

Public Land and Resources Law Review

Volume 0 Case Summaries 2015-2016

Western Watersheds Project v. Jewell

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Recommended Citation

Cail, Hannah S. (2015) "Western Watersheds Project v. Jewell," *Public Land and Resources Law Review*: Vol. 0 , Article 10.
Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss6/10>

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***Western Watersheds Project v. Jewell*, 56 F. Supp. 3d 1182 (D. Idaho 2014)**

Hannah S. Cail

The Idaho District Court granted WWP's motion for summary judgment and denied those of the BLM and intervener Cattle Associations. WWP alleged the BLM failed to protect sage grouse in some 600 grazing permit decisions issued by the Burley Field Office. The court found the decisions insufficient under NEPA because the BLM did not consider the cumulative impacts of grazing permit renewals on sage grouse.

I. INTRODUCTION

Western Watershed Project v. Jewell presented the second round of litigation related to nearly 600 grazing permit decisions issued by the Bureau of Land Management ("BLM").¹ Plaintiff Western Watersheds Project ("WWP"), Defendant BLM, and Defendant-Interveners J.R. Simplot Co., Public Lands Council, National Cattlemen's Beef Association, and Idaho Cattle Association agreed to file a series of summary judgment motions for specific allotments to make litigation manageable.² The first round of litigation found environmental reviews on five grazing allotments insufficient.³ Similarly in the second round, the United States District Court for the District of Idaho held BLM's environmental reviews were insufficient for the Jim Sage, Cassia Creek, Chokeycherry, and Almo-Womack allotments within the Burley Field Office.⁴

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Standard of Review

The Administrative Procedures Act ("APA") directs the court's standard of review of the four permits.⁵ Courts must set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁶

B. Litigation Background

WWP's original complaint alleged the BLM failed to protect sage grouse in around 600 grazing decisions across 400 million acres of the BLM managed

¹ *W. Watersheds Project v. Jewell*, 56 F. Supp. 3d 1182, 2014 WL 4853121, at *1 (D. Idaho 2014) [hereinafter *WWP v. Jewell*].

² *Id.*

³ *Id.*; see also *W. Watershed Project v. Salazar*, 843 F. Supp. 2d 1105 (D. Idaho 2012) [hereinafter *WWP v. Salazar*].

⁴ *WWP v. Jewell*, 2014 WL 4853121, at *8.

⁵ 5 U.S.C. § 706(2)(A) (2014).

⁶ *Id.*

land in Idaho and Nevada.⁷ In the first round of litigation, WWP challenged BLM's decision to renew grazing permits on five allotments from the Owyhee and Bruneau Field Offices.⁸ The court held those 5 decisions violated the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), and the Fundamentals of Rangeland Health regulations ("FRHR").⁹

In this second round for the Burley Office permit renewals, WWP also claimed that the BLM (1) violated the NEPA because the BLM's cumulative impacts analysis was insufficient, nor did it consider alternative grazing levels, including a no-grazing alternative; (2) violated the FLPMA because the permitted grazing was not consistent with the Cassia Range Management Plan ("RMP"); and (3) violated the FRHR regulations because the BLM moved certain grazing restrictions from mandatory terms and conditions to discretionary.¹⁰ The parties also sought summary judgment on nine permits renewed without environmental review pursuant to a 2003 congressional budget rider.¹¹

C. Factual Background

Sage grouse populations have declined significantly over the last quarter century.¹² Sage grouse rely on the sage steppe ecosystem and sagebrush covering ten western states, including Idaho.¹³ The birds have one of the lowest reproductive rates of any game bird in North America.¹⁴ The Idaho Conservation Plan stated the decline is due to the disappearance of sagebrush habitat caused by (1) wildfires, (2) infrastructure, (3) annual grasses, and (4) livestock.¹⁵ The BLM adopted a National Sage-Grouse Habitat Conservation Strategy in November 2004 to guide Field Offices management.¹⁶ In 2001, the BLM designated sage grouse a "sensitive species" pursuant to its Special Status Species Policy, requiring sensitive species be treated as candidate species under the Endangered Species Act.¹⁷

The Burley Field Office covers 1.6 million acres of south-central Idaho.¹⁸ Part of the Great Basin sage grouse core population inhabits the area.¹⁹ The Cassia RMP has governed the area's management since 1985, and concluded that seventy-percent of the public land was in fair to poor condition trending

⁷ The court severed and transferred the Nevada District Office decisions to the District of Nevada. *See WWP v. Jewell*, 2014 WL 4853121, at *2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at *9-10; *see* Pub. L. 108-108, § 325, 117 Stat. 1241 (2003).

¹² *WWP v. Jewell*, 2014 WL 4853121, at *9-10.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at *1, *3.

¹⁸ *Id.* at *3-4.

