



# United States Department of the Interior

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### ORDER

August 1, 2017

WESTERN WATERSHEDS PROJECT, (WWP)	)	NV-L020-14-01
	)	
Appellant	)	Appeal of November 15, 2013 Final
	)	Decision and November 22, 2013
v.	)	Amended Decision Renewing the
	)	Southern Nevada Water Authority
BUREAU OF LAND MANAGEMENT, (BLM)	)	Grazing Permit; Cottonwood and
	)	Scotty Meadows Allotments, Ely
Respondent	)	District, Nevada
	)	
<hr/> SOUTHERN NEVADA WATER	)	
AUTHORITY,	)	
(SNWA)	)	
Intervenor	)	

### WWP Motion for Summary Judgment Granted Final Grazing Decision Remanded

This case poses the question whether a grazing decision should be implemented in 2017 that does nothing to conserve, enhance, or maintain important habitat for the greater sage-grouse that is currently in poor condition, unsuitable for nesting and brood-rearing. I find that such a decision should not be implemented without at least some serious consideration of modifications intended to improve sage-grouse habitat. Therefore BLM's final grazing decision for the Scotty Meadows and Cottonwood Allotments is remanded to BLM for that purpose.

#### Proceedings – NHPA Compliance

Western Watersheds Project ("WWP") has appealed and petitioned for a stay of the captioned amended final grazing decision ("FGD") issued on November 23,

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2013, by the Ely, Nevada, District Office, Bureau of Land Management ("BLM"). The FGD renews with modifications the grazing permit held by the Southern Nevada Water Authority ("SNWA") for the Cottonwood and Scotty Meadows Allotments. SNWA has intervened in this appeal in support of the FGD. Administrative Law Judge Harvey C. Sweitzer denied WWP's petition for a stay of the FGD in an order dated January 21, 2014. The parties have filed respective cross-motions for summary judgment and responses after a lengthy suspension of proceedings to allow BLM to complete consultation with the Nevada State Historic Preservation Office ("SHPO") regarding the FGD's compliance with the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* ("NHPA").

BLM amended the original FGD one week after issuance to require consultation with the SHPO with respect to grazing within a 26-acre riparian enclosure proposed to be constructed in the Scotty Meadows Allotment. BLM had determined that the ruins of the Shoshone Ponds Civilian Conservation Corps Camp ("CCC Camp") within that Allotment were eligible for listing on the National Register for Historic Places ("NHRP"), and the swimming pool ruin within the proposed enclosure was a significant contributing element to the historic property. However BLM's Environmental Assessment ("EA") also stated that under the proposed action that became the FGD "other features of the CCC Camp, outside the enclosure, would still be subject to livestock disturbance, causing irreparable damage." (EA at 13). In an order dated March 14, 2014, I required BLM to show cause why the FGD should not be remanded to allow for additional consultation with the SHPO regarding effects of the FGD on the CCC Camp outside the enclosure, and for BLM to supplement its review under the National Environmental Protection Act, 42 U.S.C. § 4332 *et seq.* ("NEPA"), and the NHPA if necessary, to assess those impacts and provide for any appropriate mitigation.

However, rather than remand the FGD, which had already gone into effect, the parties agreed to suspend these proceedings pending completion of further consultation with the Nevada SHPO. On June 10, 2014, I issued an order to that effect, noting that BLM and SNWA had entered into a Memorandum of Agreement ("MOA") under which SNWA would post a herder and take other measures to protect the CCC Camp historic property from disturbance from livestock grazing until completion of the consultation and any required modification of the grazing permit.

BLM retained a contractor to conduct a complete inventory of archaeological and historic properties on the Scotty Meadows Allotment. Ultimately, on March 30, 2016, the SHPO concurred with BLM's determination that the entire CCC Camp,

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including the swimming pool and at least two other identified structures, were eligible for listing on the NRHP. BLM also determined, in apparent contradiction to the statement in the EA, that the FGD's authorization for livestock grazing on the Allotment would not cause any adverse effects to any of the CCC Camp features inside or outside the enclosure. BLM based this conclusion on the dispersed nature of the grazing and the lack of forage near the historic property features. In addition the fenced enclosure would protect the swimming pool ruin from adverse impacts from authorized livestock grazing (although BLM may authorize grazing within the enclosure under certain circumstances). The SHPO concurred with BLM's determination that the undertaking – the FGD – would have no adverse effects on the historic property. In its motion for summary judgment, WWP has not challenged this determination, so the issue of NHPA compliance will not be discussed further in this order.

- Supplemental Information and Briefing

The parties then filed cross-motions for summary judgment and responses in January and February 2017. While working on this case and reviewing the record, I encountered difficulty with the sparseness and age of the data in the administrative record. The FGD was issued in 2013 based on monitoring data that was already quite stale, taken from the Allotments mostly preceding 2009. Then the NHPA consultation caused another two-year suspension of proceedings.

