

July 7, 2003

Via Certified Mail, Return Receipt Requested

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Deputy Director Francis Cherry
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Re: Notice of Intent to Sue for Violations of the Federal Land Policy and Management Act, Taylor Grazing Act, Endangered Species Act, and the Code of Federal Regulations.

Dear Sirs and Madams:

I am writing on behalf of Western Watersheds Project and American Lands Alliance to provide you with notice of our intent to bring a civil action against the Bureau of Land Management (BLM) for violations of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1755, the Taylor Grazing Act, 43 U.S.C. §§ 315, 315a-315r, the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, and the Code of Federal Regulations' grazing regulations, 43 C.F.R. part 4100. This letter is in response to your actions regarding the administration and management of the use of public lands on the Worland BLM District. Specifically, we are concerned about how BLM is responding to and regulating the operations of permittee Mr. Frank Robbins.

I. BACKGROUND

Mr. Robbins has three grazing permits to graze his cattle on public lands in the Worland BLM District of Wyoming. BLM issued the first permit in 1994 when Mr. Robbins purchased the High Island Ranch. Along with the grazing permit, BLM issued a special use recreation permit for Mr. Robbins to operate his commercial trail drives and dude ranch. After violating the terms and conditions of this special use permit over several years, BLM refused to renew the permit in 1999. That same year, BLM issued Mr. Robbins a grazing permit for the HD Ranch, which he had bought in 1998.

From 1994 to 2000, Mr. Robbins and BLM had conflicts over a number of issues. Disputes arose between the parties regarding administrative access over Mr. Robbins' property to allow BLM to monitor his allotments, a reciprocal right-of-way over an access road that was partly on public and partly on private land, and numerous citations for unauthorized grazing and trespass by Mr. Robbins' cattle. Eventually, because of Mr. Robbins' history of permit violations, BLM issued decisions to cancel the High Island and HD Ranch permits. BLM also denied Mr. Robbins' application for transfer of the grazing permit for Owl Creek Ranch, which Mr. Robbins purchased in 2000.

These disputes resulted in numerous administrative appeals as well as several lawsuits. The Interior Board of Land Appeals (IBLA) upheld BLM's revocation of the special use recreation permit and its right of access over Mr. Robbins' land. IBLA also agreed that Mr. Robbins had to pay BLM a fine for conducting improvement work on the public part of the right-of-way without authorization from BLM. Before the IBLA or Office of Hearings and Appeals decided the merits of any of the other appeals, however, BLM and Mr. Robbins entered into a settlement agreement whereby they agreed to stay all but one of the administrative and judicial actions then pending.¹ The settlement agreement also mandated the transfer of the Owl Creek permit and established other rights and procedures pertaining to BLM's administration of Mr. Robbins' grazing permits. The agreement was signed by the Deputy Director of the BLM, Mr. Robbins, and Mr. Robbins' attorney, effective January 15, 2003.²

Many of the allotments on the Worland District, including those on which Mr. Robbins is a permittee, are in a degraded condition due to drought as well as effects of past livestock grazing. BLM issued an emergency closure of Mr. Robbins' allotments in 2001 because of poor range conditions. Despite this closure, Mr. Robbins continued to graze his cattle on his allotments. BLM issued several trespass notices for this unauthorized grazing, but failed to pursue any further enforcement upon direction from the Washington D.C. Office. Mr. Robbins continues to trespass and violate the terms and conditions of his grazing permits and to further degrade the condition of the range resources, but BLM has not taken any action against Mr. Robbins.

Indeed, it appears that BLM has made a political determination to effectively "exempt" Mr. Robbins from the statutory and regulatory requirements applicable to his public lands grazing and other activities. It further appears that this political decision has been made by policy-makers in Washington D.C., over the advice and scientific conclusions of BLM's field staff charged with managing the subject allotments, overriding their professional judgment and authority – to the point where local staff have been expressly excluded from involvement in management of the allotments, which is now being determined out of BLM's national offices.

¹ The only action not stayed was the lawsuit involving Robbins' RICO and Bivens claims against BLM officials pending in the U.S. District Court for the District of Wyoming.

² The agreement was also signed by an official from the Department of Justice but only for the purpose of staying one of the lawsuits that was in the U.S. District Court for the District of Columbia.

