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Date: 2/12/2010
Time: 1:30 PM
Judge/Calendar: Honorable Paula Casey

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WESTERN WATERSHEDS PROJECT and DR. STEVEN HERMAN,

Plaintiffs,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE; JEFFREY P. KOENINGS, WDFW Director; and JENNIFER QUAN, WDFW Lands Division Manager,

Defendants.

Nos. 08-2-00276-1 & 09-2-01120-3
(Consolidated Cases)

PLAINTIFFS' REPLY BRIEF

INTRODUCTION

Rather than disputing the facts demonstrated by WWP, the Washington Department of Fish and Wildlife ("WDFW") has offered excuses for its violations of law. Under the uncontested facts before the Court, the MOU and Asotin permit must be reversed. WDFW admits that Asotin pilot grazing under earlier permits has impaired the resource of the Asotin Wildlife Refuse. It then asks the Court to excuse this violation of WDFW's statutory mandate because WDFW is now impairing the resource **less** than it did in prior years. The record demonstrates, however, that WDFW is continuing to disregard the opinions of its experts and violate its statutory mandate. The MOU and Asotin permit must be reversed as arbitrary and capricous. WDFW admits that it failed to conduct environmental analysis under the State Environmental Policy Act ("Act") before issuing any of its recent decisions for the Asotin pilot grazing. It then asks the Court to excuse the agency from compliance with SEPA because it managed to get away with violating the statute in 2006. Such an interpretation, however, is plainly inconsistent with the legislature's intent in passing SEPA. The MOU and Asotin permit should likewise be reversed to failure to comply with SEPA.

REPLY ARGUMENT

I. THE MOU IS JUSTICIABLE.

A. This case presents issues of continuing and substantial public interest.

Since the filing of WWP's opening brief, the MOU has expired. *MOU AR at 41* (expiration date of 12/31/09). However, this Court should still resolve the claims challenging the MOU, because they fall within the public interest exception to mootness:

> In deciding whether a case presents issues of continuing and substantial public interest[,] [t]hree factors are determinative: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.

In re Marriage of Horner, 151 Wash.2d 884, 891–92, 93 P.3d.124 (2004).

The MOU claims are of a public nature, as the MOU relates to management of state public lands. Resolution would provide important guidance to public officials within WDFW, who may consider whether or not to renew the MOU or negotiate a similar one. The issues are also likely to recur. For the first time, with its response brief, WDFW announced that the MOU may not be renewed. It proffers a declaration stating that "WDFW has no *intention* of renewing this Memorandum of Understanding." Quan Dec. at ¶ 3 (emphasis added). But a mere "intention" does not resolve the issues in this case. An intention is no more than a state of mind, that can change from day to day, or even moment to moment. The declaration provides neither assurance nor guarantee that the MOU will not be renewed. Nor does it guarantee against a new MOU.

On the contrary, WDWF's brief illustrates that the agency does not intend of abandoning its practice of working with the livestock industry to provide subsidized grazing on Wildlife Areas. It vigorously defends its partnership with WCA, explaining that agricultural partnerships are "critical and necessary." WDFW Br. at 2. It entered into a multi-year contract with WSU to monitor grazing on the Asotin Wildlife Area. *Asotin AR at 1123*. WDFW's own brief thus reveals that a later renewal of the MOU or issuance of a new MOU is not only possible, but likely. Finally, the parties are "genuinely adverse," have fully litigated the merits, and it would be a waste of judicial resources to dismiss it. *Horner*, 151 Wash.2d at 893.

B. WWP has standing to challenge the MOU because WDFW itself repeatedly invoked the MOU as the driver of its grazing activities on the Asotin Wildlife Area.

The MOU has prejudiced WWP by providing the justification for WDFW's grazing authorization. In contending that WWP lacks standing, WDFW attempts to deny this fact by asserting that the MOU itself "does not authorize grazing activity nor is the MOU required to authorize grazing activity." WDFW Br. at 8. The record reveals, however, that WDFW's grazing decisions were premised on the MOU.

From 2006 up to the present, WDFW has relied upon the MOU to justify its delegation of the selection of the ranchers to industry group WCA. WDFW grazing regulations squarely place the authority to select the rancher for Wildlife Area grazing on the director of the agency. WAC 232-12-181(2). In contrast, the MOU expressly delegates that authority to the WCA, by stating WCA "will . . . *select the operator* determined to be the best qualified to meet WDFW's habitat and management objectives." *Asotin AR at 812* (emphasis added). Record documents show that WCA did, indeed, select the Asotin ranchers. *Asotin AR at 14* (Manager Dice stating "[c]attlemen selected the grazers."). WDFW thus followed the MOU over its regulations.

