

☐ EXPEDITE
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Date: 12/12/2008
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Judge/Calendar: The Honorable
Chris Wickham

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

DR. STEVEN G. HERMAN, and WESTERN
WATERSHEDS PROJECT,

Plaintiffs,

v.

WASHINGTON DEPARTMENT OF FISH
AND WILDLIFE, and JEFFREY P.
KOENINGS, WDFW Director,

Defendants,

WASHINGTON CATTLEMEN’S
ASSOCIATION,

Intervenor.

Case No. 08-2-00276-1

BRIEF IN SUPPORT OF PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY
JUDGMENT

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INTRODUCTION

Plaintiffs Dr. Steven G. Herman and Western Watersheds Project (jointly, “WWP”) seek partial summary judgment declaring that Defendants Washington Department of Fish and Wildlife et al. (“WDFW”) violated the Washington State Environmental Policy Act (“SEPA”) and WDFW regulations, in issuing a permit to a private rancher to graze livestock on a portion of the Whiskey Dick/Quilomene Wildlife Area known as the Skookumchuck lands without conducting any environmental analysis, despite the adverse impacts that livestock grazing has upon the state lands and their fish and wildlife resources.

Defendants argue that they were “categorically excluded” from having to conduct any environmental analysis under SEPA; but as explained below, their argument is contrary to SEPA, contrary to WDFW rules, and otherwise arbitrary and capricious. Accordingly, the Court should grant partial summary judgment for WWP; and rule that Defendants violated SEPA and the APA in issuing the Skookumchuck permit in question.¹

¹ WWP is not seeking summary judgment over the other action challenged in this lawsuit, a Memorandum of Agreement that WDFW entered with the Washington Cattlemen’s Association to authorize grazing on state wildlife area lands, which WDFW also did without any environmental review under SEPA. That claim is not ready for adjudication yet, as Plaintiffs believe WDFW has not filed the complete administrative record. WDFW has stated it does not object to staying this claim until the record dispute is settled; and Plaintiffs will apprise the Court as soon as this occurs. *See* Declaration of Kristin F. Ruether (filed herewith).

JURISDICTION AND STANDING

This action challenges WDFW's issuance of the Skookumchuck grazing permit, AR 416, which is final agency action properly subject to judicial review by this Court. RCW 34.050.570(4). Additionally, the Court has jurisdiction to review WDFW's failure to prepare any environmental analysis of the permit pursuant to SEPA. *Id.* (authorizing judicial review of failure to perform a duty required by law). This Court additionally has jurisdiction pursuant to RCW Chapter 7.24 (Declaratory and Injunctive Relief) and RCW 43.21C.075 and .080 (SEPA). Declaratory relief is appropriate, even though the challenged activity is completed, because "a judgment or decree will terminate [a] controversy or remove an uncertainty," RCW 7.24.050, and it presents an issue of "continuing and substantial public interest." *In re Marriage of Horner*, 151 Wash.2d 884, 891–92 (2004).

Plaintiffs have standing because they allege an injury in fact to their environmental and recreational interests, *see Kucera v. Dept. of Transp.*, 140 Wash.2d 200, 212–13 (2000), and have been substantially prejudiced by the impacts of the permitted grazing. *See* Declaration of Dr. Steven G. Herman (filed herewith).

STATEMENT OF FACTS

WDFW's Management of State Wildlife Areas

The Skookumchuck lands lie within the Quilomene/Whiskey Dick Wildlife Area, managed by the WDFW. WDFW's statutory mandate is to "preserve, protect, perpetuate, and manage the wildlife" of the state; and "conserve the wildlife . . . resources in a manner that does not impair the resource." RCW 77.04.012. WDFW's mission statement

1 is to “serve[] Washington’s citizens by protecting, restoring and enhancing fish and
2 wildlife and their habitats, while providing sustainable fish and wildlife-related
3 recreational and commercial opportunities.” AR 66. Thus, in contrast to some state lands
4 held in trust to maximize economic return, Wildlife Areas are to be managed primarily to
5 protect fish and wildlife.
6

7 The Wildlife Area is located about 15 miles east of Ellensburg in eastern Kittitas
8 County, with the Columbia River as an eastern boundary. *See* AR 71 (map). WDFW has
9 stated that portions of the area exhibit some of the state’s best remaining native shrub-
10 steppe communities and that it functions to link the largest remaining blocks of shrub-
11 steppe in the state. AR 81 (management plan). *See also* AR 944–957 (photos of the
12 stunning vistas and wildflowers found in the Wildlife Area).
13

14 The land constituting the Wildlife Area was gradually acquired by the State of
15 Washington beginning in the 1960s. *Answ.* ¶ 12. The Skookumchuck lands at issue in
16 this case were acquired between 2004 and 2007. *Id.* *See also* AR 77 (management plan).
17 In other words, they have only been in state ownership for 1–4 years.
18