In the interim, in September 2015 BLM issued the Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment (the "ARMPA" or "Nevada ARMPA"), followed by two Instruction Memoranda ("IMs"): IM No. 2016-141, on "Setting Priorities for Review and Processing of Grazing Authorizations in Greater Sage-Grouse Habitat"; and IM No. 2016-142 on "Incorporating Thresholds and Responses into Grazing Permits/Leases." Although the ARMPA and IMs were published after BLM issued its FGD in this case, they reinforce and expand upon the interim policy guidance in effect at the time of issuance of the FGD. If the FGD had been remanded for the NHPA consultation, as BLM initially requested, its reissuance in 2016 would have been subject to these updated policies.

In view of the passage of time since issuance of the order, the lack of recent monitoring data, and the evolving sage-grouse conservation policy, I issued an order on May 1, 2017, asking the parties to report on any settlement efforts and to submit any updated monitoring data on the two Allotments. The parties have reported that they have been unable to agree on terms for a settlement. BLM has

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submitted some updated actual use and monitoring data. The parties have supplemented their cross-motions for summary judgment which are now ripe for decision.

### Factual Background

#### - The Scotty Meadows and Cottonwood Allotments

SNWA has acquired several ranches in Spring Valley in White Pine and Lincoln Counties, in eastern Nevada, and their associated 16 livestock grazing permits, including those for the Scotty Meadows and Cottonwood Allotments. SNWA began cattle grazing operations on these two Allotments in 2008. SNWA conducts cattle grazing operations for beef production from these allotments as an adjunct to its primary mission to ultimately develop groundwater resources to be conveyed to the Las Vegas area. The Scotty Meadows and Cottonwood Allotments support approximately 25% of SNWA's beef production from its operations in Spring Valley.

The two allotments are not contiguous. The Scotty Meadows Allotment, encompassing 17,322 acres, is in White Pine County about 45 miles south of Ely, Nevada. The Cottonwood Allotment, about 15 miles further south, with an area of 49,975 acres, is located just over the county line in Lincoln County. The Cottonwood Allotment is divided into six fenced pastures: four relatively small pastures seeded with crested wheatgrass and two large native pastures. The western part of the Allotment is within the Fortification Range Wilderness Area. The Eagle Wild Horse Management Area occupies much of the eastern and southern portions of the Allotment. The Allotments lie in South Spring Valley at elevations from about 5600 to 6000 feet, though elevations in the western strip of the Cottonwood Allotment rise to over 7,800 feet in the Fortification Range. Precipitation in the area ranges from about 5 to 16 inches annually. Native upland vegetation on both Allotments consists of sagebrush – bunchgrass communities.

The Scotty Meadows Allotment contains the 1,240-acre Shoshone Ponds Area of Critical Environmental Concern ("ACEC") -- which encompasses a wet meadow and riparian complex of about 55 acres and three "refugia ponds" created by the flow from four artesian wells dug in connection with the CCC camp in the 1930's. Approximately six acres of perennially saturated soil, dominated by thick mats of Nebraska sedge, surround the spring brook formed by flow from Shoshone Well #2, which flows for about 120 feet from the well. About 22 acres are in an intermittently saturated or moist meadow system that receives flow from Wells ## 1 and 2. The

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remaining 27 acres, associated with lower flows from Wells ## 3 and 4, are only ephemerally saturated and are typically dry at the surface. The meadows support several species of sedges and rushes. The Pahrump poolfish, a species listed as endangered under the Endangered Species Act ("ESA"), currently inhabits the spring brook, as well as the fenced middle refugia pond and a stock pond within the ACEC.

Under the interim guidance in effect at the time of issuance of the EA, BLM mapped over half the Cottonwood Allotment as "Preliminary Priority Habitat" or "General Habitat" for the sensitive species greater sage-grouse ("sage-grouse"). Sage-grouse habitat occupies most of the eastern part of that Allotment. There is one known active lek in the southern part of the Cottonwood Allotment. BLM also mapped an area of sage-grouse habitat in the eastern part of the Scotty Meadows Allotment. There are no known leks within the Scotty Meadows Allotment, but there are two active leks within 3 miles of the Allotment boundary. Under the current classifications established by the Nevada ARMPA, the Cottonwood Allotment consists of approximately 36% Priority Habitat Management Area ("PHMA"), 20% General Habitat Management Area ("GHMA"), 7% Other Habitat Management Areas ("OHMA"), and 37% non-habitat. The Scotty Meadows Allotment consists of 6% PHMA, 26% GHMA, 16% OHMA, and 52% non-habitat.<sup>1</sup>

The Cottonwood Allotment has been used for winter grazing, and Scotty Meadows in the summer. SNWA's previous grazing permit for the Cottonwood and Scotty Meadows Allotments allowed cattle grazing as follows:

Allotment	Head	Season of use	Active animal unit months ("AUMs")
Cottonwood	250	11/1 – 6/15	1,865
Scotty Meadows	378	6/1 – 9/30	1,227

Under a Final Multiple Use Decision ("FMUD") issued in 1997, the native pastures on the Cottonwood Allotment have been grazed from 11/1 to 3/13, and the seeded pastures from 3/14 to 6/15. Under the previous permit, grazing in the undivided Scotty Meadows Allotment was at large throughout the summer season.

<sup>1</sup> These figures are taken from the declaration of Kenneth Cole, WWP's Idaho Director, attached to WWP's motion for summary judgment. The other parties have not challenged Mr. Cole's sage-grouse habitat mapping data.

