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

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|                             |   |                      |
|-----------------------------|---|----------------------|
| DR. STEVEN G. HERMAN, and   | ) |                      |
| WESTERN WATERSHEDS PROJECT, | ) |                      |
|                             | ) |                      |
| Plaintiffs,                 | ) | NOS. 08-2-00276-1    |
|                             | ) | 09-2-01120-3         |
| vs.                         | ) | (Consolidated cases) |
|                             | ) |                      |
| WASHINGTON DEPARTMENT OF    | ) |                      |
| FISH AND WILDLIFE, et al,   | ) |                      |
|                             | ) |                      |
| Defendants.                 | ) |                      |

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REPORT OF PROCEEDINGS  
Ruling of the Court

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BE IT REMEMBERED that on April 2, 2010, the  
above-entitled and numbered cause came on for hearing  
before the HONORABLE PAULA CASEY, judge of Thurston  
County Superior Court, Olympia, Washington.

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Cheri L. Davidson  
Official Court Reporter  
Thurston County Superior Court  
Olympia, Washington 98502  
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A P P E A R A N C E S

For the Plaintiffs: KRISTIN RUETHER  
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Advociates for the West  
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For the Defendants: MATT KERNUTT  
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APRIL 2, 2010

HONORABLE PAULA CASEY, PRESIDING

\* \* \* \* \*

(After hearing argument of  
counsel, the Court ruled as  
follows, with modifications to  
the original transcript at the  
direction of Judge Casey:)

THE COURT: When counsel were here before, I  
was mainly dealing with the legal issues in this case  
and disposed of those. The remaining issue specifically  
related to the facts of this case for me to determine  
whether the 2009 Grazing Plan of Department of Fish and  
Wildlife for the Asotin wildlife area was arbitrary and  
capricious in its making. Quite frankly, as I began to  
review the record, I was quite shocked. The parts of  
the record designated for review contained very harsh  
criticism by the Department's own scientists about  
grazing in the Asotin wilderness area.

I searched the record and was looking throughout  
the record for scientific responses to that. I  
recognize that the people within the Department of Fish  
and Wildlife, the managers who are making the decision  
about the 2009 plan, may have had scientific backgrounds  
and were scientists themselves, but none of the retort  
or response in the yellow sticky attachments or in the  
narrative responses referenced any scientific

1 information that countered the information that had been  
2 advanced by their biologists. The responses seemed to  
3 me to be more an explanation of how they were going to  
4 try to minimize the effects of the biologists' warnings.

5 The standard for review of the Court for  
6 determining whether the agency action can be overturned  
7 is whether it was arbitrary and capricious. We know  
8 that the Department of Fish and Wildlife's mission is to  
9 manage this particular area for wildlife in a manner  
10 that does not affect the wildlife resources. In order  
11 for the Court to determine that the lease is not  
12 appropriate, the Court must determine that the lease was  
13 made with willful and unreasoning action without regard  
14 to the facts and circumstances.

15 There was nothing in the record that I found that  
16 showed that the prior grazing practices in this area had  
17 any benefit to any wildlife. I think I could  
18 categorically say there was no evidence that there was  
19 any benefit to wildlife. In fact, there had been harm  
20 to wildlife by overgrazing. The most critical  
21 information in the record was directed toward the  
22 mammals, specifically to the elk and the grazing  
23 patterns of them, although of course there were  
24 scientific reports about the effects on fish and plants  
25 as well. But the overgrazing had deprived the wildlife

1 of their natural forage. In the past the grazing lessor  
2 had been unwilling or unable to remove his cattle when  
3 finally it was discovered that overgrazing was occurring  
4 and yet the new lease was with the same cattleman.

5 The responses of the Department to their own  
6 scientists' criticism of the new lease based upon past  
7 leasing practices was really an attitude of how are we  
8 going to do no harm to the wildlife in our new lease,  
9 not how are we going to benefit wildlife in our new  
10 lease. At every juncture the Department's response to  
11 the criticisms was to suggest what was learned from the  
12 past could lead to reducing the damage to wildlife  
13 habitat earlier experienced. But there was no  
14 scientific evidence that was discussed in the record to  
15 which I was referred that really had a basis for  
16 concluding that grazing practices could either preserve  
17 or improve the habitat for any wildlife.

18 The Department had no discussion about the impacts  
19 of the fencing or the pumping of water or creation of  
20 watering stations which were necessary adjuncts to the  
21 grazing to keep the cattle out of the natural streams.  
22 I think there is some significance to the fact that the  
23 Washington State University study was commissioned to  
24 figure out what the effects on the wildlife would be,  
25 but certainly that is an after-the-fact analysis.

1 Unless the Department had some idea that there was going  
2 to be no detriment or some benefit to wildlife, they,  
3 under their own mission, were in a position of being  
4 arbitrary and capricious in awarding the lease that they  
5 had no scientific evidence or no evidence to support.

6 I did recall reading the letters written just  
7 before the 2009 lease by Mr. Mendel and Mr. Fowler  
8 saying that the language in the new plan is better than  
9 the old plan, trying to be hopeful about it. But under  
10 no circumstances did either of those individuals  
11 indicate that there was going to be benefit to wildlife  
12 by the plan or that wildlife would not be harmed. The  
13 Washington State University study was commissioned to  
14 figure this after the fact.

