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# FAX COVER SHEET

October 21, 2011

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From: Andrew S. Pearlstein  
Administrative Law Judge ASP

Subject: *Western Watersheds Project v. BLM, AZ-P010-11-02*

Message: Please see attached Order Granting Summary Judgment and Imposing Interim Relief.

7 page(s) to follow excluding this cover.  
Hard copy to follow.

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## United States Department of the Interior

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October 21, 2011

WESTERN WATERSHEDS PROJECT,	)	AZ-P010-11-02
Appellant (WWP)	)	
	)	Appeal from Field Manager's Final
v.	)	Decision dated March 29, 2011,
	)	involving the Wickenburg Arrow Y
BUREAU OF LAND MANAGEMENT,	)	Allotment, Hassayampa Field Office,
Respondent (BLM)	)	Arizona

### Order Granting Summary Judgment And Imposing Interim Relief

#### Background

The Appellant, the Western Watersheds Project ("WWP"), has appealed a March 29, 2011 final grazing decision ("FGD") issued by the Bureau of Land Management's Hassayampa Field Office, located in Phoenix, Arizona ("BLM"). The FGD renewed the 10-year grazing permit for the Wickenburg Arrow Y Allotment (the "WAY Allotment"), currently held by the Lemons Family Trust.

The WAY Allotment consists of 21,587 acres, of which 75% is BLM-administered public land, located just east of Wickenburg, Arizona, about 60 miles northwest of Phoenix. The terrain consists of gently rolling to steep hills and small mountains, bisected by numerous dry washes or drainage ways. The vegetation on the Allotment is characterized as Arizona Upland Sonoran Desert scrub, dominated by palo verde, saguaro, and mixed cacti. Wildlife species that occur within the WAY Allotment are representative of the area and include mule deer, coyote, javelina, desert cottontail, Gambel's quail, and other various small mammals, reptiles, and birds. Of particular significance, most of the Allotment also provides occupied habitat for a BLM-designated sensitive species, the Sonoran desert tortoise.

The current permit for the Allotment, scheduled to expire in 2013, authorizes the permittee to graze 239 head of cattle year-long, for 2151 animal-unit-months ("AUMs"). There are no interior fences and there is no prescribed grazing rotation

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system for the WAY Allotment, which the permittee uses in conjunction with three adjacent allotments, Arizona State trust lands, and private lands. There are several developed wells and water sources on the Allotment. The permittee did not graze the Allotment at all from 2000 to 2002 due to drought conditions. Since then the permittees have operated at reduced numbers. From 2003 to 2005, the permittee ran 125 head, and averaged annual use of 1125 AUMs (52% of authorized use). From 2006 to 2009, the permittee ran an average of 155 head for an average of 1395 AUMs annually (65% of authorized use).

BLM issued the FGD after conducting a Rangeland Health Evaluation ("RHE") on the Allotment, and issuing an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq* ("NEPA"). BLM stated that the purpose and need to issue a new grazing decision for the Allotment at this time, before expiration of the existing permit, was in order "to implement new terms and conditions" as warranted by the RHE, intended "to authorize livestock grazing in a manner that maintains (or makes significant progress toward) achievement of land health standards, or to achieve resource condition objectives, in conformance with the Bradshaw-Harquahala Resource Management Plan (RMP, Approved 2010). (EA at 2).

The RHE monitored conditions at seven key areas on the Allotment. The RHE found that the Arizona Standards for Rangeland Health were achieved for Standard 1 - upland sites, and Standard 3 - desired resource conditions (for native species). Standard 2, for riparian-wetland sites, is not applicable to the WAY Allotment since there are no riparian areas or wetlands within the Allotment. The RHE also determined, with two exceptions, that "desired plant community objectives" were achieved at each of the seven key areas. Two key areas did not achieve the desired 5% species composition for perennial grasses.