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- Rangeland Health Standards Assessment and Determination

As part of the permit renewal process, a BLM interdisciplinary team undertook a rangeland health assessment memorialized in a "Standards Determination Document" ("SDD") to determine whether the Allotments were meeting the applicable standards for rangeland health: the Mojave-Southern Great Basin Area standards for the Cottonwood Allotment and the Northeastern Great Basin standards for the Scotty Meadows Allotment. The BLM team relied on standard agency reference publications on rangeland health and ecological site descriptions; vegetation utilization data obtained from the Cottonwood Allotment from several seasons from 2000 to 2009, and from the Scotty Meadows Allotment in 2006; on line point intercepts taken from numerous monitoring sites on both Allotments in several years up to 2011; and on the team's professional observations.

BLM determined that the Cottonwood Allotment met Standard 1 for soils and Standard 2 for ecosystem components (riparian areas), but failed to meet standard 3 for habitat and biota. However BLM concluded that the Allotment was making significant progress towards meeting that standard and that current livestock grazing was not a causal factor in failing to meet the standard. BLM found that the herbaceous understory had been depleted and was not meeting the habitat needs for sage-grouse in the majority of the Allotment. BLM attributed this condition to historic livestock management, drought, wild horses, and altered natural disturbance regimes (such as lack of wildfire) that have allowed pinyon and juniper trees to encroach into sagebrush communities. BLM based its determination of an improving trend on reduced utilization of key forage species in the more recent years. The latest utilization readings taken from the native pastures in the Cottonwood Allotment were from 2008, the first year of SNWA's operation, which showed light to moderate use (11-34%).

BLM determined that the Scotty Meadows Allotment was achieving Standard 1 for upland soils. However BLM concluded that the Allotment was not meeting Standard 2 for riparian and wetland sites and was not making significant progress towards meeting the standard. BLM attributed the failure to meet this standard to current livestock grazing as the primary causal factor. Cattle had over-utilized the riparian vegetation in the Shoshone Ponds area, resulting in one-inch stubble heights and almost 100-percent bank alteration along the spring brook at the close of the grazing season.

With respect to Standard 3 for wildlife habitat, BLM determined that the Scotty Meadows Allotment was not achieving the standard, with the trend

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unknown due to insufficient data. Vegetation composition in sagebrush communities has shifted from referenced conditions to a shrub-dominated community with minimal herbaceous understory, rendering those areas unsuitable for sage-grouse nesting and brood-rearing. The Pahrump poolfish were surviving despite heavy alteration of the Shoshone Ponds riparian areas and stream banks. BLM did not attribute the failure to meet standard 3 in the uplands to current livestock grazing, but attributed it to historic grazing management, drought, and altered natural disturbance regimes (lack of wildfire) that have allowed pinyon and juniper trees to expand into sagebrush communities.

SNWA's previous grazing permit for the Cottonwood and Scotty Meadows Allotments authorized grazing as shown in the table above. The Cottonwood Allotment was authorized for 1865 AUMs from 2000 to 2012, and, under the FGD, for 1940 AUMs from 2013 to 2016. The Scotty Meadows Allotment has been authorized for up to 1227 AUMs since 2000. Neither the SDD nor the EA provided any actual use data. However BLM recently supplied actual use figures in response to requests from WWP and my order of May 1, 2017 asking for updated monitoring data on the Allotments. Annual actual use on the Cottonwood Allotment has varied widely since 2000, ranging from a high of 1870 AUMs in 2007 to a low of 230 AUMs in 2013. On the Scotty Meadows Allotment actual use has ranged from 531 in 2012 to 1228 AUMs in 2010. Additional data regarding actual grazing use on the two Allotments is given in the following bullet points:

- Overall annual average on the Cottonwood Allotment from 2000 – 2016 = 1332 AUMs, which is about 71% of the original authorization of 1865, and 69% of the current authorization of 1940 AUMs.
- SNWA's annual average actual use on the Cottonwood Allotment since it acquired the permit in 2008 has been 1226 AUMs, or about 63% of its maximum authorization of 1940 AUMs.
- The Huntsman Ranch, the previous permittee, averaged 1452 AUMs annually, about 78% of its maximum authorization of 1865 AUMs.
- Without the anomalously low year of 2013 (only 230 AUMs used), SNWA's annual average rises to 1350 AUMs, or 70% of its maximum authorization.
- Average annual use on the Scotty Meadows Allotment from 2000 – 2016 = 915 AUMs, or about 75% of the maximum authorized of 1227.
- SNWA's annual average actual use on the Scotty Meadows Allotment since it acquired the permit in 2008 has been 854 AUMs, or about 70% of the maximum authorized.
- The previous permittee used an annual average of 982 AUMs on the Scotty Meadows Allotment, 80% of the maximum authorization of 1227.

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The actual use data thus shows that SNWA has reduced actual grazing use somewhat on both Allotments (by about 10%) compared to the previous permittee, and that it averages about 70% of the authorized maximum use.

