



**Western
Watersheds
Project**

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Working to protect and restore Western watersheds

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VIA FAX & Certified Mail

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RECEIVED
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Appellant: Western Watersheds Project

Re: Statement of Facts and Statement of Reasons for the Appeal of Field
Manager's Decision Record for the Judd Whitworth – Goldburg Creek
Diversion Project (IDI-034604), FONSI, and Environmental Assessment
(EA #: ID-330-2009-EA-3584)

STATEMENT OF FACTS AND STATEMENT OF REASONS

Pursuant to 43 C.F.R. Part 4, the Western Watersheds Project ("WWP") timely provided a Notice of Appeal and Petition for Stay for the Bureau of Land Management's ("BLM's") Decision approving the Right-of-Way ("ROW") Grant IDI-034604 on May 26, 2010. Pursuant to 43 C.F.R. § 4.412, WWP hereby provides the associated Statement of Facts and Statement of Reasons.

STATEMENT OF FACTS

1. The Challis-BLM's Record Of Decision ("ROD") and Finding Of No Significant Impact ("FONSI") for the J. Whitworth-Goldburg Creek Diversion Project are dated April 21, 2010. WWP received them and the Environmental Assessment ("EA") on April 26, 2010.
2. WWP provided a timely Notice of Appeal and Petition for Stay on May 26, 2010.
3. The Goldburg Creek Diversion Project was designed and funded by the USDA Natural Resources Conservation Service under their Environmental Quality Incentives Program ("EQIP") authorized by the national Food Security Act ("Farm Bill") and in a relatively new category for conserving energy. EA at 4.
4. The applicant, Judd A. Whitworth of May, Idaho, applied for a transfer of an existing water right (IDWR No. 73-156) so that an additional Point-Of-Diversion ("POD") could be added 1.1 miles upstream in Goldburg Creek. The Idaho Department of Water Resources ("IDWR") published the public notice for Water Transfer Application #7299 in the February 21, 2008 *Challis Messenger* and WWP filed a timely Protest on March 3, 2008 for the transfer based on the fact that is contrary to the local public interest. Copies of WWP's Protest were provided to IDWR, BLM, and the applicant at the December 9, 2009 pre-hearing conference meeting held in Challis, Idaho.
5. The IDWR temporarily suspended the water rights transfer protest procedures, including a potential hearing, pending the outcome of the BLM's decision on granting or denying the Right-Of-Way requests by Whitworth.
6. The Goldburg Creek Diversion Project proposed by Whitworth, a private landowner, rancher, water user, irrigator, and public lands grazing permittee, consists of the following:
 - a. Construction, ongoing maintenance, and operation of an additional POD located on BLM-managed public lands. The Goldburg Creek Diversion Project does not eliminate the existing, functional POD that is approximately 1.1 miles downstream of the new POD. The new POD is approximately 29 miles upstream of the confluence of the Salmon River and Pahsimeroi River in Goldburg Creek.
 - b. Permanent removal of 15 feet of natural stream bank and riparian vegetation from Goldburg Creek on BLM-managed public lands. The stream bank and POD will be rippedraped with rocks and boulders that are "native" to Goldburg Creek.
 - c. Construction, ongoing maintenance, and operation of a permanent open ditch from the new POD for 85 feet as a conveyance for the diverted Goldburg Creek water across BLM-managed public lands. The width of the open earthen ditch is approximately 3-foot to 14-foot width with a ROW of 35-foot width, for a disturbed area or footprint of approximately 0.10 acres of BLM-managed Public Lands.
 - d. Construction, ongoing maintenance, and operation of a permanent buried pipeline (~ 1 mile long) from the end of the new open conveyance ditch to the existing irrigation system owned and operated by Whitworth. The pipeline ROW will vary

between a 24-foot to 35-foot width, totaling approximately 3 acres of BLM-managed Public Lands.

e. Annual construction, maintenance, operation, and dismantling of an instream rock weir that will be constructed from “native” stone from Goldburg Creek.