19 The Skookumchuck acquisitions were funded by, among others, the Washington
20 Wildlife and Recreation Commission (“WWRC”), the Legislature, the Recreation
21 Conservation Office, and Hanford mitigation funds. *Answ.* ¶ 12. WDFW explained in its
22 grant application to the WWRC that “Acquisition of this parcel would protect an entire
23 watershed and connect it with the largest remaining block of shrub steppe in the State of
24 Washington” and that “[a] long list of shrub steppe obligate and associated species will
25 benefit from this acquisition including sage grouse, sage thrasher, sage sparrow,
26

1 loggerhead shrike and sagebrush lizard.” *Id.* Defendant Jeffrey Koenings stated in a
2 WDFW newsletter that the Skookumchuck acquisition was “one of the largest areas of
3 undeveloped shrub-steppe habitat in our state,” and that thanks to “\$4.67 million in
4 [Washington Wildlife and Recreation Program] funding, it will be preserved as critical
5 habitat.” *Id.*

7 The Wildlife Area is guided by the Draft L.T. Murray/Quilomene/Whiskey Dick
8 Wildlife Area Management Plan, prepared in 2006. AR 61. The stated goal of the plan is
9 to “preserve habitat and species diversity for both fish and wildlife resources, maintain
10 healthy populations of game and non-game species, protect and restore native plant
11 communities, and provide diverse opportunities for the public to encounter, utilize, and
12 appreciate wildlife and wild areas.” AR 67. The plan states that “[t]he protection and
13 enhancement of wildlife and wildlife habitat is the number one priority when developing
14 management strategies on the Wildlife Areas.” AR 81.

17 Much of the Wildlife Area was in poor condition when acquired, due to livestock
18 grazing. *Answ. ¶ 14. See also* AR 75 (management plan). The Skookumchuck lands were
19 no exception: WDFW conducted an “initial resources assessment” that found widespread
20 degradation from livestock grazing. AR 405–415. Findings in the assessment include that
21 “[the] [o]verall condition of the Riparian habitat is moderately disturbed, with areas that
22 have been severely disturbed,” AR 405; that “rangeland habitat is ‘Satisfactory’ to ‘At
23 Risk’, due in large part to inappropriate livestock grazing practices in the past . . .,” AR
24 415; that four of the four relevant components of riparian habitat were not meeting the
25 WDFW’s ecosystem standards, AR 407; and that four of the five components of
26

1 rangelands and grazeable woodlands were not meeting the standards, AR 408. The
2 grazing plan notes that the habitat has “multiple poor condition patches that have been
3 overgrazed in the recent past.” AR 479.

4
5 WDFW historically “recognized that poorly managed grazing can harm shrub-
6 steppe land, and discontinued grazing from additions to the Wildlife Area because such
7 grazing was done in an unsustainable manner.” Ans. ¶ 14. The management plan
8 explains that grazing on most of the complex was discontinued “in order to provide
9 winter and spring forage for big game species, particularly elk.” AR 75. And WDFW
10 maintains 25 miles of fencing around the perimeter of the Wildlife Area “to guard against
11 livestock trespass,” to “reduce damage to herbaceous cover needed for nesting and
12 foraging by shrub steppe obligate species,” and to reduce the spread of weeds. AR 75–76.

13 **Sage Grouse and Other Wildlife in the Wildlife Area**

14
15 The Wildlife Area is a hotspot of sagebrush steppe biodiversity. Of particular note
16 is its importance to the Columbia Basin Distinct Population Segment (“DPS”)² of sage
17 grouse, a rare, chicken-sized bird that is famous for returning to its mating grounds
18 (“leks”) year after year and for the striking, spotted plumage the male birds display
19 during mating dances. Ans. ¶ 11. Sage grouse is listed as a state threatened species. AR
20 823. In 2001, the U.S. Fish and Wildlife Service found that listing the Columbia Basin
21 sage grouse was *warranted* for listing under the federal Endangered Species Act
22 (“ESA”), but was precluded due to other listing activities. AR 823–24. It did, however,
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26 ² A Distinct Population Segment is a description of a population of a species, and is defined as a
“species” in the federal Endangered Species Act. 16 U.S.C. § 1532(16).

