

## United States Department of the Interior

### OFFICE OF HEARINGS AND APPEALS

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July 23, 2008

### ORDER

WESTERN WATERSHEDS PROJECT,	)	CA-320-08-02
	)	
Appellant	)	Appeal and Petition for Stay regarding
	)	a May 14, 2008, Grazing Agreement,
v.	)	involving the Yankee Jim Allotment,
	)	Alturas Field Office, California
BUREAU OF LAND MANAGEMENT,	)	
	)	
Respondent	)	

### Motion for Summary Judgment Granted

Western Watersheds Project (WWP) has appealed a May 14, 2008, agreement (2008 Agreement) executed by the Field Manager, Alturas Field Office, Bureau of Land Management (BLM), and Bill Wilson, one of the permittees of the Yankee Jim Allotment (Allotment). That agreement authorizes Mr. Wilson to graze 150 head of cattle on the Allotment from July 1 through August 31, 2008.

WWP has filed a motion for summary judgment, arguing that BLM violated the National Environmental Policy Act of 1969 (NEPA) because BLM executed the 2008 Agreement "without conducting any NEPA process what so ever [sic]." Additional briefing from both parties has been filed and the matter is now ripe for determination.<sup>1</sup>

The standards for evaluating a motion for summary judgment are set forth in 2 Moore's Federal Practice § 56.15[8] as follows:

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<sup>1</sup> Briefing for BLM was filed by the Field Manager. The Solicitor's Office has confirmed by telephone that it is not representing BLM in this matter.

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The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded. . . . It is not the function of the trial court at the summary judgment [stage] to resolve any genuine factual issue, including credibility; and for purposes of ruling on the motion all factual inferences are to be taken against the moving party and in favor of the opposing party . . . .

Consistent with the foregoing, the Interior Board of Land Appeals (Board) has stated:

To obtain summary judgment there must be no true issue of fact. Friends of the Earth v. Carey, 401 F. Supp 1386 (S.D.N.Y. 1975); Doehler Metal Furniture Co. v. United States, 149 F.2d 130 (2d Cir. 1945). When contemplating summary judgment all factual inferences must be drawn in the light most favorable to the opposing party. S. J. Groves & Sons v. International Brotherhood of Teamsters, 581 F.2d 1241, 1244 (7th Cir. 1978 ); Fitzsimmons v. Best, 528 F.2d 692, 694 (7th Cir. 1976).

*Larson v. BLM*, 129 IBLA 250, 252 (1994).

BLM did not prepare an environmental impact statement (EIS) nor an environmental assessment (EA) regarding the 2008 Agreement. To comply with NEPA, BLM should have prepared either an EIS or an EA regarding the actions taken in the 2008 Agreement unless it either (1) determined that its existing NEPA documentation was adequate, *see Southern Utah Wilderness Alliance*, 166 IBLA 270 (2005) (discussing use of Determinations of NEPA Adequacy (DNAs)), or (2) conducted a categorical exclusion review and properly determined that the proposed action (the 2008 Agreement) is categorically exempt from the regulatory requirement of preparing either an EIS or an EA (*see* 40 C.F.R. § 1501.4(b)), *see Oregon Natural Desert Association*, 125 IBLA 52, 64-65 (1993) (Grant, A. J., concurring); *see also Idaho Natural Resources Legal Foundation, Inc.*, 96 IBLA 19, 23 (1987) (unless a range improvement project is categorically exempt, an EA must be prepared).

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In its response to the motion, BLM references its NEPA review conducted for the applicable land use plan issued in 1999 and its EA issued in 2006 (2006 EA) regarding a proposal to issue a 10-year grazing permit for the Allotment. The 2006 EA examined the impacts of four alternative levels of livestock grazing on the Allotment: no grazing and either 200, 180, or 150 head from July 1 through August 31 annually.

In a grazing decision issued in 2006 (2006 Decision), BLM declined to issue a 10-year grazing permit, stating:

[D]ue to issues and concerns surrounding Cultural Resources within the . . . Allotment[,] no grazing decision for this allotment will be made at this time. Livestock use in the Yankee Jim Allotment will continue under annual grazing agreements. Grazing levels authorized in Yankee Jim may fluctuate to coincide with ongoing cultural resource evaluations and inventory. Once all cultural resource evaluation and inventory is completed[,] it is anticipated that continued grazing in Yankee Jim will be evaluated in a separate EA, and appropriate decision made at that time.

The cultural resource inventory and evaluations were completed in 2007, and BLM is currently preparing a new EA analyzing the impacts of issuance of a 10-year permit. Both in the 2006 EA and after the 2007 evaluations, BLM determined the most appropriate grazing level to be 150 head, which is the amount authorized in the 2008 Agreement.

Based on these facts, BLM argues:


The record shows that BLM has a history of both FLPMA and NEPA compliance for the Yankee Jim Allotment. . . . [A]t this time, the controlling decision relative to Yankee Jim grazing is the July 13, 2006 grazing decision which states: "Livestock use in the Yankee Jim Allotment will continue under annual grazing agreements." The May 14, 2008 agreement authorizes grazing use of 150 cattle from 7/1-8/31/2008.

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BLM's response does not show that it complied with NEPA. The record contains no evidence, nor even a BLM assertion, that it either (1) determined that the existing NEPA documentation was adequate for the actions taken in the 2008 Agreement or (2) conducted a categorical exclusion review and determined that the 2008 Agreement is categorically exempt. In the absence of such evidence, BLM was required to prepare at least an EA to comply with NEPA.

The logic of BLM's argument is difficult to fathom. The 2006 Decision is certainly not controlling because the 2008 Agreement, rather than the 2006 Decision, determined the grazing level for 2008. And, while BLM may have determined that 150 head was the most appropriate grazing level, this fact does not show that BLM determined that the existing NEPA documentation adequately analyzed the impacts of grazing 150 head.

Based upon the foregoing, WWP's motion for summary judgment is hereby granted in that the 2008 Agreement is set aside for failure to comply with NEPA.



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Harvey C. Sweitzer  
Administrative Law Judge

#### **APPEAL INFORMATION**

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4, Subparts B and E (see enclosed information pertaining to appeals procedures).

See page 5 for distribution.

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Distributed

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