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August 15, 2008

ORDER

WESTERN WATERSHEDS PROJECT,	)	WY-090-2007-15
	)	
Appellant	)	Appeal of Field Manager's Final Grazing Decision of May 14, 2007, issued to JRB Grazing Association, LLC, involving the Albert Creek, Granger Lease, Bigelow Bench, H.F., Spring Creek, Little Creek, Kemmerer Junction, Radio Tower, La Chapelle, Van Tassel, Hinshaw, and Tom's Draw Allotments, Kemmerer Field Office, Wyoming
v.	)	
BUREAU OF LAND MANAGEMENT,	)	
Respondent	)	
--	)	
J.R. BROADBENT GRAZING ASSOC., LLC,	)	
Intervenor	)	

. . . .

WESTERN WATERSHEDS PROJECT,	)	WY-090-2007-16
	)	
Appellant	)	Appeal of Field Manager's Final Grazing Decision of June 4, 2007, involving the Carter Lease Allotment, Kemmerer Field Office, Wyoming
v.	)	
BUREAU OF LAND MANAGEMENT,	)	
	)	
Respondent	)	
--	)	
WESTERN WYOMING OPERATING, INC.; J.R. BROADBENT GRAZING ASSOCIATION, LLC; THE MARION AIMONE ESTATE; ST. JEOR RANCH, INC.; GINO FOIANINI; LARSON LIVESTOCK, INC.; DJR LAND AND LIVESTOCK; and THE WILLIAM H. TRIPP LIVING TRUST,	)	
	)	
Intervenors	)	

WESTERN WATERSHEDS PROJECT,	)	WY-090-2007-18
	)	
Appellant	)	Appeal of Field Manager's Final
	)	Grazing Decision of June 19, 2007,
v.	)	issued to Larson Livestock, Inc.
	)	involving the Granger Lease
BUREAU OF LAND MANAGEMENT,	)	Allotment, Kemmerer Field Office,
	)	Wyoming
Respondent	)	
--	)	
LARSON LIVESTOCK, INC.,	)	
	)	
Intervenor	)	

Respondent's Motion to Dismiss Denied Regarding Docket Nos. WY-090-2007-15 and WY-090-2007-18; Appellant's Motion for Summary Judgment Granted

I. Introduction

On June 18, 2007, Western Watersheds Project (Appellant) filed a single appeal document appealing four final grazing decisions issued to four permittees by the Kemmerer (Wyoming) Field Office (KFO), Bureau of Land Management (BLM or Respondent).[1] The applicable docket numbers are WY-090-2007-15, WY-090-2007-18, WY-090-2007-19, and WY-090-2007-20 (collectively referred to as the WY-090-2007-15 appeals).

The final decisions authorize grazing use on 12 allotments (Granger Lease Allotments).[2] In most cases, grazing use is authorized for a 10-year period running

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[1] By Order dated August 2, 2007, I concluded that a fifth grazing decision dated March 13, 2007, was a proposed decision and not ripe for review at that time.

[2] The 12 "Granger Lease Allotments" are: Albert Creek, Granger Lease, Bigelow Bench, H.F. Allotment, Spring Creek, Little Creek, Kemmerer Junction, Radio Tower, La Chapelle, Van Tassel, Hinshaw, and Tom's Draw Allotments. The Granger Lease Allotment is, by far, the largest of the 12 allotments. *See* Appendix A attached hereto. Accordingly, for the sake of convenience, these allotments are collectively referred to herein as the Granger Lease Allotments.

from March 1, 2007, through February 28, 2017. The actions authorized by the final decisions were the subject of a single environmental assessment, EA No. WY 090-EA07-40 (Granger Lease EA), and four BLM proposed decisions, each with a Finding of No Significant Impact (FONSI). *See* Appendix B attached hereto. After Appellant filed protests of each of the proposed decisions, BLM issued the final decisions.

On July 18, 2007, Appellant also filed an appeal of a June 4, 2007, final decision authorizing the issuance of 16 grazing permits for 10 permittees on the Carter Lease Allotment for the 10-year period running from March 1, 2007, through February 28, 2017 (hereinafter the WY-090-2007-16 appeal). The actions authorized in the June 4, 2007, final decision were the subject of a separate environmental assessment, EA No. WY 090-EA07-80 (Carter Lease EA), and a proposed decision with a FONSI. *See* Appendix B attached hereto. After Appellant filed a protest of the proposed decision, BLM issued the final decision.

All five of the appeals were consolidated and various entities intervened as indicated by the captions above. Motions for summary judgment were filed by Respondent and Appellant and a motion for partial summary judgment was filed by Intervenors. These motions have been fully briefed, but a ruling on these motions has been held in abeyance pending a ruling on Respondent's subsequently filed motion to dismiss all of Appellant's appeals for lack of standing.

This office issued an Order dated July 21, 2008, denying the motion to dismiss regarding Docket No. WY-090-2007-16, granting it regarding Docket Nos. WY-090-2007-19 and WY-090-2007-20, and affording Appellant an opportunity to clarify whether one of its members, Jonathan Ratner, used the allotments affected by the final decisions challenged in Docket Nos. WY-090-2007-15 and WY-090-2007-18 prior to issuance of those final decisions. As noted in the Order, use prior to such issuance is critical to establish standing. That Order also discusses in detail the law regarding standing, which will not be repeated herein.

On August 1, 2008, Appellant filed the Third Declaration of Jonathan Ratner (Third Declaration) clarifying that his use occurred prior to issuance of the final decisions. Therefore, the motion to dismiss may now be completely resolved and the motions for summary judgment addressed.

II. Respondent's Motion to Dismiss Denied Regarding Docket Nos. WY-090-2007-15 and WY-090-2007-18

The Third Declaration, in conjunction with Mr. Ratner's previous declarations, clearly shows that Mr. Ratner used the Granger Lease Allotment before issuance of the final decision affecting that allotment only (Docket No. WY-090-2007-18). The declarations also show that Mr. Ratner's interests in that allotment may be adversely affected by the decision on appeal. Consequently, Appellant has standing regarding Docket No. WY-090-2007-18.

Likewise, Mr. Ratner's declarations show that Appellant has standing regarding Docket No. WY-090-2007-15, which involves multiple allotments. His declarations show that he used nearly all of those allotments prior to issuance of the final decision. As noted at page 10 of the July 21, 2008, Order, "[Appellant] need only show use of one of the allotments because each of those allotments is an integral part of a grazing scheme for the herd of one permittee, JRB." His declarations also show that his interests in those allotments may be adversely affected by the decision on appeal.

Based upon the foregoing, **Respondent's motion to dismiss must be, and is hereby, denied regarding Docket Nos. WY-090-2007-15 and WY-090-2007-18.**

III. Motion for Summary Judgment Granted

A. Factual Background

The allotments which are the subject of the remaining appeals (Allotments) are located in the high desert, sage-steppe terrain of southwestern Wyoming. Topography on the Allotments consists of flat to relatively hilly terrain ranging in elevation from 6300 to 6980 feet. As described in the Granger Lease EA and Carter Lease EA (collectively referred to as the "subject EAs"), the topography, wildlife, and foliage on the Allotments are similar.

In total, the Allotments encompass over 800,000 acres of state, private, and federal land which fall across the landscape in alternating sections of ownership forming a checkerboard-like pattern. Approximately 45 percent of the land is federally owned. The Carter Lease and Granger Lease Allotments are the largest allotments by far, containing over 700,000 acres.

The Carter Lease Allotment and Granger Lease Allotment are contiguous. *See* Appendix A attached hereto. The Moxa Arch Project Area (MAPA) is an oil and gas development planning region that overlaps roughly 25 percent of the Carter Lease Allotment and 40 percent of the Granger Lease Allotment. *See* Appendix A attached hereto. Stated another way, 12 percent of the MAPA is covered by the Carter Lease Allotment and 49.5 percent by the Granger Lease Allotment. October 2007 Moxa Arch Area Infill Gas Development Project Draft Environmental Impact Statement (MAPA 2007 DEIS) at 3-91, 3-93.[3]

The entire Carter Lease Allotment is generally considered year-round habitat for sage-grouse. Carter Lease EA at 13. Likewise, sage-grouse can be found throughout the entire Granger Lease Allotment at all times of the year. Granger Lease EA at 14.