1 become an ESA “candidate” species. AR 824. Additionally, a federal court recently
2 overruled U.S. Fish and Wildlife Service’s (“FWS”) decision rejecting petitions to list the
3 sage grouse under the ESA. *Western Watersheds Project v. U.S. Fish and Wildlife Serv.*,
4 535 F.Supp.2d 1173 (2007). Grazing and its associated fencing and roads are among the
5 primary causes listed by FWS for the bird’s decline. *Id.* at 1177–78 (quoting FWS). FWS
6 is currently undertaking a full status review of the sage grouse to determine whether it
7 should be listed as threatened or endangered under the ESA.
8

9
10 The Washington sage grouse population is particularly imperiled. According to
11 WDFW’s Greater Sage-Grouse Recovery Plan, its range has been reduced by 92% in the
12 20th century, with population declines estimated at 77% to 95%. AR 812. Populations are
13 now only found in two small areas—one in Douglas and Grant Counties, and the other on
14 the Yakima Training Center in Kittitas and Yakima Counties. AR 814. “The two
15 remaining populations in Washington are too small to be considered viable, so the
16 persistence of sage-grouse in Washington is likely to depend on recovery efforts.” *Id.*
17 Further, “[s]age-grouse recovery will require protecting remaining shrub-steppe habitat
18 from fires, harmful grazing, conversion, and development. . . . Maintaining sage-grouse
19 in Washington will depend on protecting remaining habitat, restoring degraded habitat
20 and re-establishing populations outside their current range.” AR 792.
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23 The Wildlife Area lies between the two populations and is an important potential
24 corridor connecting the two. AR 482. Connecting populations is critical because small
25 populations are at risk from problems like inbreeding. AR 814. As recently as 2007, a
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1 sage grouse nest—complete with eggshells—was located in the Wild Horse Wind Farm,
2 directly adjacent to the Skookumchuck lands. AR 482 (grazing plan), AR 753 (letter from
3 Steven Herman attaching photos of nest).
4

5 The Wildlife Area is home to a regionally-significant elk herd known as the
6 Colockum herd, AR 82–83 (management plan), and federal ESA-listed steelhead trout.
7 AR 481 (grazing plan). It is also contains many other species, including white-tailed and
8 black-tailed jackrabbits (both state candidate species), sage sparrows (state candidate),
9 sage thrashers (state candidate), loggerhead shrikes (state candidate and federal species of
10 concern), the striped whipsnake (a state candidate species and the least abundant of all
11 snakes in the state), and several other species of lizards and amphibians, “making this an
12 exceptionally diverse area for reptiles and amphibians.” AR 483 (grazing plan).
13
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15 **Livestock Grazing Impacts**

16 The Wildlife Area’s sagebrush steppe ecosystem is fragile and slow to heal,
17 receiving only 9–11 inches of precipitation annually. AR 78. The science documenting
18 the adverse impacts of livestock grazing on sage grouse and other sagebrush steppe
19 species is clear: WDFW’s Sage-Grouse Recovery Plan explains that that livestock
20 grazing reduces grass cover at sage-grouse nest sites, which can result in high rates of
21 nest predation; destroys microbotic soil crusts, which harms native plants; and increases
22 the dominance of exotic plants, among other impacts. AR 836–840. The District Wildlife
23 Biologist notes that “a net benefit to wildlife [from grazing] will be hard to prove,” that
24 elk and cattle compete for the same food, that the grazing will occur during sage grouse
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1 nesting, and that the fencing associated with the grazing will have a negative impact on
2 birds and elk. Exh. 1 to Ruether Decl. at 2 (citing references). The biologist notes in a
3 different memo that grazing on lands with less than 14 inches of precipitation will harm
4 vegetation, “primarily [because] the hoof action disturbance will open up areas for
5 cheatgrass to invade,” and that “cattle have frequently been found to displace elk on the
6 range.” AR 976 (quoting and citing references).

8 **Reintroduction of Grazing to the Wildlife Area**

9
10 After signing an MOU with the Washington Cattlemen’s Association in 2005
11 (renewed in 2008, AR 354), WDFW put forth a proposal to graze the eastern portion of
12 the Wildlife Area, known as “Whiskey Dick” proper, directly east of the Skookumchuck
13 lands. AR 48. Whiskey Dick is one of the most pristine examples of sagebrush-steppe in
14 the entire Wildlife Area complex, and is used by students from Evergreen State College
15 and the Washington Native Plant Society, among others, to study an intact example of a
16 sagebrush-steppe ecosystem. Herman Decl. ¶ 8; Answ. ¶ 32. WDFW initially prepared an
17 “environmental checklist” as part of its threshold determination, and issued a
18 Determination of Nonsignificance in April 2007. AR 48–59 (final checklist); AR 35
19 (determination). The proposal was controversial; WDFW received many concerned
20 comments from the public, including WWP. AR 226–311 (Draft Summary of written
21 public comments); AR 154–165 (chart summarizing SEPA comments); AR 166 (WWP
22 comments).

