it is not known to what extent it has addressed the effects of grazing permit renewals with respect to these issues. It may be inferred, however, that any information in that 1988 document would need to be significantly updated and that more of a "hard look" would be required in a site-specific EA to support a FONSI than would in an EA tiered to a more recent land use plan. If it was intended to be tiered to the Washakie RMP, the EA does not include the statement required by 43 C.F.R. § 46.140 that conditions and environmental effects considered in the Washakie RMP are still valid.

These factually based issues will not however form the basis of this order to remand the Decision to BLM. WWP's waiver of such issues requires considering them resolved for the purposes of these rulings in favor of BLM. On the other hand, since the Decision will be remanded on other bases, BLM would be well advised to further substantively consider the additional issues cited above in WWP's appeal and motion. If feasible, BLM should also conduct a current rangeland health assessment on the Denver Jake Draw Allotment as part of its supplemental NEPA review to renew the grazing permit for that allotment.

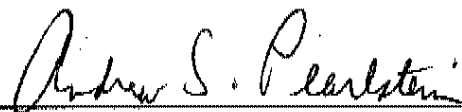
Conclusion and Order

BLM's NEPA review that led to the Decision, as shown in the EA, contained an apparent error of fact and failed to consider an environmental question of material significance by authorizing livestock grazing use at a substantially higher level of AUMs than shown was available on the Denver Jake Draw Allotment in BLM's own vegetation survey. The Decision thus authorizes grazing use that exceeds the carrying capacity of the Allotment, in violation of 43 C.F.R. § 4130.3-1(a). The Decision also did not adequately justify the need to authorize that level of

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AUMs in view of the fact that the permittee has actually averaged use of only slightly more than half that amount over the past 24 years. On remand, BLM should also, if feasible, conduct a rangeland health assessment on the Denver Jake Draw allotment, and take a harder look at environmental impacts, particularly cumulative impacts of oil and gas development, and impacts on sage grouse habitat on the Allotment.

Therefore, this order remands the Decision to BLM to conduct a supplemental NEPA review consistent with these rulings.



Andrew S. Pearlstein
Administrative Law Judge

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