f. Annual construction, maintenance, and dismantling of an earthen plug for the open conveyance ditch at the confluence with Goldburg Creek.

g. Construction and maintenance of an earthen berm along the open conveyance ditch from the confluence with Goldburg Creek to the distal end where it meets the buried conveyance pipeline.

h. Maintenance and use of access roads and trails to all parts of the diversion system. During construction and significant maintenance work, these roads and trails will carry heavy equipment including backhoes and dump trucks.

i. Construction, operation, and maintenance of a Gooby bubbler trash rack near the confluence of the conveyance ditch and Goldburg Creek. It is described as a Gooby Flat Plane Screen structure and as 25 square feet in area. The design calls for an approach velocity of 0.2 feet per second (“fps”). A lockable and measurable headgate will be installed where the diverted water enters the Gooby bubbler trash rack.

j. Diversion across BLM managed Public Lands of 3.7 cubic feet per second (“cfs”) of Goldburg Creek surface water, from a new POD that is approximately 1.1 miles upstream of the existing POD.

k. A buried bypass 30-foot long, 6-inch pipeline to return excess water diverted from Goldburg Creek back to the stream. Where the bypass pipeline enters back into Goldburg Creek will be rippedraped with rocks and boulders.

l. A new travel route during construction, but also for operations and maintenance along the new pipeline corridor (approximately 1 mile long). Includes travel and use by heavy equipment including a backhoe and dump trucks.

m. Issuance of a renewable, 30-year Right-Of-Way (“ROW”) by the BLM to the applicant, Judd Whitworth,

7. Goldburg Creek is protected from adverse modification and adverse effects under the Endangered Species Act (“ESA”) as designated critical habitat for threatened Snake River spring/summer Chinook salmon by NMFS (EA at 10 & 15). In addition to the wetted stream channel, the designated critical habitat includes the Riparian Habitat Conservation Area (“RHCA”), which encompasses the 100-year floodplain and the stream banks on each side of Goldburg Creek.

8. Goldburg Creek is protected from adverse effects under the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”) for Chinook salmon.

9. Goldburg Creek and its tributaries, Big Gulch and Ditch Creek, are occupied bull trout water. EA at 10.

10. Goldburg Creek is proposed as designated critical habitat for threatened Columbia Basin bull trout by the USFWS (EA at 15). The U.S. Fish and Wildlife Service (“FWS”) is currently deciding if Goldburg Creek will be considered as designated critical habitat since the public comment period has closed. If the ROD and ROW stand, then the

BLM will be committing irreversible and irretrievable actions and expenditures of funds prior to the completion of the USFWS' ESA designated critical habitat decision. BLM indicates from the EA (at 15) that they anticipate that the USFWS will include Goldberg Creek and its tributaries, Big Gulch and Ditch Creek, into the final designation for bull trout critical habitat, but violates the Public Trust by still persisting with this decision to alter and adversely modify the critical habitat.

11. If the 1.1-reach of Goldburg Creek is dewatered with the new POD proposed with the J. Whitworth-Goldburg Creek Irrigation Project, it is much less likely to be included as designated critical habitat protected by ESA. If the reach was included in the final designated critical habitat, the BLM would be prohibited from allowing or permitting the adverse modification and adverse effects from Federal Actions, including issuing the proposed ROWs to the applicant, Judd Whitworth.

12. Dewatering a reach of occupied bull trout habitat would certainly be considered adverse modification and adverse effects as would destroying portions of its natural stream banks, killing its riparian vegetation, destabilizing its banks and channel morphology, depleting its base and flushing flows and destroying its natural hydrograph, and regularly disturbing its stream bottom and water quality with the regular construction, maintenance, and dismantling of an instream rock weir and an earthen plug for the conveyance ditch.

13. The BLM did not fully consider the alternative of routing the pipeline across BLM-managed lands along an existing two-track road, which is in already disturbed landscape, because they are trying to save the applicant money instead of protecting valuable Public Trust natural resources. "Moreover, the alignment in a two track would have needed numerous bends and been more complex to design" (EA at 9).