23
24 Some of the most critical comments of all came from WDFW’s own biologists.
25 For example, the District Wildlife Biologist explained that “a net benefit to wildlife will
26

1 be hard to prove” because: “[t]he review of effects of grazing is poorly done and
2 incomplete,” “[t]he statement that elk and cattle have different forage preferences is also
3 wrong,” the analysis “ignored the most valuable vegetation that is being removed and
4 covered, the springs,” and the fencing would harm birds and elk. Exh. 1 to Ruether Decl.
5 at 1–2. He concluded, “I believe the proposed action is in violation of WAC 232-12-181
6 [WDFW’s grazing permit rules].” *Id.* at 2. The District Fish Biologist stated he was “very
7 concerned” about the proposal, and refused to sign the grazing permit. AR 981. The
8 Regional Habitat Program Manager commented that “[t]he objectives identified in the
9 Grazing Permit appear insufficient to accomplish the goals and no quantifiable thresholds
10 of compliance for the permittee are identified.” AR 984. *See also* AR 971, 973 (two more
11 2007 memos from District Wildlife Biologist stating more concerns about Whiskey Dick
12 Wildlife Area Grazing Plan). One of these memos included the statement:

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16 The impression I’ve received is that the permit will be issued no matter
17 what any one says. I received the plan for review the same day the weeklies
18 reported the plan was completed and grazing would start in the spring. The
19 practice of completing a plan and issuing a permit before review indicates
20 the administration is not interested in any input or making sure the plan is
21 sound. No experts from within the agency or outside the agency have
22 reviewed the plan. There were no open, announced public meetings and
23 adoption of the plan and permit are not on the commission agenda for
24 March. It appears that the entire process has purposefully been held out of
25 view of the public and most of the agency. If another public agency used
26 the same tactics, WDFW would be screaming mad and I find the current
process unprofessional and embarrassing. It leads an observer to believe
that WDFW is trying to avoid an open public process.

AR 974.

After receiving this barrage of criticism, the Department withdrew the project on
March 5, 2008, issuing a notice stating “WDFW will redefine the proposal to encompass

1 a broader geographic scope that includes new WDFW land acquisitions within the
2 Coordinated Resource Management (CRM) area, which occurred after the initiation of
3 this SEPA.” AR 36.
4

5 **Issuance of Unlawful Skookumchuck Permit**

6 Despite having just acknowledged that authorizing grazing in the Wildlife Area is
7 controversial and poses significant adverse environmental impacts that require full SEPA
8 review, in April 2008 WDFW released the grazing plan and permit authorizing up to 160
9 cattle to graze on five pastures within the Skookumchuck lands—adjacent to the Whiskey
10 Dick area originally proposed—from April 15 to June 15, 2008. AR 469 (grazing plan);
11 AR 416 (permit). Neither document went through any public review; no public comment
12 was sought, and interested parties were not officially notified of the plan or permit. The
13 Skookumchuck permit was awarded to Mr. Russ Stingley, without going through any
14 bidding process. Answ. ¶ 34. Mr. Stingley had also been the intended recipient of the
15 Whiskey Dick permit. *Id.*
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18 The record indicates that the proposal to “switch” the permitted grazing area from
19 the Whiskey Dick area to the Skookumchuck area was extremely rushed. The District
20 Wildlife Biologist’s comments on the Skookumchuck proposal state “I realize that there
21 [are] numerous political reasons for pushing through a grazing plan, and there may not
22 have been adequate time to fully develop the plan.” AR 975. He restated many of the
23 concerns he had raised for the Whiskey Dick proposal, as quoted above, noting that the
24 plan was “heavily biased toward the potential positive effects of grazing and needs to
25 recognize the potential negative effects more” and that stated objectives and monitoring
26

1 were not adequate to protect sage grouse and other wildlife. AR 975–78. No specialist
2 reports from the fish or habitat biologists are found in the record for the Skookumchuck
3 proposal.
4

5 Because WDFW thus issued the Skookumchuck grazing permit without
6 conducting any environmental analysis under SEPA, WWP amended its complaint to
7 challenge the permit. In its Answer, WDFW alleges that no SEPA analysis was required,
8 because the Skookumchuck permits supposedly falls within a “categorical exemption” to
9 SEPA that the Department of Ecology adopted to allow agencies to avoid undertaking
10 new SEPA analysis for certain grazing leases, where there is already a prior lease (with
11 SEPA analysis) in place. *See* Answ. ¶ 35; WAC 197-11-800(24)(a). Under this
12 interpretation of the categorical exclusion, WDFW could forever escape its SEPA
13 obligation to assess grazing impacts on these lands, and allow harmful grazing to occur
14 irrespective of the toll it may take on sage grouse and other sensitive species.
15
16

17 Thus, the central dispute between the parties is whether WDFW erred, as a matter
18 of law, in interpreting this grazing categorical exemption as allowing it to avoid SEPA
19 analysis in issuing the Skookumchuck permit. As explained below, the relevant statutory
20 and regulatory language cannot reasonably be read to justify WDFW’s actions, and hence
21 the Court must grant partial summary judgment for WWP.
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I. APPLICABLE STANDARDS OF REVIEW.

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.” CR 56(c).