Important areas for sage-grouse are the strutting grounds (leks), brood-rearing areas, and wintering areas. Carter Lease EA at 13. Preferred nesting and brood-rearing habitat is usually within a two-mile radius of the leks. *See id.*; February 20, 2008, Declaration of Christopher Crews (a BLM Wildlife Biologist) (Crews Declaration) at ¶ 13.

Under the three final decisions remaining at issue, cattle and sheep are authorized to utilize the Allotments at different times and in different pastures

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[3] Appellant cites to historical information in the MAPA 2007 DEIS in its motion for summary judgment and its reply to Intervenors' and BLM's responses to that motion. In each case, Appellant provides an internet address to BLM's website where the MAPA 2007 DEIS is available to the public. Intervenors quote from the MAPA 2007 DEIS in their response to Appellant's motion for summary judgment and also provide the internet address to BLM's website where the document is located. Under these circumstances, this office may rely on the MAPA 2007 DEIS for information either because the parties have made it part of the administrative record by reference or because it is a public record of the Department of which this office may take official notice. *See* 43 C.F.R. § 4.24(b).

throughout the year, with a significant portion of the authorized livestock use in animal unit months (AUMs) allocated to sheep grazing during the winter months. In total, the three final decisions authorize the consumption of approximately 31,245 AUMs annually (13,294 AUMs on the Carter Lease Allotment and 17,951 AUMs on the Granger Lease Allotments).

The final decisions authorize issuance of grazing permits with the same grazing levels and seasons of use as those previously permitted. One main difference is the addition of a new permit term requiring that sheep camps be located at least one mile from known, active sage-grouse leks between March 15 and July 15 (the one-mile buffer).

This one-mile buffer was identified as desirable in the Rangeland Standards-Conformance Review Summary dated September 20, 2005 (Summary), for the Granger Lease Allotment (attached to Appellant's appeal). Therein, BLM found that Standard 4 of the applicable standards of rangeland health was not being met because sheep grazing was adversely affecting sage-grouse. *See* Summary at 3; Granger Lease EA at 13; May 14, 2007, final decision at 6. The requirements of Standard 4 include maintaining or enhancing habitats that support sensitive species such as the sage-grouse.

BLM expressed the need for the new one-mile buffer as follows:

> The Greater-sage grouse population declines are becoming an ever increasing concern. Many factors can contribute to their range-wide decline including: habitat loss and fragmentation due to human development, invasive weeds, increase in predator populations, and disease. A lot of effort is going into finding out ways to manage sage grouse to prevent the need to list them under the ESA [(Endangered Species Act)].
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> . . . .
>
> On the negative side, sheep are present in large numbers in the early spring when sage grouse lekking and nesting season begins. Sheep camps have been documented in close proximity to lekking sites. These same camps have been used for years. The large herds of sheep

> surrounding the camps appear to reduce nearby lek activity and success. Sheep camps on public lands should not be located within 1 mile[] of a lek between March 15 and July 15. This avoidance area will not only reduce the impacts of concentrated numbers of sheep reducing lek success, it will also reduce the potential for sage grouse nests to be disturbed or destroyed.

Summary at 3 (unpaginated). In the subject EAs, BLM observed that the new one-mile buffer was needed for all the Allotments for similar reasons. *See* Carter Lease EA at 15; Granger Lease EA at 16.

BLM's efforts to prevent listing of the sage-grouse are responsive to a petition to list the species prompted by widespread declines in sage-grouse populations throughout the West. *See* MAPA 2007 DEIS at 3-57.

> The Wyoming Greater Sage-Grouse Conservation Plan concluded that using the concepts of rangeland health as a management philosophy and maintaining a mosaic of vegetation seral stages would be most beneficial to sustaining sage-grouse populations . . . . Techniques include . . . aggressively fighting noxious weed spread[] and managing grazing plans to assure compatibility of livestock and sage-grouse. . . .
>
> The sage-grouse depends almost exclusively on healthy sagebrush habitat for year-round survival. . . . Greater sage-grouse are sensitive to disturbance during the breeding nesting and early brood rearing timeframes; therefore, the BLM has developed seasonal stipulations for activities within these habitats.
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> . . . .
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> . . . [T]he BLM and [Wyoming Game and Fish Department (WGFD)] have compiled sage-grouse lek information in Wyoming for many years. Sage-grouse populations levels; lek activity, numbers and sizes; and level of survey effort have varied annually. In 2004, a team of experts assessed the status of sage-grouse and its habitat . . . . The resulting data summary suggests an overall declining sage-grouse population in Wyoming. Sage-grouse numbers throughout Wyoming

> fell to a record low in the mid 1990s, recovered by 2000, and then fell again as drought affected habitat in the early 2000s. A WGFD 2004 sage-grouse statewide trend analysis detected stabilization in breeding populations in 2003, with a slight increase in 2004 after the 2000-02 drought affected populations . . . .

Id.

B. Discussion

1. Summary of Issues, Applicable Law, and Ruling

For purposes of pursuing summary judgment, Appellant voluntarily withdrew most of the arguments it raised in its appeals. Appellant's motion for summary judgment is based entirely on the arguments that BLM violated the "hard look" requirement of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C), by (1) preparing two separate environmental assessments (EAs) rather than a single environmental impact statement (EIS) and (2) failing to adequately consider the direct, indirect, and cumulative impacts of certain activities upon sage-grouse and other sensitive species present in the area affected by the final decisions. Those activities are the grazing use authorized by the final decisions and existing, approved, and proposed oil and gas development. *See* Appellant's motion for summary judgment at 3.

> A BLM decision to proceed with a proposed action, absent preparation of an EIS, will be upheld under section 102(2)(C) of NEPA, where the record demonstrates that BLM has considered all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. An appellant seeking to overcome such a decision must carry its burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material

> significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA.

> [*Santa Fe Northwest Information Council* (*SNIC*),] 174 IBLA [93,] 104 [(2008)] (citations omitted). Thus, if it is shown that an EA failed to take a hard look at the environmental impacts of a proposed action or that a FONSI and its supporting EA failed to make a convincing case that an EIS was not required, BLM's decision will be set aside.
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> [The Council on Environmental Quality's] regulations allow BLM to decide, as it did in this case, whether to prepare an EIS by preparing an EA. 40 C.F.R. § 1501.4. Whether BLM ultimately decides to issue an EIS or EA/FONSI, BLM must take a hard look at the environmental impacts of its proposed action, including direct and indirect effects and cumulative impacts. 40 C.F.R. §§ 1502.16, 1508.9(b), 1508.25; *see SNIC*, 174 IBLA at 107 (a "rule of reason" is applied in determining whether potential environmental impacts were adequately considered). Direct effects are those "which are caused by the action and occur at the same time and place," 40 C.F.R. § 1508.8(a); indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b). A cumulative impact "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7.

Orion Energy, 175 IBLA 81, 89-90 (2008). "Cumulative impacts can result from individually minor but collectively significant actions taking place over time." 40 C.F.R. § 1508.7.

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

> 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 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). "[W]hen the only things to be determined are the legal consequences of uncontested facts," summary judgment is appropriate. *Mable Melovedoff*, 29 IBLA 250, 253 (1977).