The SDD provides vegetation utilization figures for the Cottonwood Allotment only until 2008 for native pastures and up to 2009 for the crested wheatgrass pastures. Utilization of native forage species (Indian ricegrass, needle-and-thread grass, and winterfat) was somewhat reduced in 2008 compared to previous years. For the Scotty Meadows Allotment, the SDD gives utilization data for only one season – 2006 -- which showed moderate utilization levels. In response to the recent requests, BLM supplied utilization readings taken from three sites in March 2013 on the Cottonwood Allotment, and from five locations in October 2015 on Scotty Meadows. These showed up to moderately high utilization, over 50%, at two key sites on Scotty Meadows, and light to moderate use 27-29% at two sites on the native pastures on the Cottonwood Allotment. The Cottonwood Allotment data was collected in 2013, a year when SNWA only used 230 AUMs.

- Environmental Assessment

On July 29, 2013, BLM issued an Environmental Assessment (“EA”) pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.* (“NEPA”), which analyzed several alternatives for renewing SNWA’s grazing permits for the two Allotments. Shortly afterwards BLM issued a Finding of No Significant Impact (“FONSI”), thus not requiring preparation of a more extensive environmental impact statement.

For Scotty Meadows, the EA considered alternatives including the “Riparian Pasture Alternative” which would entail fencing a 450-acre riparian pasture in the Shoshone Ponds area and incorporating a three-pasture rotation system; changing the season of use in that Allotment from summer to fall-winter; no action; and no grazing. The proposed action called for the construction of a 26-acre enclosure around the spring brook and wet meadow associated with Shoshone Well #2 to keep cattle out, although BLM could authorize occasional grazing within the enclosure to meet vegetation and riparian objectives.

The proposed action for the Cottonwood Allotment, based on recommendations from the rangeland health evaluation, basically continued the previous pattern in which the native pastures would be grazed first in late fall and winter, followed by the seeded pastures in the spring, with the addition of



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prescribed rotation systems (as will be more fully described below with reference to the FGD). The only other alternatives considered for the Cottonwood Allotment were "no action" and "no grazing."

- Final Grazing Decision

The FGD adopted the proposed action from the EA for both Allotments. The FGD characterized the type of use in both Allotments as "adaptive," meaning that SNWA is authorized to graze up to the number of cattle listed during the identified period of use, but not to exceed the total permitted AUMs for each pasture or Allotment. The FGD also established allowable use levels for both Allotments of 45% of the current year's growth for winterfat, 50% for native grasses, and 60% for crested wheatgrass. Cattle must be removed from the Allotment or pasture within 5 days when allowable use levels are met. Another term in the FGD allows BLM, upon the permittee's application, to authorize deviations from livestock numbers and seasons of use if consistent with multiple use objectives.

For the Cottonwood Allotment the FGD continued the past practice of grazing the native pastures in the late fall and winter, followed by the seeded pastures in the spring, although the overall season of use was shortened by 15 days to end on 5/31. More specifically, the two native pastures will be grazed under an alternating year or deferred rotation system from 11/1 to 2/28, based on a stocking rate of 30 acres per AUM. This will allow grazing by 278 cattle (an increase of 28 over the previous permit) for the maximum annual permitted use of 450 AUMs in the North Native Pasture and 566 in the larger South Native Pasture. The four crested wheatgrass seeded pastures will then be grazed under a rest-rotation system, by 278 cattle for up to 308 AUMs in each pasture. With one seeded pasture rested each year, the FGD thus authorized a total of 1,940 AUMs permitted annual use (an increase of 75 AUMs from the previous permit) in the Cottonwood Allotment. The FGD also provided for the establishment of temporary water haul routes and sites along existing roads and fencelines in the native pastures on the Allotment.

For the Scotty Meadows Allotment, the FGD retained the same number of cattle, season of use, and AUMs as in the previous permit (378 head for 1,227 AUMs from 6/1 to 9/30). In order to protect the central area of the Shoshone Ponds from excessive livestock grazing, the FGD provided for the construction of a 26-acre exclosure, although BLM could authorize grazing within the exclosure on a case-by-case basis in order to meet vegetative and riparian management objectives. The FGD also provided for the construction of a 1.25-mile long fence along the eastern boundary between the Scotty Meadows Allotment and an adjacent allotment.

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### Standards for Summary Judgment on a Grazing Appeal

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." Fed. R. Civ. P. 56(c); *Larson v. BLM*, 129 IBLA 250 (1997). In considering a summary judgment motion, all factual inferences and conflicts must be resolved in the light most favorable to the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). A summary judgment motion filed under 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 the parties have filed cross-motions for summary judgment and agree that there are no genuine disputed issues of fact that should require a hearing. BLM has filed documentary evidence comprising the administrative record, consisting of the EA, FONSI, FGD, and SDD. SNWA has filed declarations of its ranch manager, Bernard Peterson. WWP has not filed evidence specific to the two Allotments or attempted to raise disputed issues of fact. In order to prevail, it would therefore be incumbent on WWP to show that the FGD and supporting documents fail to comply with applicable law on their face.

The IBLA has defined the scope of review of a BLM grazing decision and the burden an appellant must bear to overturn such a decision as follows:

Under 43 C.F.R. § 4.478(b), BLM's adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 C.F.R. Part 4100. In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an administrative law judge and by this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis.