Judicial review of an agency action is governed by the Administrative Procedure Act (APA). RCW 34.05.510, 34.05.570(1). Under the APA, the Court reviews the Skookumchuck permit to determine if it was issued “[o]utside the statutory authority of the agency or the authority conferred by a provision of law,” or is otherwise “[a]rbitrary or capricious.” RCW 34.05.570(4)(c). As to relief, the Court may take various actions including “enter[ing] a declaratory judgment order.” RCW 34.05.574(1)(b).

Notably, in determining whether WDFW violated these standards here, the Court reviews de novo the meaning of SEPA categorical exclusions, *Clallam County Citizens for Safe Drinking Water v. Port Angeles*, 187 Wash.App. 214, 219 (2007), and it applies the “clearly erroneous standard” in reviewing the agency’s determination that a proposal is categorically exempt. *Id.* at 224–225. “A finding is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been made.” *Id.* (citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wash.2d 169, 176 (2000)).

1 The Supreme Court has confirmed that “[t]he courts may [] decide whether a
2 specific proposed action actually fits within the particular categorical exemption.”
3 *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wash.2d 345, 365
4 (1997).

6 **II. SEPA OBLIGATES AGENCIES TO STUDY ENVIRONMENTAL** 7 **IMPACTS OF THEIR PROPOSED ACTIONS.**

8 **A. SEPA’s Requirements.**

9 SEPA was adopted to ensure that state agencies evaluate – and disclose to the
10 public – the likely environmental consequences of their proposed actions. *See* RCW
11 43.21C.010 et seq. “The basic purpose of SEPA’s command for environmental review is
12 to require governments to fully consider environmental and ecological factors when
13 taking actions that significantly affect the quality of the environment.” *PUD No. 1 of*
14 *Clark County v. Pollution Control Hearings Bd.*, 137 Wash.App. 150, 158 (2007). Other
15 purposes of SEPA are “to promote efforts which will prevent or eliminate damage to the
16 environment . . .” and “to enrich the understanding of the ecological systems and natural
17 resources important to the state and nation.” RCW 43.21C.010.

20 To implement this statutory mandate, SEPA establishes a two-step process,
21 whereby agencies first make a “threshold determination” of whether a proposed action
22 may have significant environmental impacts; and if so, then the agency must prepare a
23 detailed Environmental Impact Statement (EIS) to study those impacts. *See* RCW
24 43.21C.030; WAC 197-11-310(a). *See also Dioxin*, 131 Wash.2d at 352 (“The central
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26

1 SEPA requirement is a threshold determination of environmental significance and, if an
2 action is significant, the preparation of an environmental impact statement (EIS).”).

3 SEPA requires that an EIS “shall be prepared ... for ... major actions having a
4 probable significant, adverse environmental impact.” RCW 43.21C.031. In determining
5 whether an action meets this standard, the reviewing agency’s threshold determination
6 must consider the environmental impacts of the project, which includes short-term, long-
7 term, direct, and indirect impacts. WAC 197-11-060(4)(c), (d). Significant probable
8 environmental effects are indicated if a project may adversely affect “environmentally
9 sensitive or special areas”; may “adversely affect endangered or threatened species or
10 their habitat”; or may “establish a precedent for future actions with significant effects.”
11 *Id.* at 197-11-330(3)(e)(i), (ii), (iv).

12 Notably, SEPA is designed to “serve as the means of assessing the environmental
13 impact of proposed agency action, rather than justifying decisions already made.” *Id.* at
14 197-11-402(10).

15 **B. The Grazing “Categorical Exemption.”**

16 However, SEPA provides that certain limited types of actions may be
17 “categorically exempt” from these threshold review and EIS requirements, if the actions
18 are so small or routine that they will not have significant environmental impacts. *See*
19 RCW 43.21C.031, WAC 197-11-305(1). SEPA thus allows the Department of Ecology to
20 adopt categories of actions that do not require SEPA analysis, but directs that:

21 The types of actions included as categorical exemptions in the rules shall be
22 limited to those types which are not major actions significantly affecting
23 the quality of the environment. The rules shall provide for circumstances
24

1 where actions which potentially are categorically exempt require
2 environmental review.

3 RCW 43.21C.110(1)(a).

4 Pursuant to this authority, the Department of Ecology adopted the grazing
5 categorical exclusion that WDFW relies upon here. It provides an exemption from SEPA
6 for two different types of grazing authorizations, as follows: “Issuance of new grazing
7 leases covering a section of land or less; and issuance of all grazing leases for land that
8 has been subject to a grazing lease within the previous ten years.” WAC 197-11-
9 800(24)(a).
10

11 The first of these exclusions – issuance of new grazing leases covering a section
12 or land or less – is obviously not applicable here, since the Skookumchuck permit
13 covered multiple sections of state land. See AR 499 (map). Accordingly, the central
14 question before the Court is whether WDFW correctly invoked the second clause of the
15 grazing categorical exemption to avoid undertaking any SEPA review of the
16 Skookumchuck permit at issue here.
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19 **III. WDFW IMPROPERLY INVOKED THE GRAZING CATEGORICAL**
20 **EXCLUSION.**