14. The BLM did not consider an alternative that would have required the retirement of the existing POD from Goldburg Creek and restoration of the disturbed lands and streambank. They only considered the Preferred Alternative and a true No Action Alternative. EA at 9. They also did not consider an alternative that would restore instream flows and riparian habitat to Goldburg Creek, making it better bull trout and Westslope cutthroat trout habitat, which would allow the BLM to live up to their legislatively mandated ESA Section 7(a)(1) conservation and recovery responsibilities. EA at 19.

15. The BLM admits that any savings of water, whether real or paper, are not guaranteed to stay in Goldburg Creek instead of being diverted by another water right. EA at 28-29. Thus, there is no conservation value for salmonids, other fish, or instream flows. Rather, there is a net loss of stream miles, designated critical habitat for ESA-listed salmonids, and occupied bull trout habitat.

16. By dewatering the Public Lands 1.1-mile reach of Goldburg Creek that is occupied salmonid habitat and claiming gains in fish habitat and stream flows on private lands downstream of the existing POD, the BLM is trading away with this proposed 30-year

ROW public access trout and salmon waters, including designated critical habitat, EFH, proposed designated critical habitat, historic habitat, and occupied bull trout stream habitat for downstream reaches of Goldburg Creek that are not open to the public, will not sustain salmonids including bull trout, steelhead, and Chinook salmon, and that adversely modifies and adversely affects designated critical habitat, proposed designated critical habitat, and EFH.

17. Increases in fine sediments in Goldburg Creek are anticipated with the project by the BLM to the detriment of water quality, fish habitats, and fish populations, including ESA-listed bull trout and BLM Sensitive Species, Westslope cutthroat trout. EA 18. The EA clearly states that increased fine sediment loads "... can have negative impacts on spawning habitat and quality of pools."

18. Increases in water temperatures in Goldburg Creek are anticipated with the project by the BLM to the detriment of water quality, fish habitats, and fish populations, including ESA-listed bull trout and BLM Sensitive Species, Westslope cutthroat trout (EA at 18).

19. With the project there will be **significant** seasonal decreases in instream flows of Goldburg Creek (EA at 18) and a resulting loss of flushing flows, and therefore increase sedimentation of pools, spawning gravels, invertebrate prey production gravels, and a general loss of stream productivity. According to the EA, using September 2007 data, the instream flow of 9.7 cfs at the new POD would be reduced by 3.7 cfs with the Goldburg Creek Irrigation Project or a **38% decline in flow**.

20. According to the BLM, the project will impede fish passage by depleting flows and stream depths in Goldburg Creek. EA at 18. Also the construction of the seasonal instream rock weir at the new POD in Goldburg Creek will act as a partial fish passage obstruction, except during drought years, when it may act as a complete barrier to fish passage upstream or downstream, including for ESA-listed bull trout and BLM Sensitive Species bull trout. EA at 8.

The BLM contradicts itself (EA at 18) when it claims that there will not be an instream rock weir and when it describes the proposed rock weir that will be completed with "native" stone from Goldburg Creek and possibly additional rock riprap (EA at 8).

21. Fish impingement (i.e. fish pinned against a structure like a screen or plate), constituting lethal and sublethal (includes injury and harm) take of fish including bull trout and Westslope cutthroat trout), on a sub-par trash screen that is only imitating a fish screen is predicted with the project by the BLM. EA at 18-19. According to the EA, the Gooby Flat-Plate Screen, a modified bubbler trash rack performed poorly under standardized scientific evaluation, resulting in the take of 82% of the 75-mm test salmonids because of contact with the trash screen (impingement) and also the bubbler screen failed to meet the NMFS criterion for escape from a screen structure in 60 seconds or less. Laurence Zuckerman, working for NMFS at the time, was part of the interagency group that was evaluating the Gooby Flat-Plate Screen as an alternative for low flow

conditions but meeting NMFS screening and fish passage criteria. The bubbler trash screen failed the evaluation which was conducted at the Abernathy Fish Technology Center in Longview, Washington.