Thus, to prevail on its motion for summary judgment, Appellant must meet the burden of demonstrating that there is no genuine dispute regarding facts which justify a legal conclusion that BLM's NEPA analyses failed to consider a substantial environmental question of material significance. As discussed further below, Appellant has met its burden by proving that there is no genuine dispute regarding the following material circumstances: (1) grazing in the Allotments causes adverse impacts on sage-grouse and its habitat, (2) existing, approved, and proposed oil and gas development in the MAPA either have, or are likely to have, significant negative impacts on sage-grouse and its habitat,[4] and (3) both of the subject EAs' analyses of

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[4] Use of the term "significant" in this context does not mean that the impacts are significant for purposes of determining the issue of whether an EIS is required for the actions authorized in the final decisions. That issue is not addressed herein.

the cumulative impacts on sage-grouse and its habitat caused by grazing and other activities completely failed to consider the impacts caused by existing, approved, and proposed oil and gas development in the MAPA, including those substantial portions within the Allotments.

These uncontested facts justify granting Appellant's summary judgment motion on the limited ground that BLM failed to consider a substantial environmental question of material significance, namely the cumulative impacts to sage-grouse and its habitat caused by grazing and existing, approved, and proposed oil and gas development. However, this Order does not pass judgment on whether BLM should have prepared a single EIS rather than two EAs or whether BLM adequately considered other impacts in the subject EAs.

2. Cumulative Impacts Analysis Under NEPA

Courts have consistently recognized that one of the fundamental purposes of NEPA cumulative impacts analysis is to assure that apparently minor and insignificant impacts do not collectively reach a level of significance, but evade consideration in the NEPA process. In *Georgia River Network v. U.S. Army Corps of Engineers*, 334 F. Supp.2d 1329, 1339 (N.D. Ga. 2003), the court explained: "Even a slight increase in adverse conditions that form the existing environmental context may threaten significant harm." Similarly, in *Hanly v. Kleindienst*, 471 F.2d 823, 821 (2nd Cir. 1972), the court noted: "One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel." Thus, if livestock grazing under the final decisions is likely to have adverse impacts on sage-grouse, no matter how slight, BLM should consider those impacts along with the impacts on sage-grouse of past, present, and reasonably forseeable future actions to determine if they rise to the level of significance.

As more fully discussed below under this subpart III.B.2, BLM itself has recognized that the grazing authorized through the final decisions is likely to have adverse impacts, albeit minimal, on sage-grouse. At multiple points in the subject EAs, declarations of BLM's employees, and other BLM documents, BLM acknowledges the existence of impacts on sage-grouse from grazing on the Allotments.

Each acknowledgment of impacts is qualified by one or more caveats, i.e., either that the impacts will not be significant, will not be adverse, or will not be new. As discussed immediately above, the fact that the adverse impacts may be insignificant when considered in isolation does not mean that there are no significant cumulative impacts which BLM should have considered.

As for BLM comments characterizing the impacts as not adverse, there are only two such comments. As more fully discussed below in this subpart III.B.2, those comments do not create a genuine issue of material fact, given many contradictory BLM statements making clear that there are and will be some adverse impacts to sage-grouse.

To the extent that the adverse impacts may not be new, that circumstance does not obviate the need and obligation for BLM to consider those impacts in the context of BLM's cumulative impacts analyses. This principle is more fully discussed in subpart III.C. below.

a. Adverse Impacts of Grazing on Sage-grouse

Although BLM repeatedly notes that impacts on sage-grouse from grazing are minimal or insignificant, the undisputed facts show that adverse impacts are occurring. For instance, both subject EAs acknowledge the adverse impacts on sage-grouse from sheep grazing and conclude that those impacts will be reduced to "minimal" rather than eliminated:

> Minimal impacts and no new impacts are anticipated from the proposed action. . . .
>
> Sheep are present in large numbers in the early spring when sage grouse lekking and nesting season begins. Sheep camps have been documented in close proximity to lekking sites. It has been documented that sheep camps close to leks tend to keep sage grouse from using the leks and eventually abandoning the leks all together. Abandoned nests and increased chick mortality also result from this disturbance. This disturbance would be *reduced* if the sheep camps are not located within 1 mile of a lek between March 15 and July 15. This avoidance area would not only *reduce* the impacts of concentrated

> numbers of sheep *reducing* lek success, it would also *reduce* the potential for sage grouse nests to be disturbed or destroyed.

Carter Lease EA at 15; Granger Lease EA at 16. In the sections of the subject EAs discussing mitigation measures, BLM similarly discusses how the one-mile buffer will reduce, rather than eliminate, the negative impacts on lek success and the potential for nests to be disturbed or destroyed, all of which stem from concentrated numbers of sheep. *Id.* at 17; Carter Lease EA at 16.

The fact that BLM also acknowledges benefits to sage-grouse if there were no livestock grazing is another indicator that grazing has adverse impacts. In each subject EA's discussion of the impacts on sage-grouse of the "no livestock grazing" alternative, BLM states: "Strutting leks and preferred nesting habitat would be protected under this alternative. This could result in increased vigor and reproductive success of these species." Carter Lease EA at 18; Granger Lease EA at 18-19.

The undisputed facts also show that concentrated sheep use, including sheep camps, contributes to the spread of weeds and other invasive non-native species (INNS) and that INNS are a contributing factor to the sage-grouse's decline. Summary at 3. With regard to INNS, the Carter Lease EA states that "most weed areas are located on disturbed areas within the allotment and around the sheep camps[.] [S]uspect cause for weeds around the sheep camps is use of feed that is not weed free. Cheatgrass is found most commonly around sheep camps . . . ." Carter Lease EA at 10

Consistent with this EA, Mr. Crews implies that disturbance caused by repeated concentrated sheep use can be problematic. He states: "By moving sheep camps away from leks, we can protect lekking areas. If the camps are located on different sites in subsequent years, the disturbance should be minimal." Crews Declaration at ¶ 20.

The last sentence is reasonably interpreted as meaning that if an area receives repeated concentrated sheep use, the disturbance can be significant. The record contains several other BLM statements recognizing that the spread of INNS is associated with such disturbances, including the following observations of Mr. Crew:

> While it is true that there is some cheatgrass on the Carter and Granger Leases, it typically occurs on sheep winter feeding areas that are almost always located on private lands. The only other instances of cheatgrass persistence which I've noted are in the disturbed areas in the Moxa Arch gas field. In those areas the cheatgrass, and halogeton, is the direct result of energy developments in the area, not from livestock grazing.
>
> . . . .
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> . . . While there are some weed issues that are directly related to oil and gas development, the dominance of weeds disappears as one moves away from the Moxa Arch gas field. With very few exceptions, this trend indicates oil and gas developments are the primary source of any weed infestations in these allotments rather than livestock grazing.

Crews Declaration at ¶¶ 34, 37.

In the February 20, 2008, Declaration of Edward Feeley (Feeley Declaration), the causal connection between sheep grazing and occurrences of INNS is likewise implied, but Mr. Feeley recognizes that these occurrences are not nearly always on private lands. Mr. Feeley is employed by BLM as a Rangeland Management Specialist. Feeley Declaration at ¶ 1.

With regard to INNS, Mr. Feeley states:

> The KFO considers control of invasive species a high priority issue . . . .
>
> . . . .
>
> Approximately 52 to 57% of the intensely disturbed sites and sheep camp areas within the allotments are located on private and state lands.
>
> . . . There are scattered patches of cheatgrass within the KFO. Some cheatgrass has been found around sheep camps that have been

> used for years on the same site, but rarely around existing [water] pits on the allotments. Some of the intensively disturbed sites and sheep camp areas within the KFO (and specifically within the Carter and Granger Lease allotments) are located on private and state lands.

Feeley Declaration at ¶ 34-35.[5]

As previously mentioned, the presence of INNS is important because BLM has identified them as a factor contributing to range-wide decline of the sage-grouse population. *See, e.g.*, Summary at 3 (unpaginated). However, in the post-hearing briefing and declarations submitted by BLM, Respondent avers that WFGD sage-grouse counts on leks in the Carter and Granger Lease Allotments "have been on the increase in recent years" and that habitat fragmentation (ostensibly due to livestock grazing) has positive effects on sage-grouse. *See, e.g.*, Crews Declaration at ¶¶ 12, 16.