21 An agency may only invoke a categorical exemption to avoid SEPA’s threshold
22 determination and EIS requirements if the proposed action “actually fits within the
23 particular categorical exemption.” *Dioxin*, 131 Wash.2d at 365. Here, WDFW errs as a
24 matter of both fact and law in claiming that the Skookumchuck permit is categorically
25 exempt from SEPA under the second clause of WAC 197-11-800(24)(a).
26

1 As explained below, the Skookumchuck permit cannot fall within the grazing
2 exemption. First, the only interpretation of the exemption consistent with SEPA is that
3 the triggering grazing authorization must be a state lease (or permit), not some prior
4 private lease (as WDFW alleges here). Second, even if a private lease was sufficient, the
5 Skookumchuck permit still does not fall within the exemption because WDFW has not
6 produced any lease or permit for the majority of the permitted area.
7

8 **A. A Private Lease Cannot Trigger the Grazing Exemption.**
9

10 Again, the second clause of the grazing categorical exemption applies to “issuance
11 of all grazing leases for land that has been subject to a grazing lease within the previous
12 ten years.” WAC 197-11-800(24)(a). WDFW interprets this language as authorizing it to
13 avoid SEPA analysis of its grazing authorizations when it has recently acquired the lands
14 from a private party, and there was supposedly some prior private lease or permit
15 allowing grazing on those lands. The Court must reject that interpretation as a matter of
16 law, since it is not consistent with the letter or intent of SEPA – and would create an
17 absurd situation allowing newly-acquired lands to forever evade environmental review of
18 state grazing authorizations, no matter how ecologically destructive they may be.
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21 For context, it is helpful to first consider how the second clause of the exemption
22 applies to long-held state land. The effect is to provide SEPA “relief” to an agency that
23 wishes to graze land where it has already conducted environmental analysis as required
24 by SEPA. It also provides SEPA relief to agencies that acquire land from another state
25 agency, where the previous agency owner had conducted the required environmental
26 analysis under SEPA and leased the area for grazing within the last ten years. Thus, it

1 exempts the state from conducting potentially redundant SEPA analyses on the
2 environmental impacts of grazing state land. The question here concerns newly-acquired
3 land: when the state wants to introduce livestock grazing on more than one section of
4 newly-acquired land, does the fact that the land was previously leased for grazing by the
5 prior private landowners permit the state to invoke the second clause of the grazing
6 exemption?
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8 The answer must be “no.” Contrary to WDFW’s reading, nothing in the grazing
9 categorical exemption purports to address prior grazing authorizations on *private lands* at
10 all. The exemption speaks only of leases within the prior ten years, which can only be
11 construed as prior *state grazing leases* – which presumably underwent prior SEPA
12 review, and hence the Department of Ecology deemed these leases less likely to pose
13 significant new environmental impacts requiring new SEPA analysis. By attempting to
14 expand this exemption beyond prior state grazing leases into the realm of recently-
15 acquired private lands, WDFW is thus exceeding its legal authority, requiring reversal.
16

17 A private action – such as a private grazing lease – cannot be deemed part of the
18 grazing categorical exemption from SEPA as a matter of law, because SEPA addresses
19 state actions only. See WAC 197-11-704(1)(a) (defining “actions” subject to SEPA as
20 “[n]ew and continuing activities (including projects and programs) *entirely or partly*
21 *financed, assisted, conducted, regulated, licensed, or approved by agencies*”) (emphasis
22 added). Thus, an entirely private action, such as a lease between two private parties to
23 permit one to graze livestock on the others’ private property, is not a SEPA action. As
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1 such, it cannot be utilized as the triggering event to invoke a SEPA categorical
2 exemption, as WDFW urges.

3 Further, the fact that the second clause of the exemption uses the word “lease”
4 strongly implies that it only applies to lands that have been previously grazed *by the state*.
5 This is because, if it does indeed apply to private grazing, the exemption creates an
6 arbitrary and absurd distinction between private landowners who graze their land
7 themselves and those who lease their land to a third-party grazer. “Constructions that
8 would yield unlikely or absurd results should be avoided.” *Densley v. Dep’t of Ret. Sys.*,
9 162 Wash.2d 210, 221 (2007) (citing *State v. Keller*, 143 Wash.2d 267, 277 (2001),
10 internal quotations omitted).