22. Since the USFWS completed their informal Section 7 ESA consultation with a Letter Of Concurrence ("LOC") (BLM Response to WWP's Petition For Stay at 3) instead of formal consultation with a Biological Opinion and an Incidental Take Statement ("ITS"), any take, lethal or sublethal is not exempt from prosecution under Section 9 of ESA.

23. Lower water quality and not meeting designated uses for Goldburg Creek is predicted by the BLM with the proposed Goldburg Creek Irrigation System project and its 30-year, renewable ROW. EA at 22-23. The BLM mentions historic overgrazing as part of the water quality baseline problems, but fails once again to connect the dots and tie historic and current livestock grazing on the two BLM-managed allotments to even more heightened adverse water quality effects associated with the Goldburg Creek Irrigation System project without any off-setting mitigation measures.

24. Increased aquatic habitat fragmentation with dewatering and/or water temperature barriers are predicted with the proposed Goldburg Creek Irrigation System project. EA at 18. In this section the BLM discounts the weir as a potential passage barrier for fish at different life stages, but elsewhere in the EA, describes the weir construction and operations.

25. Retarded natural rates of recovery of bull trout, Snake River spring/summer Chinook salmon, Snake River Basin steelhead, and Westslope cutthroat trout and their stream and riparian habitats are predicted with the adverse effects of the proposed project on the stream and riparian habitats.

26. The proposed irrigation project will increase the likelihood of local extirpations of bull trout and Westslope cutthroat trout from Goldburg Creek and its tributaries, Big Gulch and Ditch Creek. It will also increase the likelihood of genetic inbreeding and decreased survival rates.

27. BLM in the EA, ROD, FONSI, and E&D fails to fully consider cumulative impacts by avoiding the discussion of the adverse effects to threatened, endangered, and sensitive ("TES") fishes by ongoing livestock grazing in the upstream Goldburg Allotment and the Upper Pahsimeroi Allotment, which includes the footprint of the Goldburg Creek Irrigation Project, and that the BLM has complete management control over, even if they do not exercise their oversight powers to the benefit of the fishes and stream. They also fail to consider alternatives that would reduce adverse impacts to TES fishes and their protected and proposed protected riparian and stream habitats, such as modifying, reducing, resting, or eliminating livestock grazing upstream and within the project reach, and thereby mitigating or offsetting adverse effects to fishes and habitats associated with this proposed project, including increased water temperatures, increase fine sediment loads, decreased riparian cover, and lower water quality further increasing the likelihood

of not meeting the CWA, the Idaho State Water Quality Standards, the TMDL, and the designated uses for coldwater biota and salmonid spawning.

28. BLM has assumed the role of lead Federal Action Agency under the ESA and MSA consultations with the NMFS and FWS since the NRCS did not consult independently. Therefore, BLM in its consultation, has the added duty to ensure that Federal Actions by the NRCS, including funding expenditures, project planning, and engineering, conform to ESA and its associated regulations

STATEMENT OF REASONS

I. BLM's Failure to Consider Reasonable Alternatives to the ROW Violates NEPA and FLPMA.

As the Ninth Circuit recently put it:

In addition to the proposed agency action, every EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" to that action. 40 C.F.R. § 1502.14(a). The analysis of alternatives to the proposed action is "the heart of the environmental impact statement." *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1121 (9th Cir. 2008) (quoting 40 C.F.R. § 1502.14). "The existence of reasonable but unexamined alternatives renders an EIS inadequate." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998).

Ctr. for Biological Diversity v. U.S. Dep't of Interior, 581 F.3d 1063, 1071 (9th Cir. 2009).