As a result, serious ecological degradation is continuing on the subject allotments, which is aggravated both by Mr. Robbins' defiance of the applicable laws, regulations, standards and guidelines; and further aggravated by drought conditions. Plaintiffs believe that irreparable harm is occurring, and will continue, to soils, water, habitat and wildlife of the affected areas, while BLM fails to take meaningful action to enforce the applicable requirements of law.

II. LEGAL VIOLATIONS

BLM is the agency responsible for managing the public lands. Under the Taylor Grazing Act and FLPMA, BLM must regulate the use of public lands and manage them for multiple use purposes, in compliance with land use plans. 43 U.S.C. § 315a; 43 U.S.C. §§ 1732, 1740. Among other duties, FLPMA expressly imposes the mandatory duty upon the Secretary of Interior, in managing BLM public lands, that "the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). In order to implement its duties under the Taylor Grazing Act and FLPMA, BLM promulgated regulations that govern its administration of grazing on public lands. 43 C.F.R. Part 4100.

BLM has violated a number of applicable statutory and regulatory requirements with respect to its handling of the Robbins' permit matters in the Worland Field Office, as discussed below:

A. BLM Acted Arbitrarily and Capriciously when it Transferred the Owl Creek Permit.

BLM has transferred the Owl Creek permit to Mr. Robbins because the settlement agreement required it to do so. This transfer was arbitrary and capricious under the Administrative Procedure Act because it was based on an invalid agreement that did not comply with BLM's regulations.

The grazing regulations allow an individual who purchases base property to apply for a transfer of the grazing preference that accompanied that base property. 43 C.F.R. § 4110.2-3(b). The individual must also simultaneously file an application for a grazing permit. *Id.* § 4110.2-3(a)(4). In order to transfer the preference and issue the permit, BLM must determine that the transferee has a satisfactory record of performance. *Id.* § 4110.1(b). BLM determined in 2000 that Mr. Robbins did not have a satisfactory record of performance because of his history of permit violations, and was therefore not a qualified applicant when he applied for the Owl Creek permit. Subsequent to that determination, Mr. Robbins continued to violate the terms and conditions of his other permits.

The settlement agreement mandated that BLM conditionally transfer the Owl Creek grazing permit to Mr. Robbins for a period of two years. By mandating the permit transfer, the settlement agreement violated the regulations. BLM never determined that Mr. Robbins had a satisfactory record of performance before issuing the permit and,

indeed, the record indicates that Mr. Robbins' performance had not improved since BLM's original finding that he was not a qualified applicant. Numerous trespass notices were issued to Mr. Robbins in 2001, including seven repeated willful trespass violations. BLM also documented continued grazing by Mr. Robbins in 2002 after BLM imposed the emergency closure on all of Mr. Robbins allotments. This record establishes that Mr. Robbins still did not have a satisfactory record of performance. The settlement agreement therefore violated the regulations by requiring BLM to transfer the grazing preference and issue the permit to an unqualified applicant.

The settlement agreement was unlawful for other reasons. The agreement established a set of rules and procedures governing Mr. Robbins' grazing privileges that apply to no other permittee and that are contrary to the regulations. One provision of the agreement distinguishes allotments that are less than 50% public land from those that are more than 50% public land. For the allotments that are less than 50% public land, Mr. Robbins does not have to abide by the period of use and livestock numbers specified in his permits. FLPMA expressly provides that the Secretary must regulate the use and occupancy of the public lands, including these, through permits, leases and other such authorizations; and further provides that use and occupancy of the public lands in violation of such authorizations or other regulations is "unlawful and prohibited." 43 U.S.C. § 1732(a)-(b) & § 1733(g). In addition, the applicable regulations require BLM to specify the number of livestock and period of use in all permits, and prohibit permittees from violating these terms and conditions. 43 C.F.R. §§ 4130.3-1, 4140.1(b)(1). Neither do the BLM's regulations somehow allow it or Mr. Robbins to contravene these statutory and regulatory requirements so as to treat public land allotments differently based on the amount of public land involved. The settlement agreement is directly contrary to the statute and regulations because it allows Mr. Robbins to ignore these mandatory terms on two-thirds of his allotments.