13 The second clause of the grazing exemption only applies to “land that has been
14 *subject to a grazing lease* within the previous ten years.” WAC 197-11-800(24)(a)
15 (emphasis added). Black’s Law Dictionary defines lease as “[a] contract by which a
16 rightful possessor of real property conveys the right to use and occupy that property in
17 exchange for consideration, usu. rent.” BLACK’S LAW DICTIONARY 898 (Bryan A. Garner
18 ed., 7th ed. 1999). Thus, even if the exemption is triggered by private grazing, it can only
19 apply to lands which private landowners had leased to a third-party grazer, for
20 consideration. Landowners who had grazed their land *themselves* before selling to the
21 state would not have entered into any lease, and so such lands could not comply with the
22 exemption’s lease requirement. Land acquired from these landowners would be subject to
23 SEPA review upon acquisition if the state wished to continue to graze. Of course, this
24 distinction as to what kind of private party grazed the land prior to acquisition is absurd.
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1 Because WDFW's urged interpretation would require this result, it "should be avoided."
2 *Densley*, 162 Wash.2d at 221.

3 WDFW's interpretation would lead to highly inconsistent treatment of long-held
4 state lands versus newly-acquired state land under SEPA. As the record here reflects,
5 such newly-acquired lands are often more environmentally degraded than their long-held
6 state land counterparts; and yet those past destructive grazing practices have never
7 undergone any public environmental review, as has long been required for grazing on
8 state lands under SEPA. Again, the assessment conducted upon WDFW's acquisition of
9 the private Skookumchuck lands here repeatedly notes how the prior grazing practices
10 injured the land. *See e.g.*, AR 415 (noting "inappropriate livestock grazing practices in
11 the past, particularly grazing during the critical growth period every year."). State-
12 regulated grazing, while far from benign, is at least governed by minimal regulations to
13 protect the environment, such as the Ecosystem Standards for State-Owned Agricultural
14 and Grazing Land, "a set of guidelines intended to maintain and restore fish and wildlife
15 habitat." AR 335 (state grazing permit, stating that grazing must comply with the
16 Ecosystem Standards and other requirements).

17 WDFW's interpretation would permit the state to *never* conduct SEPA analysis on
18 a decision to graze large areas of newly-acquired but degraded land, regardless of the
19 impacts on the environment—despite the fact that the environmental impact of livestock
20 grazing on newly-acquired land will often be *more severe* because of the degraded state
21 of newly-acquired lands. This interpretation violates the fundamental mandate of SEPA –
22 the requirement to conduct a threshold determination to determine if the environmental
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1 effects of a project are significant. *Dioxin*, 131 Wash.2d at 352. It irrationally assumes
2 that all grazing on newly-acquired land will never have a significant effect on the
3 environment, flatly contradicting WDFW's recognition in the context of other state land
4 that grazing may have adverse effects. Indeed, on this very Wildlife Area, WDFW is
5 currently in the process of preparing a full EIS for a proposal to graze the entire CRM
6 area, *see* Answ. ¶ 40, a recognition of grazing's significant environmental effects.

8 WDFW's interpretation is also not consistent with SEPA's categorical exemption
9 guidance (quoted above), because it does not limit the application of the exemption to
10 "those types which are not major actions significantly affecting the quality of the
11 environment" or "provide for circumstances where actions which potentially are
12 categorically exempt require environmental review." RCW 43.21C.110(1)(a). The
13 grazing exemption at least makes an attempt to provide for such circumstances for long-
14 held state land: for new leases greater than one section, or larger areas that have not been
15 subjected to lease for ten years or more, SEPA analysis is required. But under WDFW's
16 interpretation, no such distinctions are made for newly-acquired lands, for which WDFW
17 asserts it can authorize grazing no matter how significant the adverse impacts may be.

21 In short, WDFW has erred as a matter of law in broadly interpreting the grazing
22 categorical exemption as allowing it to avoid any SEPA analysis of grazing on recently-
23 acquired private lands, which have never undergone environmental review and
24 irrespective of how harmful the grazing may be for sensitive species or habitats. Because
25 the grazing exemption does not reach as broadly as WDFW claims, its reliance on that
26 faulty reading in issuing the Skookumchuck permit requires reversal by this Court.

1 **B. Even If A Private Lease Triggered The Exemption, There Is No Lease**
2 **Or Permit In The Record.**

3 An ironic part about WDFW’s urged interpretation of the grazing exemption is
4 that it has not placed any evidence into the administrative record that the WDFW portion
5 of the Skookumchuck lands were subject to a “lease” of any kind. One searches the
6 record in vain to find any sort of pre-acquisition lease or permit on the WDFW
7 Skookumchuck lands.³ An agency email in the record admits that it has none. AR 223
8 (Email from Theodore Clausing dated 4/10/08, stating “The Skookumchuck acquisitions
9 were previously private lands and were grazed through private agreements. We don’t
10 have access to any of these ‘agreements’ and have been told that they were informal
11 ‘hand shake’ deals.”).