BLM considered only two alternatives for the Project, including: (1) the Proposed Action; (2) No Action. EA at 7-9. That is, there are no alternatives to the proposed action in addition to the required "no action" alternative. BLM did not seriously consider and analyze any other action alternatives for the proposed Project, which would involve dewatering a shorter reach of Goldburg Creek, a pipeline and ROW that followed previously disturbed lands in and along the alignment of an existing two-track road, use of a NMFS-criteria screen that would protect for Section 9 ESA take all sizes and life stages of ESA-listed salmonids (e.g., threatened bull trout) and Sensitive Species like the Westslope cutthroat trout and not obstruct upstream and downstream fish passage and genetic flow, or other energy-efficient alternatives to a gravity-fed irrigation system that disrupts and adversely modifies designated critical habitat and TES fishes on BLM-managed public lands such as employing solar or wind power to move irrigation water and provide head pressure for delivering the irrigation water to crops and irrigated pastures, and which are clearly reasonable, feasible, and effective. These alternatives would meet the purpose and purported need for the Project, including in the last case, costs to the applicant, with fewer and less intensive environmental impacts. Also, the alternative of employing an NMFS-criteria fish screen on any diversion project will avoid the potential adverse effects and habitat disturbances associated of having to remove the Gooby trash rack and replace it as anadromous salmonids continue to be restored to the Pahsimeroi River and its tributaries like Goldburg Creek.

Unfortunately, BLM refused to seriously consider and analyze any alternative that

would have fewer impacts on surface water resources, stream, bank, and riparian habitats, sagebrush steppe, and the TES species that depend on them. BLM's defense to not further consider and analyze a third alternative that would have routed the pipeline and ROW along an existing, disturbed two-track road, and thereby reduce adverse environmental impacts, was "...the alignment in a two-track would have needed numerous bends and been more complex to design." EA at 9. When balancing the costs to the applicant against the benefits to the public for Public Trust natural resources, including ESA-listed species and their protected habitats, the BLM should side on the conservative side for the Public Trust natural resources, benefits, and public uses. The BLM has failed to meet this balancing of public and private interests in the NEPA document, ROD, and FONSI for the Project.

Another alternative that deserves a "Hard Look", especially in light of the BLM's claim that the warmer, siltier Pahsimeroi River water that is diverted into Goldburg Creek for Mr. Whitworth's downstream use actually harms the bull trout, designated and proposed designated critical habitat, the natural hydrograph, water quality, and other natural resource values of the BLM-managed lands and Goldburg Creek reach (EA at 22), which is being used in part as a conveyance system for diverted water for downstream irrigation, is the construction of a pipeline from the Pahsimeroi River POD downstream to Whitworth's place of use. This alternative would also meet the BLM's ESA Section 7(a)(1) conservation and recovery of ESA-listed species mandates by improving occupied bull trout habitat that was proposed and is currently being decided for inclusion as designated critical habitat as well as designated critical habitat for Snake River spring/summer Chinook salmon and historic steelhead habitat.

The BLM also fails to give the necessary "Hard Look" to the "No Action" Alternative, which in this case does **not** translate into no irrigation water from Goldburg Creek for the applicant, Judd Whitworth, but rather status quo, where Mr. Whitworth diverts his irrigation water according to his existing Idaho State Water Right from the existing downstream POD. With this "No Action" Alternative there are no new PODs, ROWs, berms, Gooby trash racks, new open earthen ditches, new buried pipelines, bank removals, rock riprap, and instream rock weirs on BLM-managed public lands, including a 1.1-mile reach of Goldburg Creek. Grazing still occurs if not part of the Proposed Federal Action, but the "No Action" Alternative does not preclude the BLM from improving, reducing, or eliminating domestic livestock grazing and restoring occupied bull trout stream and riparian habitats.