*West Cow Creek Permittees v. BLM*, 142 IBLA 224, 236 (1998). To reverse a BLM grazing decision, an appellant must carry the burden of proof by a preponderance of the evidence. *Smigel v. BLM*, 155 IBLA 158, 164 (2001).

With respect to NEPA, the IBLA has frequently considered the standards BLM must meet when basing a decision on an environmental assessment rather than

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an environmental impact statement, and those an appellant must meet in order to show that BLM did not do so.

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 [finding of no significant impact], 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 additional cases cited].

*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. §§ 46.300-325.

A site-specific EA may be tiered to a previously completed programmatic EIS that covers a larger area or a broader range of proposed actions, as provided in 40 C.F.R. § 1508.28 and 43 C.F.R. § 46.140. In this case, BLM tiered the EA to the 2007 Ely District Resource Management Plan/Final EIS ("Ely RMP").

As seen in these formulations of the legal standards, an appellant bears a heavy burden of proof to show that a BLM EA, FONSI, and FGD, failed to comply

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with NEPA or other applicable laws. Especially to prevail on a motion for summary judgment, an appellant must show there is a material error of fact or failure to adequately consider a substantial environmental question of material significance in the EA and supporting documents -- either on the face of the NEPA documents themselves, or through evidence filed by the appellant.

### Positions of the Parties

WWP's original 69-page appeal asserts a broad array of allegations that the FGD violates various requirements of NEPA, the Federal Land Policy Management Act, 43 U.S.C. § 7201 *et seq.* ("FLPMA"), and the grazing regulations, 43 C.F.R. Part 4100.<sup>2</sup> WWP's motion for summary judgment however focuses exclusively on the FGD's impacts on sage-grouse and its habitat on the two Allotments. WWP alleges that the FGD violates FLPMA since it is inconsistent with the sage-grouse land use plan amendments for Nevada (the "ARMPA" cited above on page 3), as well as with the interim guidance previously in effect; that BLM violated NEPA by failing to consider a reasonable range of alternatives to protect sage-grouse habitat; and that BLM also violated NEPA by failing to adequately consider the direct, indirect, and cumulative impacts of the FGD on sage-grouse. WWP seeks an order remanding the FGD to BLM and requiring interim management of livestock grazing on the two Allotments in compliance with the ARMPA's sage-grouse habitat objectives, until BLM issues a new grazing decision.

BLM and SNWA contend that the FGD should be upheld in full, and seek an order denying WWP's motion for summary judgment and dismissing its appeal. SNWA also alleges that WWP lacks standing to file this appeal. Both BLM and SNWA assert that BLM adequately considered the FGD's impacts on sage-grouse and its habitat, and that provisions in the Nevada ARMPA, issued in September 2015, should not be applied retroactively in this case with reference to the FGD.

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<sup>2</sup> WWP's appeal was filed by its former Biodiversity Director, Katie Fite, who is no longer with the organization. Kristin F. Reuther, Esq., assumed representation of WWP in this proceeding in October 2016, and authored WWP's motion for summary judgment and response.

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Discussion- WWP's Standing to Appeal

SNWA argues at this late juncture, some three years after the filing of the appeal, that WWP lacks standing to have done so. The grazing procedural rules do not provide a time limit for filing such motions. I suppose theoretically that a jurisdictional motion such as one challenging standing could be filed at any time while the appeal remains pending. Nevertheless I decline to consider it at this time long after such a motion should have been filed in the interest of judicial efficiency.<sup>3</sup>

- FGD's Impacts on Sage-Grouse

This case raises the issue whether BLM may properly renew a grazing permit with terms and conditions that will admittedly do nothing to improve, enhance, or restore priority sage-grouse habitat that is admittedly in unsuitable condition. This Decision finds that, whether under the recently issued land-use plan amendments or the pre-existing interim guidance for livestock grazing in sage-grouse habitat, it may not. In these circumstances BLM's final grazing decision must make at least some attempt to foster the enhancement or restoration of healthy sage-grouse habitat on the subject Allotments.

Both the Cottonwood and Scotty Meadows Allotments failed to meet rangeland health Standard 3 for wildlife habitat due to unsuitable conditions for sage-grouse nesting and brood-rearing. BLM found in its rangeland health assessment that "[b]ased on vegetation data the majority of the [Cottonwood] allotment is not meeting the habitat needs for Greater Sage-Grouse with minimal herbaceous understory necessary for early brood-rearing." (SDD at 20). BLM made the same finding with respect to the Scotty Meadows Allotment: "Based on vegetation data, the sagebrush communities are not meeting the habitat needs for Greater Sage-Grouse because of minimal herbaceous understory." (SDD at 33). However, BLM determined that current livestock grazing was not a cause of these conditions. BLM determined that the Cottonwood Allotment was making significant progress towards achieving Standard 3, based on somewhat decreasing

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<sup>3</sup> BLM has not challenged WWP's standing in this case. In any event, WWP's standing is amply supported by the declarations of its Idaho Director, Kenneth Cole, who has repeatedly visited the subject Allotments and demonstrated a cognizable interest in their ecology and wildlife.