One of the contentious issues between BLM and Mr. Robbins concerns a road that provides access to Mr. Robbins' land and that crosses both his land and BLM land. Under FLPMA, BLM is required to ensure that rights-of-way granted upon BLM lands are subject to terms and conditions needed to minimize damage to environmental and other values, protect federal property, and ensure efficient management of the public lands. 43 U.S.C. § 1765. The regulations further provide that BLM can, if it is in the public interest, require an applicant for a right-of-way to grant a reciprocal right-of-way to BLM. 43 C.F.R. § 2801.1-2. The settlement agreement, however, requires BLM to grant the right-of-way to Mr. Robbins without insisting on a reciprocal right-of-way, and without ensuring that the values identified under 43 U.S.C. § 1765 are fully protected. Accordingly, this provision violates the statute and regulations because it precludes BLM from requiring a reciprocal right-of-way even if it would be in the public interest.

The settlement agreement again violates the regulations by allowing Mr. Robbins to use actual use billing for any allotment that is covered by an allotment management plan. The regulations state that noncompliance with the terms and conditions of the allotment management plan and the permit shall be cause for BLM to revoke actual use billing. 43 C.F.R. § 4130.8-2(e). Plenty of evidence exists that Mr. Robbins has violated the terms

and conditions of both the allotment management plan and his grazing permits, including repeated trespass notices, documentation of unauthorized grazing in violation of the emergency closure order, and documentation of grazing in excess of the livestock numbers and outside of the season of use specified in the permits. Instead of prohibiting actual use billing, as called for in the regulations, BLM is ignoring these violations and allowing Mr. Robbins to use actual use billing.

Finally, the settlement agreement conflicts with the grazing regulations by establishing a new procedure for enforcing the regulations and appealing any enforcement decisions. Under the regulations, BLM must serve all proposed decisions on the affected permittee and the permittee can then protest that decision. Once BLM issues a final decision, the permittee can appeal that decision to the Office of Hearings and Appeals. 43 C.F.R. subpart 4160. The agreement creates a new “Informal Dispute Resolution” procedure whereby BLM and Mr. Robbins will consult and cooperate over any problems or disputes that arise. If the parties cannot resolve the dispute, they can seek review by the Director’s Office, and only the Director’s Office or the Director’s Designee can authorize action against Mr. Robbins. This new “informal dispute resolution” process contradicts the administrative remedy process outlined in the regulations and circumvents proper enforcement of the regulations.

Aside from conflicting with individual provisions of the regulations, the settlement agreement was also unreasonable because it created a dichotomous set of rules and rights, with the rules applied to Mr. Robbins differing significantly from those applied to all other permittees on the Worland District. BLM’s disparate treatment of Mr. Robbins concerning the forgiveness of all of his past violations as well as the creation of new rights demonstrates that BLM is not regulating its permittees under uniform standards, as required. See 43 C.F.R. § 4100.0-1 (stating that the purpose of the regulations is to “provide uniform guidance for administration of grazing on the public lands”). Because the Owl Creek permit transfer was based on this unlawful agreement, the transfer was arbitrary and capricious and violates the APA.

B. BLM Is Violating the Fundamentals of Rangeland Health And FLPMA

As noted, FLPMA requires that use and occupancy of the public lands can only occur pursuant to proper authorization (such as lease or permit), and further mandates that the Secretary “shall. . . take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(a)-(b).

Pursuant to this and other statutory authority, BLM has adopted the “Fundamentals of Rangeland Health” regulations, in order to ensure that livestock grazing does not cause unnecessary or undue degradation of the public lands and the multiple use/sustained yield mandates of FLPMA. See 43 C.F.R. Part 4180. These regulations state that BLM must take action to modify grazing practices if it determines that the range is in poor ecological condition. Under the Fundamentals of Rangeland Health regulations, BLM must take appropriate action by the start of the next grazing year upon determining that existing grazing management must be modified to ensure that watersheds are making significant

progress toward properly functioning physical condition, there is significant progress toward attainment of ecological processes that support healthy biotic populations, water quality complies with state standards and BLM management objectives, and habitats for ESA listed and other special status species are being restored. 43 C.F.R. § 4180.1. Furthermore, BLM must take appropriate action by the following grazing year upon determining that grazing is a significant factor in failing to achieve state standards and guidelines that address the health, productivity, and sustainability of public rangelands. *Id.* § 4180.2(c). Therefore, if BLM determines that grazing practices are degrading the range resources, it must modify grazing permits or take other action to protect those resources by the next grazing year. See *Idaho Watersheds Project v. Hahn*, 187 F.3d 1035, 1037 (9th Cir. 1999).