BLM then issued an EA that considered two alternatives: the "proposed action" and "no action." The "no action alternative" would renew the grazing permit with the existing terms and conditions. The "proposed action" would also renew the permit with the existing terms and conditions, with the addition of two terms and conditions: (1) a term restricting the placement of salt blocks and mineral supplements at least 1/8 mile from washes and 1/4 mile from watering facilities; and

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(2) requiring the permittee to file annual actual use reports in accordance with 43 C.F.R. § 4130.3-2(d).

The FGD selected the "proposed action," which retains the same grazing system and AUM authorization as the existing permit, with the addition of the two above described terms and conditions. Although not included as a specific term in the previous permit, the restriction on the placement of salt blocks and mineral supplements is already required by the RMP. The requirement to file annual actual use reports is also standard practice under the grazing regulations, and has no environmental effect on the Allotment.

#### WWP's Appeal and Subsequent Proceedings

WWP's appeal alleges that the FGD violated several provisions of NEPA and the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq* ("FLPMA"). WWP did not petition for a stay of the FGD. Among other allegations, WWP alleges the FGD failed to consider an adequate range of alternatives; failed to take a hard look at the impacts on the Sonoran desert tortoise; and failed to impose any rotational grazing system for the WAY Allotment to protect range resources.

WWP filed a motion for summary judgment on June 14, 2011. The motion largely repeats WWP's statement of reasons in support of its appeal, focusing particularly on BLM's alleged failure to consider an adequate range of alternatives as required by NEPA, and its failure to adequately consider the effects of the FGD on the desert tortoise. Although WWP states there is no dispute as to the facts underlying the FGD, in its motion WWP does question the methodology and conclusions reached in the EA and RHE, and takes issue with facts asserted in those documents concerning the availability of forage for the desert tortoise. WWP's motion seeks an order remanding the FGD to BLM to complete a valid NEPA analysis before authorizing livestock grazing on the Allotment, and to limit the authorized grazing use on the Allotment to the average actual use until BLM issues a new grazing decision.

BLM's response was due August 11, 2011. However, instead of filing a response, on August 9, 2011, BLM filed a request or motion to vacate and remand the FGD. BLM did not provide any reason for its motion or indicate its future intentions for management of the Allotment. I then issued an order directing BLM

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to provide its reasons for its motion to vacate and remand the FGD. In response, BLM only stated that it “no longer wishes to implement the decision” and that “BLM is not aware of any unusual circumstances in which the option of vacating the decision would not be the most efficient method of proceeding with this appeal.” BLM cited the IBLA order in *Petan Company of Nevada*, IBLA 2002-223 (Order, December 23, 2005), for this proposition. The Appellant, Western Watersheds Project (“WWP”), filed a response opposing BLM’s motion to vacate the FGD, and asking that summary judgment be granted in accord with its motion filed on June 14, 2011.

In an Order issued on August 30, 2011, I denied BLM’s motion to vacate and remand the grazing decision since doing so would have, in effect, simply continued the existing grazing system on the Allotment while depriving WWP of its right to appeal the FGD under the Taylor Grazing Act. The Order also extended the deadline for BLM to respond to WWP’s motion for summary judgment until September 21, 2011. BLM did not however file any response to WWP’s motion. Noting BLM’s default, WWP then renewed its request that summary judgment be granted in accord with its motion.

### 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*, 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.

In this case however, BLM did not respond to WWP’s motion for summary judgment. Generally, “when a party fails to respond to a motion for summary judgment, its failure ‘constitutes an admission . . . that there are no disputed issues

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of genuine fact warranting a trial." *Terrell v. American Drug Stores*, 65 Fed.Appx. 76, 77 (7<sup>th</sup> Cir. 2003), citing *Flynn v. Sandahl*, 58 F.3d 283, 288 (7<sup>th</sup> Cir. 1995). In *Terrell*, the Court of Appeals deemed the plaintiff's failure to respond to the defendant's motion for summary judgment as an admission that the defendant's version of the facts was true. *Id.* The Court also noted that the district court had found support for the defendant's motion in facts derived from the plaintiff's own deposition testimony.