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livestock utilization data from 2000 to 2009. BLM discerned no trend regarding the habitat standard on the Scotty Meadows Allotment due to limited data.<sup>4</sup>

The EA and FGD however do not hold out any hope for improvement in the health of sage-grouse habitat on either allotment. For the Scotty Meadows Allotment, the EA states that the proposed action (which BLM adopted as the FGD), will have the result that "Greater Sage-Grouse nesting and early brood-rearing habitat on the benches are expected to remain the same with minimal herbaceous understory. This may indirectly effect [sic] adult reproduction, nest predation, and chick survivorship." (EA at 21). Those "indirect" effects would presumably not be beneficial to the species.

For the Cottonwood Allotment, the EA states that the proposed action's (and FGD's) water hauling may help distribute cattle throughout the Allotment, and that this "may improve vegetative conditions [which are not meeting sage-grouse nesting and early brood-rearing habitat conditions] by allowing high use areas to rest." (EA at 21). On the other hand the EA states that concentration of cattle use around the water haul sites could have adverse effects on sage-grouse habitat. The EA also notes that the winter grazing provided in the Cottonwood Allotment has mixed or unclear effects on sage-grouse. Although native pastures are not grazed during the critical growing season, "winter grazing also reduces residual grasses that are needed for Greater Sage-Grouse nest concealment." (*Id.*). Thus, according to the EA, any possible benefits for sage-grouse derived from the proposed action are negated by detrimental effects, of apparently at least equal magnitude. The EA does not consider any other alternatives for the Cottonwood Allotment other than "no action" and "no grazing."

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<sup>4</sup> BLM's conclusions regarding trend on both Allotments are highly questionable, and may even be said to lack a rational basis due to the sparseness and staleness of the data on which they rely, as discussed below. Actually, BLM's failure to discern any trend on the Scotty Meadows Allotment should default to a finding of failing to make significant progress. In addition, BLM as usual fails to discuss how it distinguishes between historic and current livestock grazing management as a causal factor for failing to meet the rangeland health standards. Where is the time line drawn? How is that determined? I do not rely on these factors in this Decision, but raise them as corroborating the ultimate conclusion that BLM should have seriously considered and potentially incorporated into the FGD at least some terms and conditions intended to move these Allotments towards meeting the wildlife habitat standard.

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In the SDD, BLM determined that the Cottonwood Allotment was making progress towards meeting the habitat standard. This finding was based on “[d]ata collected between 2000 and 2009 [that] indicate that livestock utilization levels have decreased over this time period.” However this finding is highly questionable. The utilization data presented in the SDD is sparse, stale, and thin. For the native pastures there is data only for the 2000, 2001, 2003, 2007, and 2008 grazing seasons.<sup>5</sup> Utilization was very high in 2001 and 2002, but very low in 2003. Then there is a three-year gap until 2007, which showed some moderately high use, followed by 2008 which showed light to moderate use. Thus, the finding of a positive trend was apparently based on intermittent utilization data, the most recent of which was already five years old when BLM issued the FGD in 2013. The SDD offers no other corroborating support for the finding of significant progress on the Cottonwood Allotment. It is difficult to understand how a current trend could be determined in 2013 without any monitoring data for the past 5 years, or even a description of more recent observations or any other basis for the positive finding.

For the Scotty Meadows Allotment the SDD presents utilization data for only one grazing season – 2006 – seven years before issuance of the FGD. At least there BLM recognized that it had insufficient data to determine a trend. The staleness of the information in the SDD and EA is also indicated by the dates of the photographs: 2007 and 2009 (SDD at 9, 19, and 26).

Neither the EA nor the SDD present any actual use data, although BLM has recently supplied actual use figures in connection with the supplemental briefing and status reports. The latest line-point intercepts to determine vegetative cover on both Allotments were apparently done in 2011. The lack of meaningful recent monitoring data led me to request BLM to submit any more recent available data obtained from the Allotments.

While there may be an argument to be made that the effects on sage-grouse should not be the sole driver of BLM decisions on grazing and other uses of the public lands, this sensitive species has been the subject of extensive study by the Department that has resulted in two major findings by the U.S. Fish and Wildlife Service (“FWS”). In 2010 FWS found that listing the sage-grouse as endangered under the Endangered Species Act was warranted, but precluded at that time by higher priority listing actions. 75 Fed. Reg. 13910 (March 23, 2010). Based on heightened conservation efforts undertaken by BLM and other federal, state, and

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<sup>5</sup> There is data up to 2009 for the crested wheatgrass pastures, which do not provide sage-grouse habitat.

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private landowners – mainly the amended land use plans or ARMPAs applicable in the several regions occupied by sage-grouse – the FWS in 2015 found that listing of sage-grouse as an endangered species was not now warranted. 80 Fed. Reg. 59858 (Oct. 2, 2015).

Neither the FWS findings, NEPA, FLPMA, nor even the ARMPA and associated IMs, require that a livestock grazing permit renewal decision have no impact on sage-grouse or that the potential effects on sage-grouse and its habitat must drive the agency decision to the exclusion of all other factors. However I believe the upshot of these regulatory events should require BLM, the federal agency with by far the greatest area of sage-grouse habitat under its jurisdiction, to give serious consideration to options that could improve unsuitable habitat where at all feasible when it issues land-use decisions. Even if current livestock grazing management is not the cause of failing to meet the habitat standard, BLM should still be obligated to consider reasonable alternatives, including modifications in grazing management that could improve sage-grouse habitat, and incorporate them into land-use decisions where feasible.