The WFGD sage-grouse counts do not create a genuine issue of material fact as to whether grazing is causing adverse impacts to sage-grouse for several reasons. First, the vague reference to recent increases in the two allotments is not specific as to the timing or amount of the increase. Second, a recent increase of unknown proportions does not address whether the population is still below historic or appropriate levels. For instance, as previously mentioned, despite a slight, statewide population increase in 2004, experts concluded that the sage-grouse population was experiencing an overall decline statewide. Third, even if sage-grouse populations are increasing in the Allotments, that circumstance does not demonstrate that adverse impacts to sage-grouse are not occurring nor that BLM's "ever increasing concerns" about sage-grouse are not material. Fourth, and most importantly, if the counts were interpreted as meaning that adverse impacts were not occurring, this interpretation would be contrary to the aforementioned BLM statements acknowledging that adverse impacts have occurred and are likely to continue at some level. BLM will not be allowed to create a genuine issue of material fact simply by presenting internally contradictory statements without a reasonable explanation for the contradictions. *See, e.g.*, *DiMauro v. Pavia*, 492 F.Supp. 1051 (D.C. Conn. 1979), *aff'd*, 614 F.2d 1286,

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[5] Mr. Feeley also states: "Excessive grazing has not been documented on this allotment except in very small isolated areas, especially around herder camps." Feeley Declaration at ¶ 42.

cert. denied, 446 U.S. 939; *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984).

This principle applies equally to the two isolated comments that no adverse impacts to sage-grouse have occurred or are anticipated. Mr. Crews made one of the comments in the following context: "The KFO did not include all of the information in its files regarding the population trends and viability of the sage-grouse on these allotments in [the subject EAs] because *there were no identifiable adverse impacts to the sage-grouse caused or anticipated by livestock use.*" Crews Declaration at ¶ 14. This comment contradicts BLM's prior statements without a reasonable explanation for the contradiction, and therefore the statement does not create a genuine issue of material fact.[6]

The other "no adverse impacts" comment appears in the following context:

> By implementing a 1 mile distance for sheep camps from sage grouse leks, the impacts to sage grouse by winter sheep use will be lowered by fewer disturbances of the birds by the sheep on the allotment and will provide enough area to keep birds on the active leks. It has been documented that sheep camps close to leks tend to keep sage grouse from using the leks and eventually abandoning the leks all together. *There should be no adverse impacts once the new camp sites are established.*

Carter Lease EA at 15 (emphasis added).

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[6] While not essential to the determination that it is undisputed that livestock grazing on the Allotments causes adverse impacts to sage-grouse, there is additional evidence of the adverse impacts of livestock grazing on sage-grouse in the Draft Resource Management Plan and Environmental Impact Statement for the Kemmerer Field Office Planning Area issued in July 2007 (2007 DRMP/EIS). *See, e.g.*, 2007 DRMP/EIS at 3-85 to 3-88, 4-128. This document is published on BLM's website and is therefore a public record of the Department of which this office may take official notice. *See* 43 C.F.R. § 4.24(b).

Curiously, this comment is found only in the Carter Lease EA and not the Granger Lease EA. Further, this comment does not appear to address the acknowledged potential for disturbing or destroying nests which usually are located within two miles of leks nor the impacts of spreading INNS caused by concentrated sheep use.

In addition, it acknowledges continued disturbances, just not at a level sufficient to drive the birds from the leks. The obvious question is whether those disturbances, when combined with disturbances from oil and gas activity, may become significant. In any event, to the extent the comment contradicts the aforementioned BLM statements recognizing adverse impacts, it does not create a genuine issue of material fact because there is no reasonable explanation for the contradiction.

The foregoing leads to the conclusion that the subject EAs, declarations of BLM's employees, and other BLM documents establish undisputedly that there are adverse impacts on sage-grouse from livestock grazing on the Allotments which may be reduced but not eliminated by the grazing scheme authorized in the final decisions. The remaining questions are what are the impacts of oil and gas development in the MAPA on sage-grouse and whether the cumulative effects of those impacts were adequately addressed in the subject EAs in conjunction with the adverse impacts of grazing in the Allotments on sage-grouse.

b. Adverse Impacts of Oil and Gas Development on Sage-grouse

The MAPA encompasses 475,808 acres of federal, state, and private lands, the majority of which fall within the boundaries of the Allotments. *See* Appendix A attached hereto. Existing management planning for the MAPA was conducted through a 1996 Environmental Impact Statement and 1997 Record of Decision (collectively referred to as the MAPA 1996-97 EIS ROD). MAPA 2007 DEIS at ii.

The MAPA 1996-97 EIS ROD analyzed and approved drilling 1,325 wells in the MAPA in addition to the 1,119 approved or completed wells existing at that time. MAPA 2007 DEIS at ii. As of June 2007, there were approximately 1,400 existing producing wells and approximately 670 wells approved in the MAPA 1996-97 EIS ROD but not yet drilled. MAPA 2007 DEIS at ii, 1-1, 1-5.

Sometime prior to October of 2005, oil and gas operators proposed drilling an additional 1,861 oil and gas wells in the MAPA. BLM formally initiated the scoping process for this proposal by publishing a Notice of Intent to Prepare an Environmental Impact Statement in the Federal Register on October 7, 2005. MAPA 2007 DEIS 1-14. Two years later, in October of 2007, BLM issued the MAPA 2007 DEIS evaluating the environmental impacts of the proposed action.

In the MAPA 2007 DEIS, BLM identifies multiple impacts to sage grouse which it expects to occur under any of the management alternatives analyzed in that document, including the no-action alternative which simply continues management under the MAPA 1996-97 EIS ROD (i.e., approximately 670 already approved wells to be drilled over the next roughly 6 years). MAPA 2007 DEIS at 2-24 Table 2-6, 4-54 Table 4-12, 4-55, 5-13. For instance, BLM acknowledges:

> It is likely that significant impacts to [sage grouse] leks and breeding and nesting habitat have already occurred in portions of the [MAPA]. Holloran (2005) indicated that 4.7 well pads or more within 2-miles of leks result in decreased use of leks and decreased overall nesting success.

MAPA 2007 DEIS at 4-54.

In the section of MAPA 2007 DEIS analyzing cumulative impacts from the actions considered in that document, BLM states: "Therefore, sage-grouse displacement and nest abandonment from habitat fragmentation, dust, noise, human activities, and long-term loss of sagebrush habitat would be cumulatively significant, leading to lower productivity and potentially a long-term decline in the population of this species." MAPA 2007 DEIS at 5-13. Accordingly, it is uncontested that existing, approved, and proposed oil and gas development in the MAPA likely has caused and will continue to cause significant negative impacts to sage grouse and sage grouse habitat.

3. Cumulative Impacts Analysis in the Subject EAs

The cumulative impacts analyses in the subject EAs are brief and virtually identical. The entire analysis in the Granger Lease EA reads as follows:

> Cumulative impacts are the effects on the environment which result from the incremental impacts of actions in this EA when added to other past, present, and reasonably foreseeable actions outside the scope of this EA.
>
> No impacts to rangelands, vegetation, soils, T&E species and/or wildlife were documented in the S&G assessments. No impacts are anticipated under this alternative.
>
> Given the past experiences with livestock impacts on resources on Public Lands, as well as the cumulative impacts that could occur on the larger ecosystem from grazing on various public *and private* lands in the region, management of livestock grazing is an important factor in ensuring the protection of Public Land resources.
>
> Since livestock grazing occurs throughout the area and [on] adjacent private lands, it is reasonable to assume that impacts similar to those identified earlier in this chapter would occur elsewhere in the area. No specific issues (direct, indirect, or cumulative impacts) were raised when scoping letters were sent out to the permittees and interested public[] in connection with actions analyzed in this EA.

Granger Lease EA at 16-17 (emphasis added). The only difference in the wording of the cumulative impacts analysis in the Carter Lease EA is the omission of the emphasized language "and private." Carter Lease EA at 16.