BLM evaluated two of Mr. Robbins' allotments in April 2002 and found that livestock grazing was degrading the range. An interdisciplinary team found moderate to severe livestock use over much of the allotments, creating poor vegetation condition and poor soil moisture and infiltration ability due to a lack of litter and ground cover. Subsequent to the evaluation, BLM issued a "Determination Report" for the two allotments, analyzing the extent of ecological damage. This determination concluded that livestock use was excessive, creating heavy to severe grazing impacts. This excessive use was detrimental to plant health and reduced the forage base for wildlife habitat. Severe livestock use also degraded riparian areas, water quality, and nutrient cycling. The report concluded that the watershed was not making significant progress toward a properly functioning physical condition because of the continued, excessive livestock use, ecological processes were not being maintained to support a healthy biotic community, and habitat quality for wildlife was not being maintained.

The conditions on Mr. Robbins' allotments also showed that livestock use was a significant factor in failing to achieve the Wyoming State Standards. As the Determination Report noted, livestock use was impairing soil stability and water infiltration, requisites under Wyoming Standard #1. Livestock use was also degrading riparian areas and upland vegetation, violating Standards #2 and #3. Finally, grazing was impairing wildlife habitat, contrary to Standard #4. Upon such a determination, the regulations require BLM to take action by the next grazing year that will result in significant progress toward fulfillment of these standards. 43 C.F.R. § 4180.2(c).

Despite BLM's determination, it did not take appropriate action by the next grazing year. Instead, it reauthorized Mr. Robbins to continue grazing those allotments under the same permit terms and conditions. BLM has not modified the terms and conditions of the High Island Ranch permit, which covers the two allotments evaluated by BLM, nor required Mr. Robbins to alter his grazing practices in any way and we are now into the 2003 grazing year. All evidence available to Plaintiffs indicates that conditions are continuing to worsen on the allotments in 2003, due both to drought and Mr. Robbins' livestock grazing, which is now essentially unregulated by BLM despite its findings about poor conditions on the allotments. Thus, BLM has unreasonably delayed taking appropriate action, as required under the regulations; and is causing unnecessary and undue degradation of the public lands in violation of FLPMA.

C. BLM is Violating the Taylor Grazing Act, FLPMA, and the Grazing Regulations by Failing to Regulate the Use and Occupancy of the Public Lands and Failing to Manage the Public Lands for Multiple Use in Accordance with the Land Use Plan.

As noted, BLM has a clear duty under the Taylor Grazing Act and FLPMA to regulate the use and occupancy of the public lands. See 43 U.S.C. §§ 315a, 1732. To help fulfill this mandate, the statutes required BLM to promulgate regulations that govern management of the public lands. *Id.* §§ 315a, 1740; 43 C.F.R. part 4100. FLPMA also requires BLM to manage public lands in accordance with land use plans and with the intent of managing for multiple use and sustained yield purposes. 43 U.S.C. § 1732. The regulations emphasize these requirements by stating that BLM “shall manage livestock grazing on public lands under the principle of multiple use and sustained yield, and in accordance with applicable land use plans.” 43 C.F.R. § 4100.0-8. BLM has abdicated its statutory and regulatory responsibilities by ignoring Mr. Robbins’ grazing violations and allowing him to continue to degrade the range resources.

FLPMA and the Taylor Grazing Act impose a clear statutory duty on BLM to regulate the use of public lands. This regulation occurs in part through enforcement of the grazing regulations that BLM promulgated. By failing to follow those regulations and enforce them against Mr. Robbins, BLM is not carrying out its statutory duty. For instance, the regulations require BLM to issue a written notice of unauthorized use and an order to remove livestock whenever it appears that a trespass has occurred. *Id.* § 4150.2(a). BLM is aware that Mr. Robbins’ cattle were trespassing throughout most of the 2002 grazing year and have also trespassed in 2003. However, after the Worland District Office issued two trespass notices to Mr. Robbins in early 2002, the Washington D.C. BLM Office told Worland BLM to ignore any further trespass by Mr. Robbins and to take no further action on the previous trespass. Since then, BLM has issued no trespass notices to Mr. Robbins despite its knowledge about numerous instances of trespass. By ignoring Mr. Robbins’ unauthorized grazing on public lands, BLM is avoiding its duty to regulate the use of those lands.