WDFW has also explicitly relied upon the MOU to justify its failure to charge a fee to the Asotin ranchers. For instance, the 2006 grazing permits state, "No fee shall be charged for this permit per MOU with WCA." *E.g. Asotin AR at 3415*. Similarly, the 2009 grazing permit states "As provided in the MOU between WDFW and WCA, there will be no grazing fee during the term of this permit." *Asotin AR at 3408* The record is full of other documents stating the same. *See Asotin AR at 31 (2007 plan); id. at 122, 145 (2007 permits)*; *id. at 142* (Dice email stating "I wrote language in the permits that specify attaching the MOU between WCA and WDFW to the permits. I figured that would help explain the fee issue.").

Finally, WDFW has repeatedly stated that the MOU caused the Asotin pilot grazing project. The 2006 grazing plan states, "The Pintler Creek livestock-grazing permit *is the result of* a cooperative agreement between WDFW and the [WCA]. Through a [MOU], WDFW and WCA *agreed to establish* livestock grazing pilot projects on specific lands managed by WDFW." Attach. B at 3. The 2007 Pintler plan states: "The purpose of this livestock-grazing permit is to . . . 2) *fulfill requirements* of the WCA/WDFW [MOU] to facilitate the establishment of a pilot-grazing project." AR at 50. The 2007 Smoothing Iron plan provides: "The Smoothing Iron livestock

grazing agreement *is the result of* a cooperative agreement between WDFW and the [WCA]. Through a [MOU] (signed November 10, 2005) WDFW and WCA *agreed to establish* livestock grazing pilot projects on specific lands managed by WDFW. . ." Asotin AR at 28 (emphasis added). The 2009 grazing plan states "The *primary purpose* of this document is to *ensure that the objectives of the MOU are realized*. In support of this, this plan includes the following *requirements identified in Section 3.0 of the MOU* . . . ." Asotin AR at 3327 (emphasis added).

These documents show that the Asotin grazing was required by, the result of, and established by the MOU. WDFW does not deny that the grazing has injured WWP, as it does not challenge WWP's standing to challenge the 2009 permit. Thus, WWP must also have standing to challenge the MOU.

II. WDFW VIOLATED ITS STATUTORY MANDATE AND ACTED ARBITRARILY AND CAPRICIOUSLY IN AUTHORIZING THE 2008 MOU AND 2009 PERMIT.

WWP's opening brief explained how the Asotin livestock grazing was "[o]utside the statutory authority of the agency" and "arbitrary and capricious," RCW 34.05.570(4)(c), for failing to provide a reasoned analysis for casting aside recommendations by its scientists and by causing environmental damage in violation of the WDFW's statutory mandate to "conserve the wildlife . . . in a manner that does not impair the resource." RCW 77.04.012. Rather than citing any evidence suggesting that grazing has not "impaired the resource," WDFW accuses WWP of unfairly focusing on "alleged negative issues" from the past. Yet, WDFW's admission that is it is still trying to discover what the impacts of grazing are and its ongoing failure to grapple with key critical statements from its own scientists refutes WDFW's assertion that it has turned over a new leaf.

WDFW has pointed to no site-specific evidence showing that the Asotin grazing has achieved the desired enhancements, or even served to maintain, the Asotin Wildlife Area's

resources such as wildlife and native plants. Instead, the agency makes prospective statements that demonstrate it is still unsure about what the effects of grazing actually are. For instance, WDFW contends that it has now "gotten WSU involved in the grazing activity in Pintler to study and evaluate the conservation practices proposed," and that this research "to be performed by WSU will better assist the agency in determining if targeted cattle grazing can enhance the ecological integrity . . . ." WDFW Br. at 14. It argues that a paragraph in its 2009 plan citing to a handful of studies supports what it admits is a "*theory*" that grazing improves wildlife habitat. *Id*.

This is somewhat hard to believe in light of the record, and an anemic defense to a program that had gone on for three years as of the challenged 2009 decision. If, after three years during which its own scientists presented it with a mass of evidence that grazes causes ecological harm, the agency still had no evidence for its "theory" that "well managed and monitored grazing activity can improve wildlife habitat," it was arbitrary and capricious to continue the grazing program. If the agency truly had no idea whether the pilot grazing would harm or hurt an area, it should not have undertaken it on a Wildlife Area governed by substantive mandates to protect wildlife habitat.

Further, WDFW asserts that all "issues" of the past were solved in 2009. However, while some of the most egregious excesses may have been reigned in, WDFW continued to ignore numerous biologist concerns in the 2009 plan.., For instance, WDFW cites no response to or consideration of the biologist's protest that the "unlimited use" standard allowed in areas infested by cheatgrass was unwise and would only serve to "exacerbate the noxious weed problem." *Id. at 2658*. The provision allowing unlimited use in cheatgrass remained in the plan. *Id. at 3352*. The agency claims that it addressed its Wildlife Biologist's concerns regarding plant utilization levels in the plan by making the 50% standard include both livestock and wildlife. WDFW Br. at 12. This does not make sense. There is nothing in the record suggesting that WDFW was differentiating

between these two uses in prior years, and the biologist points out that the 50% was far higher than prior year's standards as well as the 20–25% standard needed to provide a margin of safety for native plants; and no explanation is provided for rejecting that recommendation.