As is evident above, neither EA's cumulative impacts analysis makes any reference to impacts to sage grouse caused by existing and proposed oil and gas development in the MAPA which, as discussed above, falls largely within the boundaries of the Allotments. *See* Appendix A attached hereto. Each EA only makes two brief references to oil and gas development. *See* Granger Lease EA at 13-14; Carter Lease EA at 11. These references occur in the context of very narrow analyses discussing the effects of oil and gas leasing on available AUMs and explaining that no black-footed ferrets have been located in surveys conducted for oil and gas leasing purposes. Except for these references, the subject EAs do not include any discussion of the 1,400 producing oil and gas wells, the 670 approved wells which have not yet been drilled, and the 1,861 wells which have been proposed for development within the 475,808-acre MAPA. Accordingly, the record demonstrates undisputably that BLM did not consider in the subject EAs the cumulative impacts resulting from grazing and existing, and proposed oil and gas development on sage grouse and its habitat.

This amounts to a failure to consider a substantial environmental question of material significance, given BLM's acknowledgment that the impacts to sage grouse caused by oil and gas development likely have been and will continue to be significant (*See* MAPA 2007 DEIS at 5-13) and BLM's recognition of the importance of preventing sage grouse population declines and listing under the ESA, *see, e.g.*, Granger Lease EA at 13; Carter Lease EA at 14 ("The Greater-sage grouse population declines are becoming an ever increasing concern."); Granger Lease EA at 14 ("A lot of effort is going into finding out ways to manage sage grouse to prevent the need to list them under the ESA."). Such a failure constitutes a violation of NEPA's "hard look" requirement.

C. Arguments Raised by Respondent and Intervenors

1. Grazing Activity - Incremental Impacts and the Status Quo

Intervenors and Respondent argue that cumulative impacts analysis under NEPA only requires consideration of incremental impacts above the status quo or existing baseline which, according to Intervenors and Respondent, includes existing grazing activity on the Allotments. In other words, Intervenors and Respondent argue that in the cumulative impacts analysis sections of the subject EAs, BLM only needed to consider new impacts resulting from the final decisions. Intervenors contend: "When compared to the baseline of grazing, there are no incremental impacts of grazing and the BLM's EAs should be upheld." Intervenors' April 30, 2008, brief at 11.

Respondent echos a similar view of cumulative impacts analysis, writing:

> The appropriate starting point or baseline for the consideration of impacts in a NEPA analysis is central to BLM's argument. BLM maintains, and [Appellant] seemingly agrees, that the current condition of the environment[] is the baseline for consideration of what additional

> or incremental impacts are likely to result from the action under consideration. . . . [Appellant] has made no showing that the renewed authorization of the same livestock grazing use of the public lands at issue will result in any impacts to the environment above and beyond the baseline, i.e., the current rangeland conditions.
>
> . . . .
>
> NEPA does require adequate consideration of cumulative impacts, but, if the authorized activity, in this case, the renewal of grazing permits, will not add any new impacts to the existing environment, the cumulative impacts analysis is at an end.

Respondent's May 2, 2008, brief at 3-4 (footnote omitted).

In support of their argument that the appropriate baseline for the cumulative impacts analyses is the status quo, Respondent and Intervenors cite *American Rivers v. Federal Energy Regulatory Commission*, 201 F.3d 1186 (9th Cir. 2000). However, *American Rivers* is inapposite.

The *American Rivers* court explicitly noted that it was not addressing the appropriate baseline for a cumulative impacts analysis. *Id.* at 1197 n.19. Instead, the court held that the status quo provided an appropriate baseline for considering proposed <u>alternatives</u> not cumulative effects. *Id.* at 1192. The court reached the conclusion that the status quo was an appropriate baseline for considering alternatives, because, among other reasons, the status quo provided a practical benchmark for assessing whether alternatives would improve or degrade existing ecological conditions. *Id.* at 1198-99.

Intervenors assert that *Conservation Law Foundation v. Mineta*, 131 F. Supp. 2d 19 (D.D.C. 2001), stands for the proposition that the status quo is the appropriate baseline to utilize for purposes of NEPA analysis. Citing *Conservation Law Foundation*, Intervenors write: "Many courts have defined the 'baseline' as the status quo." Intervenors' April 30, 2008, brief at 6.

The salient facts in *Conservation Law Foundation* are as follows. The court considered, among other issues, the NEPA adequacy of two EAs prepared in conjunction with decisions made by the National Marine Fisheries Service (NMFS).[7] One of the two EAs analyzed a proposed action, which NMFS eventually approved, to allow fishing vessels to spend 120 days at sea (DAS) scallop harvesting during the year 2000.

Prior to that approval, 120 DAS were authorized for 1999 and 51 DAS for 2000 under a management plan designed to improve the health of the scallop resource. The plan allowed for change in the authorized DAS based on new scientific information. A 1999 report that the scallop population was being rebuilt at a far greater pace than expected prompted NMFS to revise the authorized DAS for 2000.

For its NEPA analysis, NMFS used the 120 DAS figure as a baseline. The appellants argued that NMFS should have used 51 DAS as the baseline and that the radical increase to 120 DAS warranted preparation of an EIS, rather than an EA, because of its potential effect on the environment.

The court concluded that NMFS did not act arbitrarily or capriciously in using 120 DAS as the baseline. 131 F.Supp.2d at 26. It reasoned:

> It is simply not the Court's obligation to resolve the methodological question of whether the agency should have used 120 or 51 DAS as the true "status quo" for purposes of the 2000 fishing season. . . . The only issue, rather, is whether [NMFS] acted in an informed and rational manner, considering all the relevant factors, in [increasing] the DAS for the 2000 fishing season. . . . [T]he Court concludes that [it] did.

Id.

Conservation Law Foundation cannot reasonably be read as standing for the proposition that cumulative impacts should only be measured from the status quo. This is so for several reasons. First, the court did not consider the appropriate baseline to be critical to its analysis. Second, the court did not address the issue of

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[7] The subject decisions were actually made by the NMFS in conjunction with several other federal agencies and government entities. However, for the sake of simplicity, only the NMFS is referenced in this Order.

concern in the present case, i.e., whether the action agency should consider the impacts of the ongoing activity which preceded the challenged decision approving continuation of that activity at some level. Third, the court did not even address whether the baseline for purposes of cumulative impacts analysis was at issue. Fourth, in fact, the court did not address the cumulative impacts analysis at all.

In contrast, Appellants have identified cases addressing cumulative impacts analysis under NEPA that are instructive. In *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339 (D.C. Cir. 2002), the court considered the adequacy of the cumulative impacts analysis conducted by the Federal Aviation Administration (FAA) for noise pollution associated with operation of an expanded replacement airport for St. George, Utah (located near Zion National Park). The new airport was being built to replace an existing airport which could no longer meet the needs of the growing St. George community. In considering the cumulative noise impacts of the new airport, the FAA established a noise pollution baseline by determining the level of noise pollution attributable to the existing airport and nearby air traffic.

First, the FAA concluded that 80 arrivals and departures occurred at the existing airport everyday. The FAA then determined that, due to expansion, there would be 85 arrivals and departures at the new airport each day. Finally, the FAA determined that the additional 5 arrivals and departures would result in an increase in noise pollution of 3.5 dBA[8] each day. However, in its cumulative impacts analysis, the FAA did not add the 3.5 dBA to the existing ambient level of noise caused by the already occurring 80 arrivals and departures.

The FAA considered the 3.5 dBA to be the incremental noise impact of the replacement airport and concluded that "there will be little difference associated with the replacement airport, as compared with the existing airport . . . ." *Grand Canyon Trust*, 290 F.3d at 345.

The FAA also considered additional flights over Zion National Park (overflights) that would occur as a result of constructing the replacement airport. The FAA determined that the replacement airport would add eight additional

[8] The symbol "dBA" represents a time weighted measurement of decibels.

overflights per day to the existing roughly 281 daily overflights of the park. The FAA concluded that an additional eight overflights was insignificant.