As noted above, in September 2015, since issuance of the FGD, as a basis for the FWS finding, BLM has issued the land-use plan amendments, the ARMPAs, including the Nevada ARMPA which amends the Ely Resource Management Plan (“RMP”), which encompasses the Cottonwood and Scotty Meadows Allotments. The ARMPAs would require BLM to give greater consideration to meeting the objective to: “Manage permitted livestock grazing to maintain and/or enhance PHMAs [Priority Habitat Management Areas] and GHMAs [General Habitat Management Areas] to meet or make progress towards meeting all GRSG [Greater Sage-Grouse] life-cycle requirements and habitat objectives (Table 2-2), based on site potential.” (ARMPA, Objective LG 1 at 2-23).

The parties spend considerable effort in their briefs arguing over whether the ARMPAs should apply retroactively to this FGD which was issued almost two years before the ARMPAs were finalized.<sup>6</sup> At the time of issuance of the FGD, however, as BLM concedes, the agency was bound to follow the interim guidance provided in an Instructional Memorandum (“IM”), entitled Greater Sage-Grouse Interim Policies

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<sup>6</sup> If the FGD had been remanded as BLM originally requested, and then reissued after the NHPA consultation, it would have been reissued in 2016 and would have been subject to the Nevada ARMPA. BLM would also have discretion, due to the lengthy delay during which this appeal was suspended, to request a remand to modify the FGD to conform to recent regulatory changes.



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and Procedures, IM No. 2012-043 ("Interim Sage-Grouse Policy or IM"), issued in December 2011. The guidance in that IM is generally consistent with the more specific management directives provided in the ARMPA. For example, IM 2012-043 states that one of its guiding principles is "[m]anagement of habitats to maintain, enhance, or restore conditions that meet Greater Sage-Grouse life history needs." (*Id.* at 1). For the purposes of these rulings I will therefore decline to rule on whether the ARMPA should be applied to this FGD, but will focus only on the policy in the Interim IM.

With specific reference to livestock grazing, the Interim Sage-Grouse IM requires BLM, when it issues or renews grazing permits, to: "Plan and authorize livestock grazing and associated range improvement projects on BLM lands in a way that maintains and/or improves Greater Sage-Grouse and its habitat." In addition BLM is directed to: "Incorporate management practices that will provide for adequate residual plant cover (e.g. residual grass height) and diversity in the understories of sagebrush plant communities as part of viable alternatives." (*Id.* at 8). Moreover:

Where monitoring data are not available or inadequate to determine whether progress is being made toward achieving Land Health Standards, an interdisciplinary team should be deployed as practicable to conduct a new land health assessment. The NEPA analysis for the permit/lease renewal must address a range of reasonable alternatives including alternatives that improve Greater Sage-Grouse habitat.

*Id.* Further:

To ensure that the NEPA analysis for permit/lease renewal has a range of reasonable alternatives:

- Include at least one alternative that would implement a deferred rest-rotation grazing system if one is not already in place and the size of the allotment warrants it.
- Include a reasonable range of alternatives (e.g., no grazing or a significantly reduced grazing alternative, current grazing alternative, increased grazing alternative, etc.) to compare the impacts of livestock grazing on Greater Sage-Grouse habitat and land health from the proposed action.

*Id.* at 9.

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BLM determined that both Allotments failed to meet Standard 3 for wildlife habitat, due to unsuitable sage-grouse habitat. BLM conceded that it did not have adequate data to discern a trend with regard to that land health standard on the Scotty Meadows Allotment. "Due to limited data we are unable to determine a trend." (SDD at 33). BLM attributed the failure to meet Standard 3 on the Scotty Meadows Allotment to historic livestock management practices, lack of fire, and drought, but not to current livestock grazing. (SDD at 34).

BLM did find that the Cottonwood Allotment was making progress towards achieving this standard. However I believe this finding lacked a rational basis. As noted above, it was based only on one season's somewhat reduced vegetation utilization compared to the previous season or earlier scattered data with no additional monitoring data cited or available for the five seasons preceding the issuance of the FGD in November 2013 (let alone the fact that we are now in 2017). A determination of trend based on such limited data that is five years old is not made on a rational basis. There was apparently no effort to monitor this Allotment specifically for sage-grouse habitat objectives (as would now be required under the ARMPA). This lack of adequate data is the main reason that led me to issue the order of May 1, 2017, requesting any available updated monitoring records and suggesting that the parties try to reach a settlement. BLM attributed the failure to meet the standard on the Cottonwood Allotment again to "historic livestock management practices," lack of fire, drought, and wild horses, but not current livestock grazing. (*Id.*).