WDFW does not respond to WWP's explanation that there is no evidence to support WDFW's fundamental assertion in its 2009 grazing plan, that the grazing would enhance deer and elk habitat. WWP Br. at 16–17; Asotin AR at 389–90 (habitat biologist comments). WDFW likewise failed to address the calls of scientists, both in and outside the agency, for caution in constructing fencing and water developments. WWP Br. at 17. It cites no document where these concerns were considered or explained. Instead, the 2009 plan goes so far as to call for even more in the Pintler area, through its Objective 2A to maximize stocking rates "through infrastructure developments." Asotin AR 3348 (2009 plan).

WDFW argues that drafters of the 2009 plan were scientists who made "scientific conclusions and arguments." WDFW Br. at 13. But the cited document—three biologists' critical comments on the grazing plans, with John Pierce's comments in the margins— does not contain "scientific conclusions and arguments." Rather, it consists of statements **affirming** the necessity of considering the comments. Asotin AR at 2015. For example, in response to the Area Habitat Biologist's comments that the grazing does not improve deer and elk habitat, Pierce responds: "Need to really address these questions well in detailed study plan." Asotin AR 2019. This is a fine first step, but it is not a scientific conclusion. And WWP does not find anything in the 2009 plan where the question is in fact addressed.

Finally, WDFW takes offense at the implication that grazing was responsible for a 2008 Asotin mudslide. But the implication was the agency's; WWP's brief cited District Team meeting notes where WDFW staffers explain that the mudslide occurred on a very steep slope that had been

grazed heavily and in excess of utilization targets, and where the question of "[d]id the grazing cause this" was discussed. Asotin AR at 4030.

Because virtually all evidence available to the agency indicated that its grazing pursuant to the 2008 MOU and 2009 permit would impair and degrade the resources of the Asotin Wildlife Area, and WDFW's brief has not shown otherwise, the agency has thus breached its statutory mandate to preserve and protect state wildlife resources; and has acted in an arbitrary and capricious manner, thus requiring reversal of the 2009 MOU and 2009 Asotin permit.

III. NO SEPA EXEMPTIONS APPLY.

WDFW does not dispute that it conducted no SEPA analysis for any component of the Asotin pilot grazing project. It provides no response to the documents showing that its own Lands Division Manager and Wildlife Area Manager both stated that SEPA analysis on the 2009 permit was needed. *See* WWP Br. at 22–23 (quoting memos). Instead, for the first time, WDFW asserts the excuse that it need not comply with SEPA due to the application of one or another "categorical exemptions."[1]

A. The Prior Leases Do Not Trigger the 10-Year Grazing Exemption.

SEPA provides an exemption for the "issuance of all grazing leases for land that has been subject to a grazing lease within the previous ten years," the effect of which is to require the agency to conduct SEPA analysis for grazing proposals on land that has been rested from grazing for over 10 years. WAC 197-11-800(24)(a). WDFW does not and cannot dispute the fact that the Wildlife Area was rested from livestock grazing for *16 years* before the Asotin pilot grazing

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[1] It also criticizes WWP for arguing that the actions would have significant environmental impacts, because a plaintiff cannot so challenge the application of a categorical exemption. *Dioxin*, 131 Wn.2d at 360. However, since WDFW enumerates its claimed exemptions for the first time in its response brief, WWP had no way of knowing that WDFW would claim them. Regardless, WWP additionally challenges the applicability of those exemptions, as permitted by *Dioxin*. *Id.* at 365.

project began. Yet, the agency argues, in essence, that it should be allowed to continue degrading the Wildlife Area indefinitely without ever preparing any environmental analysis, because it did not get caught violating SEPA when the pilot project began in 2006. This argument must be rejected.

It is uncontested that the first 2006 permits were done outside of SEPA. The 2007 status report states that prior to 2006, "[p]ermitted grazing last occurred on this site in 1990." *Asotin AR at 342*. WDFW's answer admits the complaint's statement that "Prior to 2006, livestock grazing had not been permitted on the Pintler Creek area since at least 1990." Complaint and Answer, ¶ 21. Thus, the Pintler lands were not subject to a grazing lease for the previous 16 years; and SEPA analysis was plainly required when the grazing activities commenced in 2006 as a series of two-week grazing permits on the Wildlife Area. WDFW's failure to conduct SEPA analysis at that time was a violation of SEPA. Yet WDFW not attempts to tier its 2009 permit, and all of the prior permits, to the first 2006 permit for its SEPA compliance.