The court in *Grand Canyon Trust* concluded that the FAA's cumulative impacts analysis violated NEPA because it only took into account the new or additional noise impacts and new or additional overflights associated with the replacement airport. The court wrote:

> The FAA's noise analysis in the EA, including the Supplemental Noise Analysis may, in fact, be a splendid incremental analysis, but it fails to address what is crucial if the EA is to serve its function. . . . NEPA regulations require that an agency consider cumulative impacts and the FAA's EA fails to address the total noise impact that will result from the replacement airport.
>
> . . . .
>
> Without analyzing the total noise impact on the Park as a result of the construction of the replacement airport, the FAA is not in a position to determine whether the additional noise that is projected to come from the expansion of the St. George airport facility at a new location would cause a significant environmental impact . . . .

Id. at 345-46.

The court explained that the point of including cumulative impacts analysis in EAs is to provide adequate information to "alert interested members of the public to any arguably cumulative impacts involving . . . other projects." *Id.* at 342. In the present case, BLM's EAs clearly failed to alert anyone to the potentially cumulative impacts resulting from grazing and oil and gas development on sage grouse and other sensitive species.

Another D.C. Circuit Court case addressing cumulative impacts is *Town of Cave Creek Arizona v. Federal Aviation Administration*, 325 F.3d 320 (D.C. Cir. 2003). In that case, the court upheld the FAA's cumulative impacts analysis, noting that the FAA considered both existing noise pollution attributable to aircraft and new noise pollution which would occur due to additional air traffic. *Id.* at 329.

In *Georgia River Network v. U.S. Army Corps of Engineers*, 334 F. Supp.2d 1329 (N.D. Ga. 2003), the court considered a cumulative impacts analysis on impacts to wetlands developed by the Army Corps of Engineers (the Corps). The court found the impacts analysis to be appropriate because, among other things, the analysis considered all of the impacts of prior projects on wetlands in the planning area as well as impacts of building a proposed reservoir. The court observed: "For its analysis, the Corps first identified all the wetlands lost from current and proposed projects in the Upper Ocmulgee Basin, the Upper Oconee Basin, the Lower Oconee Basin, and the Altahama Basin. The Corps then considered the significance of the Reservoir's impacts when combined with these losses." *Id.* at 1339.

These cases show that a cumulative impacts analysis must consider historic and ongoing impacts from federal actions. Thus, BLM's cumulative impacts analysis should have considered the impacts from current and historical grazing and oil and gas activity.

This conclusion holds notwithstanding Intervenors' and Respondent's additional argument that renewing grazing permits merely continues an ongoing action and does not require cumulative impacts analysis. This argument is unpersuasive under the present circumstances for several reasons.

First, grazing authorized under the Final Decision is not identical to the grazing authorized by the permittees' prior permits. Thus, the Final Decisions create new and different impacts which require cumulative impacts analysis. However, even assuming, *arguendo*, that the Final Decisions do not create different impacts from historical grazing on the Allotments, BLM is still obliged to consider the cumulative effect of those impacts in conjunction with oil and gas development on the MAPA.

This is the case because BLM is re-authorizing grazing on the Allotments for a 10-year period, and grazing on the Allotments causes impacts which BLM acknowledges. While many of those impacts have occurred in the past, they will continue into the future only by virtue of the fact that BLM is re-authorizing grazing on the Allotments.

Intervenors point out that the lands encompassed by the Allotments have been selected for grazing pursuant to the Taylor Grazing Act (TGA), as amended, 43 U.S.C. § 315 (2000). However, the TGA confers no absolute right to graze livestock.

The decision whether or not to renew a grazing permit, and at what level of authorized use, is committed to BLM's discretion. In *National Wildlife Federation v. Bolten Ranch Inc.*, 24 IBLA 391 (1976), the Board explained:

> [T]he Secretary of the Interior is not limited by 43 CFR 4113.1 in determining whether to renew a grazing license. The Secretary or his delegate is not obligated to issue a license or permit to an applicant. The issuance of such permits or licenses is committed to agency discretion. Chournos v. United States, 193 F.2d 321 (10th Cir. 1951); Bedke v. Quinn, 154 F. Supp. 370 (S.D. Idaho 1957).

Id. at 395.

At that time, § 4113.1 provided:

> A grazing license or permit may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation of the terms or conditions of the license or permit or for a violation of the act or of any of the provisions of this part or any approved special rule.

43 C.F.R. § 4113.1 (1976). Today, contemporary federal grazing regulations continue to provide broad authority for BLM to cancel or modify grazing permits. *See* 43 C.F.R. §§ 4110.3, 4110.3-2, 4110.3-3, 4170.1-1, and 4180.1. The Supreme Court has recognized that "the grazing regulations in effect from 1938 to the present day have made clear that the Department retained the power to modify, fail to renew, or cancel a permit or lease for various reasons." *Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000).

Thus, if BLM identified substantial resource conflicts resulting from the cumulative impacts of grazing and oil and gas developments on the Allotments, it would not be obligated to re-authorize grazing use. At minimum, BLM is certainly not obligated to re-authorize grazing use under terms and conditions similar to those of the permittees' prior permits.

Under these circumstances, BLM cannot simply jettison its responsibility to conduct cumulative impacts analysis by claiming that re-authorization of historic grazing practices is a continuation of the status quo or a *fait accompli* beyond the reach of NEPA's cumulative impacts analysis requirements. Courts have consistently rejected similar arguments.

In *Pit River Tribe v. United States Forest Service*, 469 F.3d 768 (9th Cir. 2006), the Government argued that the extension of two geothermal leases was a mere continuation of the status quo that did not require NEPA analyses beyond the EAs conducted for issuance of the original leases. The 9th Circuit Court of Appeals disagreed holding that:

> The agencies urge that the 1998 lease extensions merely preserved the status quo and do not require separate assessments.
>
> . . . .
>
> We conclude that the situation presented here is different from the "continued use" scenario . . . . Without the affirmative re-extension of the 1988 leases, Calpine [the lessee] would have retained no rights at all to the leased property and would not have been able to go forward with the Fourmile Hill Plant. The status quo before the 1998 extensions was that Calpine owned rights to produce geothermal steam valid through May 31, 1998, after which Calpine owned nothing. Instead of preserving the status quo, the lease extensions gave Calpine an extra five years to develop the land . . . .

Id. at 784.

The circumstances here are similar. Intervenors are not authorized to graze public lands without grazing permits. Thus, if BLM chose to take no action and simply let the subject grazing permits expire without re-authorization, legal grazing could not occur on the public lands in the Allotments. Accordingly, re-authorization of the permittees' permits is not maintenance of the status quo but, instead, an affirmative action which authorizes an additional 10 years of grazing.

Respondent attempts to distinguish the facts in *Pit River Tribe* on several grounds. Respondent argues that the court in *Pit River Tribe* was applying different applicable law, but in both *Pit River Tribe* and the present case, the critical law being applied is NEPA.

Respondent argues that the geothermal leases at issue in the *Pit River Tribe* case were undeveloped, but several exploratory geothermal core holes were drilled under the terms of the initial leases. *Id.* at 776. It is true that a geothermal power plant had not been built pursuant to the leases at issue. However, development of a geothermal power plant was beyond the scope of the initial leases, and a separate NEPA analysis, in the form of an EIS and record of decision, was subsequently conducted for construction of the power plant. *Id* at 777.

Finally, Respondent argues that the Forest Service in *Pit River Tribe* had renewed the geothermal leases without any NEPA analysis, whereas BLM did conduct some NEPA analysis regarding renewal of the grazing permits. This is a distinction without a difference because, in both cases, the cumulative impacts analyses were inadequate.

Pit River Tribe clearly stands for the proposition that when the government renews leases and permits it is taking affirmative action and not merely maintaining the status quo for purposes of NEPA analysis.[9] Further, the *Pit River Tribe* case does not stand alone.

In *Louisiana v. Lee*, 758 F.2d 1080 (5th Cir. 1985), the Corps renewed shell dredging permits without conducting an EIS. The Corps concluded that an EIS was unnecessary because, according to the Corps, 50 years of ongoing dredging had created a status quo that included the environmental impacts of dredging. The court disagreed holding:

> Defendants maintain that the only question is whether the continued dredging will affect the status quo as it exists after fifty years of dredging.
>
> . . . .