WWP based its motion for summary judgment primarily on alleged legal deficiencies in BLM's NEPA review leading to the FGD – not on disputed issues of fact (although it did raise some potential disputed factual issues in its motion). Applying the principles stated in *Terrell*, BLM's failure to respond to WWP's motion for summary judgment would constitute an admission that WWP's allegations of legal deficiencies in the NEPA review leading to the FGD are true – at least where those allegations have some substantive support in the record. Since WWP did not provide affidavits or other evidentiary material to specifically challenge factual findings in the EA and RHE, for the purposes of this Order BLM's statement of those facts will generally remain accepted as true.

An appellant normally bears a heavy burden of proof to show that a BLM EA and grazing decision failed to comply with NEPA. To prevail on a motion for summary judgment, there must be a fairly glaring error of fact, a failure to consider a substantial environmental question of material significance, or a legal inadequacy, on the face of the EA or other supporting documents. *Escalante Wilderness Project et al v. BLM*, 176 IBLA 300, 303 (2009). In this case, however, where BLM did not respond to WWP's motion for summary judgment, WWP's burden to show such deficiencies is considerably eased.

As noted above, the RHE concluded that, with two minor exceptions, the objectives contained in the Bradshaw-Harquahala RMP and Arizona Standards for Rangeland Health were being achieved throughout the Allotment. The EA used this finding as justification for eliminating from consideration an alternative decreasing or eliminating livestock grazing use. The EA therefore only considered two alternatives – the "proposed action" and "no action" – that were essentially identical. They included the same grazing authorization of 2151 AUMs yearlong, with no prescribed rotation or other limitation on grazing use. The addition of the terms restricting salt block placement and requiring actual use reports in the

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proposed action that became the FGD cannot be considered a significant difference, since those conditions are already required by the RMP and the grazing regulations.

The EA states that:

Overutilization by livestock can remove cover and forage for wildlife and degrade habitat by causing changes in plant communities. Based on the data presented in the Rangeland Health Evaluation, current levels of livestock use are not degrading wildlife habitat conditions.”

(EA at 18). WWP alleges that BLM should have considered a reduced grazing or no-grazing alternative in view of the fact that the RHE only monitored conditions under current levels of grazing use, and that any increase in use would be detrimental to the desert tortoise habitat. The RHE and EA at least establish that at current levels of livestock use, the rangeland health standards and forage needs for the desert tortoise are being met. However, by failing to respond to WWP’s motion, BLM has in effect conceded to WWP’s argument that those current levels should not be exceeded, and that BLM should have considered a reduced grazing alternative.

Therefore, in light of WWP’s unopposed motion for summary judgment, the record supports allowing grazing to continue on the WAY Allotment, but limited to the average actual use over the past three years – 155 head or 1395 AUMs annually, until BLM issues a renewed permit for the Allotment after conducting a valid NEPA review.

#### Order

WWP’s motion for summary judgment is granted. Grazing on the WAY Allotment may continue according to the terms and conditions in the FGD with the exception that maximum annual authorized use will be 155 head of cattle for 1395 AUMs until such time as BLM issues a renewed permit for the Allotment upon conducting a valid review pursuant to NEPA.

See page 7 for distribution.

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Andrew S. Pearlstein  
Administrative Law Judge

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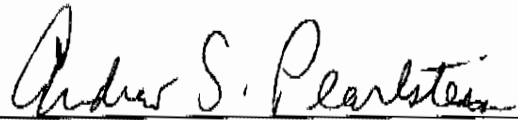
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Appeal Rights

Any party adversely affected by this Order may file an appeal with the Interior Board of Land Appeals according to the procedures found in 43 C.F.R. §4.410 *et seq.*



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Administrative Law Judge

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