15 Based on the record I find that the Department was  
16 arbitrary and capricious in the 2009 lease. At this  
17 point the Department had quite a bit of experience from  
18 the last three years of grazing, and many problems had  
19 come to the wildlife at that point. Some adjustments  
20 had been made in the plan to try to lessen harm in the  
21 future. But I saw no scientific evidence that suggested  
22 that there would be either less harm or benefit to the  
23 wildlife. Accordingly, the decision to adopt the 2009  
24 lease should be overturned.

25 MR. KERNUTT: May I ask a point of

1 clarification, Your Honor?

2 THE COURT: Sure.

3 MR. KERNUTT: Is the Court ruling that for the  
4 Department of Fish and Wildlife to have grazing on its  
5 property it must show within the record that the grazing  
6 will benefit fish and wildlife?

7 THE COURT: I think that is the mission. Are  
8 you suggesting that do no harm is sufficient?

9 MR. KERNUTT: Well, Your Honor, I think that  
10 is sufficient, Your Honor. I think that for the  
11 Department there is no case law interpreting the mandate  
12 as such to say that any activity that the agency  
13 incorporates must in fact benefit fish and wildlife. So  
14 I would assert, Your Honor, that the changes the  
15 Department made which the Court would characterize as do  
16 no harm would in this particular case, particularly when  
17 they're trying to study how to best manage a practice,  
18 has occurred for a long period of time in Eastern  
19 Washington, best manage a practice in such a way, if --  
20 and while I understand the Court's reading of the record  
21 as it all is do no harm, that is, I would submit to the  
22 Court, sufficient to not be arbitrary and capricious.

23 THE COURT: I am going to let Ms. Ruether  
24 speak to that also.

25 MS. RUETHER: Thanks.

1           Well, I think the documents that you just outlined  
2           show also just as much that it was not doing no harm, so  
3           I think it's kind of a moot point.

4           THE COURT: Well, I do think that I did  
5           announce that I thought do no harm was not sufficient.  
6           Certainly it was the goal of the Department apparently  
7           expressed, the maximum goal or the highest goal of the  
8           Department was to do no harm, not to benefit, but I am  
9           very satisfied, based upon the scientific evidence in  
10          the record, that this plan was not about to achieve a do  
11          no harm status.

12          MR. KERNUTT: Fair enough, Your Honor.

13          Would the Court like the parties to work out an  
14          order, Your Honor, detailing both the SEPA argument and  
15          the arbitrary and capricious decision?

16          THE COURT: Sure. We haven't entered any  
17          orders from the previous hearings; is that right?

18          MR. KERNUTT: No.

19          THE COURT: So I assume you are not prepared  
20          to do that today.

21          MS. RUEETHER: I'm not. Could we do it within  
22          a few days?

23          THE COURT: Sure. I imagine you will be able  
24          to reach an agreement, but if you don't --

25          MR. KERNUTT: I'm sure, Your Honor, we will be



1           able to reach an agreement, but if the Court would be  
2           more comfortable setting a date, that would be fine.

3                   THE COURT:   Just so we don't lose track of it.  
4           Should we say April 30th?

5                   MS. RUETHER:   Sure.

6                   May I ask one more question?

7                   THE COURT:   Yes.

8                   MS. RUETHER:   This is a case where it's an  
9           annually occurring event, so the Department is about to  
10          issue -- they issue a plan every year around mid-April I  
11          believe, so they're about to issue their 2010 plan for  
12          the same area.   I'm not sure.   Would you like us to try  
13          to draft some kind of language addressing that?   The  
14          nature of an APA plan is you can't sue on it until it's  
15          been issued.   Should we address anything about future  
16          grazing like going on this year in the order?   Should I  
17          take a stab at it or --

18                   THE COURT:   Well, I don't think the Court has  
19          authority under an APA review to address future leases.  
20          I would assume the Department of Fish and Wildlife may  
21          be appealing this under any circumstances, so if they  
22          are about to issue a lease that you don't like I suppose  
23          that you will be in requesting some emergency action.  
24          Either party may also request reconsideration.

25                   MS. RUETHER:   Okay.   Thank you.

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(Proceedings were concluded.)

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C E R T I F I C A T E

STATE OF WASHINGTON       )  
                                          ) ss  
COUNTY OF THURSTON       )

I, Cheri L. Davidson, Notary Public, in and for the  
State of Washington, residing at Olympia, do hereby  
certify:

That the annexed and foregoing Verbatim Report of  
Proceedings, Ruling of the Court, was reported by me and  
reduced to typewriting by computer-aided transcription;

That said transcript is a full, true, and correct  
transcript of the ruling announced by Judge Paula Casey,  
with modifications made per local court rule, on the 2nd  
day of April, 2010 at the Thurston County Courthouse,  
Olympia, Washington;

That I am not a relative or employee of counsel or  
to either of the parties herein or otherwise interested  
in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL THIS \_\_\_\_\_ day of  
\_\_\_\_\_, 2010.

\_\_\_\_\_  
Notary Public, in and for  
the State of Washington,  
residing at Olympia.