[9] This is not to say that the BLM is obligated to conduct new NEPA analysis every time it renews a permit or lease. Where pertinent NEPA analysis has already been conducted, BLM may tier to that analysis, updating information from the prior analysis as necessary. Here, BLM failed to tier to any pertinent NEPA analysis.

> The renewal of these permits will not maintain a status quo, but rather will continue a course of environmental disruption that began years ago. . . . [O]n remand, the trial court should compare the projected ecological status of the affected areas if the dredging is continued for another five years with their projected condition if the dredging were halted now.

Lee, 758 F. 2d at 1085-86.

As a practical matter, BLM does not know if the impacts of grazing management on the Allotments are contributing to cumulative impacts in conjunction with existing and reasonably foreseeable oil and gas development because BLM has not undertaken analysis to assess whether cumulative impacts are occurring.[10] For example, in the above-quoted statements from Mr. Feeley's and Mr. Crews' declarations regarding weeds on the Allotments, Mr. Feeley acknowledges that weed infestations occur in conjunction with sheep camps (some of which fall on public lands), and Mr. Crews acknowledges that weed infestations occur in conjunction with oil and gas development projects. Despite these acknowledgments, and the recognized fact that INNS are a factor contributing to range-wide decline of the sage grouse population, nothing in the cumulative impacts analysis sections of the subject EAs indicates that the weed infestation impacts have been considered collectively.

2. Need for and Adequacy of Consideration of Impacts of Existing and Proposed Oil and Gas Development

a. Previous Consideration

Respondent and Intervenors argue that BLM was not obligated to consider the cumulative impacts of grazing and existing oil and gas development in the MAPA because impacts associated with oil and gas leasing have already been considered in prior NEPA documents, including BLM' s 1985 Kemmerer Resource Management Plan Environmental Impact Statement and the 1986 Record of Decision adopting that

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[10] If BLM has conducted cumulative impacts analysis with regard to existing oil and gas development, BLM must, at minimum, tier to that analysis in the EA.

plan (collectively the Kemmerer 1985-86 RMP EIS ROD) and the MAPA 1996-97 EIS ROD. This argument fails for at least two reasons.

First, the subject EAs are not tiered to the environmental analyses in those documents, as none of them are mentioned in the EAs.[11] Second, even if BLM had tiered the subject EAs to the environmental analysis in the Kemmerer 1985-86 RMP EIS ROD, that analysis is outdated and not sufficiently site-specific, as evidenced by a comparison to the MAPA 1996-97 EIS ROD.[12]

b. Forseeability of Proposed Oil and Gas Development

Respondent and Intervenors argue that BLM was not obligated to consider the cumulative impacts of the proposed development of 1,891 oil and gas wells analyzed in the MAPA 2007 DEIS because that development is not reasonably foreseeable. According to them, this is so because the MAPA 2007 DEIS postdates the final decisions, and because BLM has not selected a preferred alternative from the alternatives analyzed in that document.

Contrary to these arguments, the actions analyzed in the MAPA 2007 DEIS are reasonably foreseeable and should have been considered in the cumulative impacts analysis BLM undertook in each subject EA. The new oil and gas development in the MAPA was proposed by oil and gas operators sometime before October of 2005, when BLM formally initiated scoping by publishing a Notice of Intent in the Federal Register on October 7, 2005. MAPA 2007 DEIS at 1-14. Thus, long before publication of the subject EAs in February and May of 2007, BLM was aware of and treated the new oil and gas development proposal as a formally proposed action.

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[11] The "Kemmerer Resource Management Plan" is mentioned in the subject EAs under the heading "Conformance with Land Use Plans," but this reference is not germane.

[12] Additionally, the current adequacy of the NEPA analysis in the MAPA 1996-97 EIS ROD is questionable, as the MAPA 2007 DEIS states that "much of the current [oil and gas] reclamation [in the MAPA] is not complying with the standards authorized as part of the 1997 ROD . . . ." MAPA 2007 DEIS at 3-57.

Under NEPA, a formally proposed action is considered reasonably foreseeable, and therefore BLM must consider the cumulative impacts of that action and the action which is the subject of an EA or EIS. *See Save Medicine Lake Coalition*, 156 IBLA 219, 243 (2002).[13] This includes proposed oil development. *Colorado Environmental Coalition*, 108 IBLA 10, 18 (1989). Accordingly, BLM was obligated to consider in each of the subject EAs the cumulative impacts of grazing and existing, approved, and proposed oil and gas development in the MAPA.

Intervenors cite *Environmental Protection Information Center v. U.S. Forest Service*, 451 F.3d 1014 (9th Cir. 2006), and *City of Oxford, Georgia v. Federal Aviation Administration*, 428 F.3d 1346 (11th Cir. 2005), to support their assertion that oil and gas development in the MAPA is not reasonably foreseeable for purposes of BLM's NEPA analysis. However, both cases are factually inapposite and, if anything, support the conclusion in this Order that BLM was obligated to consider the cumulative impacts of oil and gas development.

In *Environmental Protection Information Center*, the court held that a future timber sale was not reasonably foreseeable for purposes of cumulative impacts analysis because the parameters of the sale (size and treatment prescriptions) were not known at the time the Forest Service began drafting its EA. Here, because an existing oil and gas development plan had been in place since 1997, and because additional development had been proposed sometime before October 2005, BLM was aware of the parameters of existing, approved, and proposed oil and gas development in MAPA long before it drafted the subject EAs.

Moreover, in *Environmental Protection Information Center*, the court noted that the Forest Service had engaged in a "reasonably complete discussion" of the future timber sale based on information available to the Forest Service when it was responding to comments the agency had received during the NEPA process. *Environmental Protection Information Center*, 451 F.3d at 1015. The same cannot be said

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[13] Although not considered for purposes of the holding in this Order, it is interesting to note that in BLM' s July 2007 Draft Resource Management Plan and Environmental Impact Statement for the Kemmerer Field Office Planning Area, BLM identifies the actions proposed in the MAPA 2007 DEIS as being reasonably foreseeable. *Id.* at 4-250.

of BLM's analysis in the present case, as there is no discussion of the proposed, approved, or existing oil and gas developments.

The facts and circumstances in *City of Oxford* are even less analogous to the instant case. The court in *City of Oxford* found that construction of a new airport terminal was not reasonably foreseeable in the context of a NEPA analysis of an airport renovation where no plan for a new terminal was known to exist and there was little indication of intent to build a new terminal. 428 F.3d at 1356-57.

Intervenors' and Respondent's argument that BLM could not have considered the actions analyzed in the MAPA 2007 DEIS because BLM has not selected a preferred alternative is incorrect. BLM was not foreclosed from considering impacts from the proposed project or other alternatives merely because a preferred alternative has not been selected. For example, BLM could have analyzed cumulative impacts under all four alternatives proposed in the MAPA 2007 DEIS or perhaps just the most aggressive development alternatives (i.e., Alternatives B and C).[14]

c. Timing of NEPA Analysis

Intervenors and Respondent also argue that there is no need to address cumulative impacts from proposed oil and gas development and grazing because those impacts will be addressed in the final EIS which will follow the MAPA 2007 DEIS. In so arguing, Intervenors and Respondent fail to appreciate the significance of timing to NEPA analysis.

The pertinent regulations governing timing of NEPA analysis provide that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values . . . ," 40 C.F.R. § 1501.2, and that an EIS "shall be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. While the latter provision refers to an EIS rather than an EA, there is no difference

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[14] These examples are only offered by way of suggestion. BLM may have been able to adequately analyze cumulative impacts from grazing and proposed oil and gas development in any number of ways.

between an EA and an EIS in terms of the importance of their timing and value in achieving the goals of NEPA. *See Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). Thus, the environmental review documents must be prepared prior to any irreversible and irretrievable commitment of resources. *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998); *Union Oil Co. of California, et al.*, 102 IBLA 187, 191 (1988).