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14 In the absence of any evidence of a lease beyond a rumor of a “hand shake” deal,
15 the Skookumchuck lands cannot meet the plain language of the second clause of the
16 grazing exemption—i.e., “land that has been *subject to a grazing lease* within the
17 previous ten years.” WAC 197-11-800(24)(a) (emphasis added). A contrary interpretation
18 would read the phrase “subject to a grazing lease” out of the grazing exemption. If the
19 regulations had been intended to do so, the exemption would apply to “land that has been
20 *grazed* within the previous ten years.” But it does not. This is another reason that the
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24 ³ WDFW did place four Department of Natural Resources (“DNR”) permits into the record. AR
25 1 (2001 DNR permit), AR 10 (2004 DNR permit), AR 25 (2006 DNR permit), AR 376 (2006
26 DNR permit). But these permits only leased the *DNR* land in the Skookumchuck area, a small
portion of the total area. They did not lease any of the now-WDFW land. See AR 499 (ownership
map of Skookumchuck permit area, showing that DNR land within the five Skookumchuck
pastures (in green) only consists of less than four sections of land, compared to the much larger
amount of WDFW land).

1 exemption cannot properly apply to the Skookumchuck permit. For all of these reasons,
2 the Skookumchuck permit is “clearly erroneous.”

3 **II. WDFW VIOLATED ITS OWN RULES AND DISREGARDED ITS OWN**
4 **SCIENTISTS.**

5 WDFW’s rules permit it to issue temporary permits, free of charge, where
6 “benefits to wildlife management programs and the public interest can be demonstrated.”
7 WAC 232-12-81(4). But here, virtually all information before the agency suggested that
8 neither wildlife nor the public interest would benefit from the Skookumchuck permit.
9

10 As detailed above, three separate WDFW biologists told WDFW that the
11 analogous Whiskey Dick permit would harm wildlife resources or was otherwise
12 inadequate. AR 971, 973, 981, 984, Exh. 1 to Ruether Decl. There are far fewer specialist
13 reports concerning the Skookumchuck permit in the record, suggesting WDFW may even
14 not have submitted it for review to many of its biologists. The only biologist to comment
15 on it noted that the process was rushed, and stated that it, too, was inadequate to protect
16 wildlife. AR 975.
17

18 The record is replete with other documents suggesting the grazing would not
19 provide benefits to wildlife. WDFW’s own Sage-Grouse Recovery Plan identifies grazing
20 as a threat to sage grouse, notes the need to restore degraded lands, and repeatedly
21 emphasizes the need to connect the two small populations remaining by restoring the land
22 in between, which includes the Wildlife Area. *E.g.* AR 792. Additionally, public
23 comments were overwhelmingly against introducing grazing into the wildlife area, AR
24 154–165 (chart summarizing SEPA comments); the grazing is contrary to the goal of the
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1 management plan to “preserve habitat and species diversity for both fish and wildlife
2 resources” and “protect and restore native plant communities,” AR 67, and WDFW’s
3 mission to “protect[], restor[e] and enhance[e] fish and wildlife and their habitats,” AR
4 66; and the grazing is contrary to WDFW’s stated purpose when seeking public funding
5 to acquire the land, to “preserve[] [it] as critical habitat.” Answ. ¶ 12.

7 Under this record, WDFW cannot establish that the permit resulted in “benefits to
8 wildlife management programs and the public interest.” WAC 232-12-81(4). Further,
9 WDFW’s decision to act contrary to the opinions of its own biologists, many concerned
10 publics, and the language of its Sage-Grouse Recovery Plan and management plan,
11 renders the action arbitrary. As the Western District of Washington has held, “[a]n EIS
12 that fails to disclose and respond to ‘the opinions held by well respected scientists
13 concerning the hazards of the proposed action ... is fatally deficient.’” *Seattle Audubon*
14 *Society v. Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wa. 1992), *aff’d sub nom Seattle*
15 *Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993) (quoting *Friends of the Earth v.*
16 *Hall*, 693 F.Supp. 904, 934 (W.D.Wash.1988)). And “[t]he Court will reject conclusory
17 assertions of agency ‘expertise’ where the agency spurns unrebutted expert opinions
18 without itself offering a credible alternative explanation.” *Northern Spotted Owl v. Hodel*,
19 716 F. Supp. 479, 483 (W.D. Wash. 1988). Thus, the Skookumchuck permit was
20 “[o]utside . . . the authority conferred by a provision of law” and otherwise “[a]rbitrary or
21 capricious.” RCW 34.05.570(4)(c).

1 **CONCLUSION**

2 Because the SEPA categorical exemption for grazing, WAC 197-11-800(24)(a),
3 cannot have applied to the Skookumchuck permit, and because WDFW failed to conduct
4 a threshold determination or EIS as required under SEPA, WDFW violated SEPA.
5 WDFW also violated its own rules and acted arbitrarily in disregarding its own scientists
6 and guidance. Accordingly, the Court should grant this motion for partial summary
7 judgment, and declare that Defendants violated SEPA and its rules in issuing the
8 Skookumchuck permit.
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11 Respectfully submitted this September 15, 2008,
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