When there is inadequate data to determine a trend, as was the case here, the Interim IM says BLM should deploy an ID team "as practicable to conduct a new land health assessment." (IM at 8). Here BLM's ID team issued a "Standards Determination Document," the "SDD." Perhaps significantly, BLM did not characterize its effort as a "land health assessment." Maybe it was not practicable to go out and conduct an updated thorough rangeland health assessment on these two Allotments in 2013 when the permit was scheduled for renewal. But BLM's reliance on sparse and stale data does not help its case and also contributed to the failure to anticipate effects on the historic property on the Scotty Meadows Allotment that required further consultation with the Nevada SHPO before the permits could be finalized. One reason for my decision to remand the permit is the lack of adequate data to support the determinations and the FGD.

The Interim Sage-Grouse IM also requires BLM to consider a reasonable range of alternatives, including no grazing or reduced grazing use, and deferred or rest-rotation systems. The EA here does meet this minimum requirement. It does

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include a no-grazing alternative and a deferred rotation alternative for the Scotty Meadows Allotment. The proposed action adopted by the FGD incorporates deferred rotation for the native pastures on the Cottonwood Allotment, and rest-rotation for the seeded pastures. The EA does not consider a reduced grazing alternative, such as one limiting grazing use to recent average actual use (about 70% of authorized use), as urged by WWP.

What I find remarkable about the alternatives, however, is that the EA itself states that the "Riparian Pasture Alternative," which incorporates a three-pasture rotation system in the Scotty Meadows Allotment, "may improve the riparian meadow habitat for potential brood-rearing and nesting, . . ." and that "[t]he herbaceous understory is also expected to improve in the uplands providing needed concealment for nests as well as diet of forbs and insects for Greater Sage-Grouse and their chicks." (EA at 21-22). The EA also states that "Change Period of Use Alternative" and of course the no-grazing alternative would have beneficial effects for sage-grouse habitat that are absent from the proposed action which became the FGD.

While the EA also states that these non-selected alternatives may have some adverse effects on vegetation, soil resources, and the Pahrump poolfish in the Shoshone Ponds area, the EA does not attempt to balance the positive and negative effects, or explain why the proposed action is superior. Most significantly, neither the EA nor the FGD considers some combination of these alternatives with the proposed action. For example, why not leave the FGD's enclosure in place to protect the most sensitive part of the Shoshone Ponds ACEC, while incorporating a rotation system in the remainder of the Scotty Meadows Allotment, as proposed in the Riparian Pasture Alternative? As the IBLA has frequently proclaimed, OHA is not a range manager and should not substitute its judges' opinions on livestock grazing for those of BLM. I don't know whether my suggestion of combining those two alternatives would actually work in practice, but I don't understand why it was not at least considered in the EA or FGD.<sup>7</sup> BLM should also have at least given some consideration to several other possible management modifications, some suggested by WWP, that could benefit sage-grouse.<sup>8</sup>

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<sup>7</sup> I have seen other BLM final grazing decisions that have combined elements of two or more alternatives considered in the EA.

<sup>8</sup> These include imposing more restrictive vegetation use limits to accord with sage-grouse habitat objectives, perhaps only in PHMA and GHMA; reducing authorized grazing use to average actual use levels; further restrictions on water hauling to avoid PHMA and GHMA

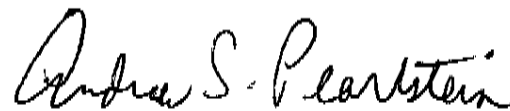
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I am not trying to manage the Allotments for BLM. But I find that the failure of the EA and FGD to consider additional alternatives or modifications in livestock management on these two Allotments that could benefit sage-grouse while still meeting livestock management objectives, violated NEPA as well as the Interim Sage-Grouse Policy. In other words, BLM's selection of the proposed action as the FGD with no attempt to seriously consider and incorporate any terms and conditions that could benefit sage-grouse habitat was without a rational basis. Put another way, BLM's failure to seriously consider options that could improve admittedly unsuitable sage-grouse habitat amounts to a "failure to consider a substantial environmental question of material significance." *Escalante Wilderness Project, supra*. In addition, the FGD's lack of any terms and conditions that could improve unsuitable sage-grouse habitat on the Allotments violates the applicable land-use plan as modified by the Interim Sage-Grouse Policy (if not the ARMPA), and thus constitutes a violation of FLPMA.

Although I cannot direct BLM's management of the Allotments upon remand, I nevertheless make the following general recommendation. The FGD's current terms and conditions should remain in effect while BLM conducts a renewed land health assessment on the two Allotments, rather than revert to the pre-existing terms and conditions. The monitoring effort and NEPA analysis for renewal will be subject to the Nevada ARMPA and implementing IMs, and, in accord with those policies, should consider and potentially incorporate thresholds and responses intended to maintain, enhance, and restore sage-grouse habitat on the Cottonwood and Scotty Meadows Allotments, in accord with the Nevada ARMPA.

### Order

WWP's motion for summary judgment is granted, and the motions for summary judgment of BLM and SNWA are denied. The FGD is remanded to BLM for further processing consistent with the rulings in this Order.



Andrew S. Pearlstein  
Administrative Law Judge

See page 21 for distribution.

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on the Cottonwood Allotment; additional seasonal restrictions to avoid PHMA and GHMA, and increased monitoring for sage-grouse habitat objectives.

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