¹⁹ *Id.* at *4.

downward because livestock grazing damages riparian areas and sage grouse food sources.²⁰ The final RMP planned to increase grazing and impose mandatory terms and conditions that included: (1) manage riparian areas to restore, protect, and enhance quality and quantity of sagebrush; (2) implement grazing systems to protect or improve riparian areas; (3) take measures to eliminate conflict or land uses that will jeopardize threatened, endangered, or sensitive species; (4) resolve conflicts in favor of wildlife; and (5) manage public land to maintain or improve wildlife habitat.²¹

The BLM evaluated the Jim Sage, Cassia Creek, Chokecherry, and Almo-Womack allotments under the FRHR in 2002 and 2003. All contain important sage grouse habitat, and the court determined that all violated at least one applicable standard of the FRHR that affect sage grouse.²² Jim Sage spans 66,417 acres with fifteen authorized livestock grazing permittees, and violated six of seven applicable FRH including riparian areas, stream channels, native plant communities, seedings, water quality, and wildlife habitat for sensitive species.²³ Cassia Creek contains 3,615 acres, with a majority being key sage ground habitat with one breeding site known as a lek.²⁴ Cassia Creek violated one of three applicable standards: seedings. Chokecherry contains 1,057 acres with two permittees authorized to graze on the smallest allotment that contains sage grouse habitat.²⁵ The court determined that it violated four of six applicable standards: riparian areas, stream channels, water quality and threatened and endangered species.²⁶ Almo-Womack is 4,194 acres, with large areas considered key habitat with no leks.²⁷ The BLM found Almo-Womack violated the sensitive species standard; however livestock grazing was not considered the cause.²⁸

In 2008, the BLM issued the final Environmental Assessment (“EA”) pertaining to the four allotments permit renewals.²⁹ The court considered each EA alternative nearly identical, maintaining current grazing levels and seasons of use.³⁰ According to the BLM, a “no grazing alternative” was not considered because no grazing would not meet the underlying purpose and need for action to renew grazing permits.³¹ The BLM issued a Finding of No Significant Impact (“FONSI”) with the final decisions. WWP claimed that the EA, FONSI, and final decisions violated the NEPA and the FLPMA.³²

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *4-5.

²³ *Id.* at *5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *6.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

III. ANALYSIS

WWP claimed the EA failed to adequately analyze cumulative impacts on sage grouse.³³ An EA must fully address cumulative environmental effects and impacts and provide sufficient detail of past, present, and future projects to explain the agency's rationale and analysis.³⁴ The court determined that the EA at issue failed to discuss existing degraded sage grouse habitat conditions in the surrounding allotments, three of four of which violated the FHR sensitive species standard.³⁵ The court determined that the EA violated the NEPA by failing to adequately analyze the cumulative impacts on the four allotments.³⁶

WWP also claimed the EA fails to consider alternatives to the existing grazing levels, including a "no grazing" alternative.³⁷ "The EA must 'rigorously explore and objectively evaluate all reasonable alternatives,' and the 'existence of a viable but unexamined alternative renders the environmental impact statement inadequate.'"³⁸ The court found the EA violated the NEPA because it failed to identify reasonable alternatives and all the alternatives presented permitted the same level of grazing.³⁹

The BLM's final decision must act to cure violations if evaluations of FRH regulations show standards and guidelines are not met.⁴⁰ "Appropriation action" is action that results in "significant progress" toward fulfilling and conforming to the violated Standards and Guidelines.⁴¹ As in the first round of litigation, the court held the BLM violated the FRH regulations when the agency made permit criteria used to cure violations discretionary instead of mandatory.⁴²

WWP further claimed the BLM violated the FLPMA because management of grazing is inconsistent with the RMP.⁴³ The court declined to address the FLPMA issue because the BLM will modify permits to provide adequate alternatives and comply with the FRH Standards, which would change the analysis.⁴⁴ As in round one, the court found the BLM could remedy flaws without the cessation of grazing.⁴⁵

The Burley Office has renewed permits on 168 out of 200 allotments without NEPA or FLPMA review since 2005.⁴⁶ The BLM argued § 325 of Public

³³ *Id.*

³⁴ *Id.* at *6-7 (citing *Te-Moak Tribes of W. Shoshone of Nev. v. U.S. Dep't. of the Interior*, 608 F.3d 592 (9th Cir. 2010)).

³⁵ *Id.*

³⁶ *Id.* at *8.

³⁷ *Id.*

³⁸ *Id.* (quoting *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2010)).

³⁹ *Id.*

⁴⁰ *See* 43 C.F.R. § 4180.2(c)(2) (2015).

⁴¹ *WWP v. Jewell*, 2014 WL 4853121, at *8.

⁴² *Id.* at *9.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (quoting *WWP v. Salazar*, 843 F. Supp. 2d 1105).

⁴⁶ *Id.*

Law 108-108 tolls the review time and allows NEPA and FLPMA review after permits renewal.⁴⁷ The court found that expiring grazing permits must be renewed under § 402 of the FLPMA⁴⁸ because “the rider expressly carves out an exception for FLPMA . . . and requires a continuing obligation [for BLM] to follow that statute.”⁴⁹ However, the court held § 325 tolls NEPA review, shifting the condition precedent environmental review to a potential condition subsequent.⁵⁰

IV. CONCLUSION

The court ordered the EA, the FONSI, and Final Grazing Decisions for the four allotments remanded to the BLM to fully address the cumulative environmental impacts on sage grouse, to identify reasonable grazing alternatives, and to maintain mandatory terms and conditions within every permit under the FRH.⁵¹ Additionally, the court ruled that permits renewed under § 325 of the 2003 rider tolls the BLM’s NEPA review, but carved out an exception for the FLPMA, thus requiring FLPMA review and compliance before renewal.⁵²

⁴⁷ *Id.* at *10.

⁴⁸ *See* 43 U.S.C. 1752 (2014).

⁴⁹ *Id.* at *11; *see* *W. Watershed Project v. Bennett*, Civ. No. 04-0181-S-BLW, 2008 WL 2003114 (D. Idaho May 8, 2008).

⁵⁰ *WWP v. Jewell*, 2014 WL 4853121, at *10 (quoting *W. Watershed Project v. Bureau of Land Mgmt.*, 629 F. Supp. 2d 951, 970 (Ariz. 2009)).

⁵¹ *Id.* at *11.

⁵² *Id.* at *9-10.