Where BLM waits to conduct a cumulative impacts analysis until after it has issued grazing permits to the permittees, BLM may be reticent to make needed amendments or adjustments to those permits. Courts have recognized this possibility and held that appropriate NEPA analysis must precede agency actions.

Considering NEPA timing, the court in *Environmental Defense Fund Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979), wrote: "This court has also noted that delay in preparing an EIS may make all parties less flexible. After major investment of both time and money, it is likely that more environmental harm will be tolerated." In that case, the court held that NEPA analysis had to be conducted for a plan to distribute water to end users prior to authorization of the program even though detailed information about the end uses of the water were not known at the time. *Id.* at 853.

In *Confederated Tribes and Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission*, 746 F.2d 466, 476 (9th Cir. 1984), the Federal Energy Regulatory Commission (FERC) re-licensed a hydroelectric dam prior to developing an EIS evaluating impacts of the dam on fish populations. FERC argued that there was no need to develop an EIS because impacts of the dam on fish populations would be evaluated as part of a separate planning process. The court disagreed holding: "As noted above, however, an EIS must be prepared before a project is approved, and the [separate planning process] does not satisfy that obligation."

In *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975), the court discussed the timing of NEPA analysis as follows:

> An ex post facto justification generally is not an acceptable substitute, as "NEPA . . . does not authorize defendants to meet their responsibilities by locking the barn door after the horses are stolen. . . ." That the filing of an EIS should precede rather than follow federal agency action has been consistently recognized by the courts.

Id. at 794 (quoting *Lathan v. Volpe*, 350 F. Supp. 262 (W.D. Wash. 1972)).

The important question is whether BLM's NEPA analysis, at the time it issued the grazing permits and leases, was sufficiently thorough to meet the "rule of reason" standard. In *Wade Patrick Stout, et al.*, 153 IBLA 13, 21 (2000), the Board described the rule of reason standard as follows: "In determining whether an EA promotes informed decision making, a 'rule of reason' will be employed. The query is whether the EA contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences' of the proposed action and the alternatives thereto." *Id.* at 21 (internal citations omitted). Here, because BLM's cumulative impacts analysis fails to even discuss issues related to oil and gas development, it cannot be considered to have met the rule of reason standard.

D. Conclusion

Based upon the foregoing, **Appellant's motion for summary judgment is granted based solely on the ground that the cumulative impacts analysis in each of the subject EAs fails to comply with NEPA's "hard look" requirement. Accordingly, the three final decisions are set aside and the matters are remanded to BLM.**

Harvey C. Sweitzer
Administrative Law Judge

Appeal Information

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

See page 35 for distribution.

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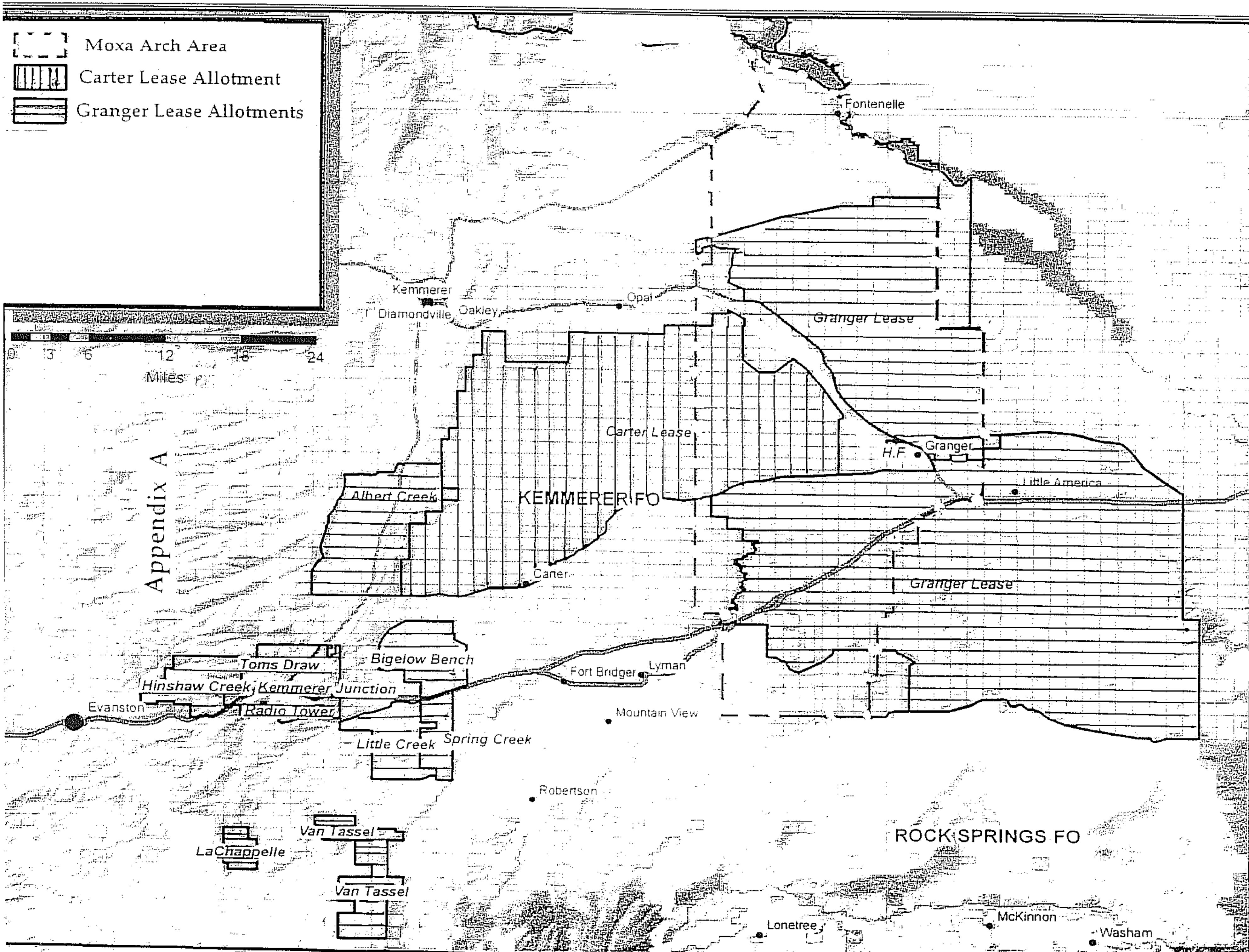
Appendix A


Moxa Arch Area
Carter Lease Allotment
Granger Lease Allotments
0 3 6 12 18 24
Miles
Kemmerer
Diamondville
Oakley
Opal
Fontenelle
Granger Lease
Carter Lease
KEMMERER FO
Albert Creek
Carter
H.F.
Granger
Little America
Granger Lease
Toms Draw
Bigelow Bench
Hinshaw Creek
Kemmerer Junction
Radio Tower
Evanston
Little Creek
Spring Creek
Fort Bridger
Lyman
Mountain View
Robertson
Van Tassel
LaChappelle
Van Tassel
ROCK SPRINGS FO
Lonetree
McKinnon
Washam

Appendix B

EA No.	DecisionDate	Docket No.	Allotment(s)
EA WY 090-EA07-40 (The Granger Lease Allotments)	May 14, 2007	WY-090-2007-15	Granger Lease, H.F. Allot., Little Creek, Bigelow Bench
			Granger Lease, Albert Creek, Spring Creek
			Van Tassel, Hinshaw Creek, La Chapelle
			Kemmerer Junction, Toms Draw, Radio Tower
	May 24, 2007	WY-090-2007-20	Little Creek
	June 8, 2007	WY-090-2007-19	Little Creek
	June 19, 2007	WY-090-2007-18	Granger Lease
EA WY 090-EA07-80 (The Carter Lease Allotment)	June 4, 2007	WY-090-2007-16	Carter Lease