FLPMA also requires BLM to manage its lands for multiple use and sustained yield purposes in accordance with land use plans. Pursuant to this authority, the regulations require BLM to reduce grazing use or make other changes as needed when grazing use is impairing the properly functioning condition of ecosystems and causing an unacceptable level of utilization, is not conforming to land use plans, or is not complying with the Fundamentals of Rangeland Health. *Id.* §§ 4110.3, 4110.3-2. Again BLM is failing to carry out this mandatory duty by allowing Mr. Robbins to continually degrade the range resources to the detriment of other uses and contrary to the Grass Creek Resource Management Plan (RMP). The Grass Creek RMP’s management objective is to improve forage production and range condition to provide a sustainable resource base for livestock grazing while improving wildlife habitat, watershed protection, and forage for wild horses. The RMP later states that the standards developed pursuant to the fundamentals of rangeland health regulations will direct on the ground management on a continuing basis

and that the level of livestock grazing may be reduced in areas with excessive soil erosion or poor vegetative condition or as necessary to provide for other multiple uses.

Although BLM determined that the conditions on at least two of Mr. Robbins' allotments were poor, did not support good wildlife habitat, and did not demonstrate the qualities required under the Wyoming State Standards, the agency has done nothing to alter Mr. Robbins' grazing practices. The agency continues to allow Mr. Robbins to graze all of his allotments under the original terms of his permits while requiring other permittees to substantially reduce grazing because of the prolonged drought. By failing to adjust Mr. Robbins' grazing use, BLM is not acting in accordance with the regulations or with the land use plan. The agency also is not protecting the resources for multiple uses and sustained yield. Thus, BLM is not performing its mandatory statutory duty under FLPMA.

D. BLM Violated the ESA by Failing to Consult Over the Transfer of the Owl Creek Grazing Preference.

Any action that is authorized, funded, or carried out by a federal agency and that may affect an endangered or threatened species must undergo consultation with the Fish and Wildlife Service or National Marine Fisheries Service to ensure that such action is not likely to jeopardize the continued existence of that listed species. 16 U.S.C. § 1536(a)(2). Fish and Wildlife Service frequently consults on grazing permits that may affect listed fish or wildlife. Indeed, Fish and Wildlife Service has been consulting on grazing permits on the Worland BLM District if grizzly bears have been found within the allotments under those permits.

Grizzly bears have been observed on allotments covered by the Owl Creek permit. BLM's transfer of the Owl Creek grazing preference and issuance of the Owl Creek permit to Mr. Robbins were agency actions. As with other grazing actions, BLM should have consulted with Fish and Wildlife Service before transferring the grazing preference and issuing the permit. BLM failed to do so and therefore violated section 7 of the ESA. We are providing notice of this violation pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). Under this provision, we may file civil litigation against BLM for violation of the ESA within 60 days of the date of this letter.

III. CONCLUSION

BLM has egregiously violated the applicable laws and regulations by arbitrarily and capriciously relying on an unlawful settlement agreement as authority to transfer the Owl Creek permit to Mr. Robbins, by unreasonably delaying its modification of grazing practices pursuant to the Fundamentals of Rangeland Health regulations, and by failing to perform its mandatory statutory duty to regulate the use of public lands for multiple use and sustained yield purposes in accordance with land use plans. Furthermore, BLM violated the ESA by failing to consult with Fish and Wildlife Service over the transfer of the Owl Creek grazing preference and issuance of the permit.

My clients intend to promptly file litigation over claims arising under FLPMA, implementing regulations and the APA, and to seek appropriate judicial relief (including possible injunctive relief) to remedy these violations of law in the near future. Following expiration of 60 days from the date of this letter, my clients also intend to bring claims under the ESA for failure to consult over the Owl Creek permit, as discussed above. See 16 U.S.C. § 1540(g) (requiring 60 days notice before bringing ESA citizen enforcement claims).

If you wish to avoid litigation through a mutually acceptable solution, you may contact our clients at the following addresses or myself at the address listed on the letterhead.

Sincerely,

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