WDFW's argument is troubling because of the two-week nature of the first permits in 2006. *Attach. B at 1–2, 6–7* (April 15 and May 1 permits); *Asotin AR at 3415–16* (May 15 permit). None of the permits were analyzed under SEPA; they all relied on the existence of the first 2006 permit. WDFW argues at length that WWP has missed the date to challenge the prior permits. But WWP is not attempting to challenge them. Rather, WWP is arguing that WDFW may not *rely upon* the 2006 permits, which were illegal themselves, to escape SEPA review indefinitely.

Nor can WDFW argue that WWP somehow waived its ability to challenge the permit issued after 2006. The 2006 permits only authorized grazing for two weeks, which means they would have been impossible to challenge in court—that is, even if WWP and the public had been informed about them. But "[t]here was no official public comment period on the grazing plans as

they don't go through SEPA." Asotin AR 183 (email from then-Lands Division Manager Mark Quinn). Thus, there was no way for WWP to have even known about the first two-week permit.

In an analogous case, the Supreme Court held a timber sale contract was *ultra vires* for being in violation of SEPA. *Noel v. Cole*, 98 Wash.2d 375, 655 P.2d 245 (1982), *superseded by statute as stated in Dioxin/Organochlorine Ctr. v. PCHB*, 131 Wash.2d 345, 360, 932 P.2d 158 (1997).[2] There, the parties conceded that the action should not have been categorically exempted due the exemption regulation being invalid. *Noel*, 98 Wash.2d at 380. The Court explained that the *ultra vires* doctrine "retains its vitality" in "actions against governmental entities" such as challenges to government contracts. *Id*. at 379. It found that since the agency failed to comply with procedures required under SEPA, the contract was *ultra vires*. *Id*. at 380–81.

Likewise, WWP requests that the Court hold that WDFW *cannot tier* to a WDFW permit that was promulgated in violation of SEPA's environmental assessment requirement, and was therefore *ultra vires*. Allowing WDFW to forever escape its duties under SEPA due to tiering to an unlawful action would be an abuse of the categorical exemption and a subversion of the goals of SEPA. Further, it would create an absurd incentive for WDFW to subject any long-ungrazed Wildlife Area to a two-week (or even two-day) permit, without SEPA review, and forever thereafter tier to that permit pursuant to the 10-year exemption to evade SEPA's required environmental review.

B. The "research" exemption cannot apply to the Asotin pilot grazing.

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[2] *Dioxin* notes that the portion of *Noel* permitting "case by case SEPA environmental review" of actions claimed to fall within categorical exemptions was overturned due to later amendments to SEPA. *Dioxin*, 131 Wash. 2d at 360. However, the case's discussion of *ultra vires* principles was not overturned, which is the only point of the case upon which WWP relies. *Noel* is still good law for its other points. *See Young v. Young*, 164 Wash.2d 477, 487, 191 P.3d 125 (2008) (citing with approval *Noel*'s discussion of contract principles).

WDFW's post-hoc attempt to recast the Asotin pilot grazing as a research project fails. Although WDFW described and executed the Asotin pilot project as a way to support the livestock industry, the agency now claims, for the first time, that the Asotin pilot grazing falls into the SEPA's exemption for "[b]asic data collection, research, resource evaluation, requests for proposals (RFPs), and the conceptual planning of proposals." WAC 197-11-800(17).

WDFW's own statements show that the Asotin pilot grazing was not a research project, but a project designed and executed to assist the livestock industry. In a draft 2007 status report, the agency stated, "*[i]t is important to note that the pilot project is not a research project.*" *Asotin AR at 333* (emphasis added). Again, WDFW's own Lands Division Manager and Wildlife Area Manager stated that SEPA was needed on the 2009 permit, showing that the agency did not consider the project an exempt research project.

Nor does the plain language of the 2009 grazing plan support the idea that the Asotin grazing was a research project. As noted, the plan states that "[t]he primary purpose of this document is to ensure that the objectives of the MOU are realized." *Asotin AR at 3327*. One of the 2009 plan's two "goals" is to "[s]upport an operationally and economically viable livestock grazing operation." *Id. at 3328*. The project was thus designed to provide grazing, not investigate impacts. And as noted in WWP's opening brief, industry group WCA retains a large degree of control over the project. *E.g. Asotin AR at 3374.*

CONCLUSION

For these reasons, the Court should rule in Plaintiffs' favor, and reverse the January 9, 2008 MOU and April 8, 2009 Asotin grazing permit.

Respectfully submitted this January 27, 2010,

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Kristin F. Ruether, *pro hac vice*
ISB #7914, OSB #05368
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208-342-7024
Attorney for Plaintiffs