Rather, in violation of NEPA and FLPMA, the BLM appears pre-decisional and predetermined to approve this ROW application and justifies it in their convoluted interpretation of their "... multiple-use, Federal land managing agency mandate, as established by Federal Land Policy and Management Act (FLPMA)." EA at 4. The BLM is correct that the mandate may obligate them "... to *consider* [WWP added emphasis] applications for rights-of-way", but errs when they misinterpret that as an obligation to *approve* all rights-of-way applications, as they appear hear to be so bent. The BLM is under no such obligation to approve all land uses applied for in any given management area such as the Project area including Goldburg Creek and its riparian ecosystem. While multiple-use may promote more than one use including outdoor recreation, wildlife, and scenic values and not just consumptive uses such as domestic livestock grazing and irrigation diversions and conveyances, not all uses are suitable for all areas. The BLM must deny this application since the need is not clearly demonstrated and the use is not compatible with other land uses

(at the project site and adjacent lands upstream and downstream) that conform to the conservation of Public Trust natural resources on public lands.

Some of the alternatives suggested by Appellants are eminently reasonable because they stake a middle ground between the “No Action” Alternative, which essentially calls for no new water diversion and transport, and the Proposed Action, which proposes the full Goldburg Creek Irrigation Project (as described above in this document. Some of the Appellants’ suggested alternatives involve dewatering a significantly shorter reach of Goldburg Creek while protecting populations of bull trout and Westslope cutthroat trout.

Indeed, the pending Idaho Department of Water Resources (“IDWR”) water transfer, whom the appellants protested in the state process, might become moot under some of the above scenarios including the “No Action” Alternative.

BLM violated NEPA by failing to consider the reasonable alternatives of transporting less water or for a shorter distance or a less environmentally harmful route or manner. *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998) (“The existence of reasonable but unexamined alternatives renders an EIS inadequate.”).

BLM also erred by failing to explain why it rejected these clearly-reasonable alternatives. NEPA’s implementing regulations require agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. [] ‘The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.’” *Oregon Natural Desert Ass’n v. BLM*, 531 F.3d 1114, 1121 (9th Cir. 2008) (citations omitted); 40 C.F.R. § 1502.14(a). However, there is no discussion of the alternatives suggested by Appellants in the alternatives analysis in the EA, nor does BLM provide reasons (as opposed to conclusionary statements) for why these alternatives were rejected. *See* EA at 9. There is no basis for BLM’s failure to discuss the reasons for their having been eliminated. BLM’s failure to explain why it eliminated the suggested alternatives from further analysis, violates NEPA.⁸

BLM acknowledges that its analysis must include “direct, indirect, and cumulative effects of the proposed irrigation system.” EA. To satisfy NEPA’s requirements, the BLM must demonstrate it has taken a “hard look” at the environmental consequences of the proposed action. *See, e.g., Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002) (quoting *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 374 (1989)). The BLM is under a continuing duty to supplement existing environmental analyses in response to “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1509(c)(1)(ii). NEPA also requires an analysis of the cumulative environmental impacts of the proposed action. *See* 40 C.F.R. §§ 1508.7, 1508.25(a)(2). Here, the Decision is arbitrary, capricious and not in accordance with NEPA because the agency (1) refused to take a “hard look” at the environmental consequences of its proposed action with respect to the threatened and endangered species resource, by relying on outdated and inaccurate information and refusing to consider new relevant information; (2) refused to consider significant new circumstances or information; and (3) failed to analyze cumulative impacts of the proposed action with respect to the threatened and endangered resource.

Specifically, WWP submitted detailed objections to resource damages in its Protest of the associated IDWR Water Rights Transfer and discussed them at the Pre-hearing Conference, which the BLM and the Applicant participated in and were copied with the Protest letter and points. Still, the BLM persisted in their predetermined, pre-decisional manner and issued their ROD, which issues the 30-year renewable ROW and everything necessary to install, operate, and maintain the Goldburg Creek Irrigation System.

B. Violation of FLPMA.

FLPMA imposes on the BLM a substantive, continuing duty to manage the public lands for multiple-use and to prevent unnecessary or undue degradation to the public lands and their resources. 43 U.S.C. § 1732(a), (b). FLPMA requires the BLM to manage the public lands consistent with the “principles of multiple use and sustained yield.” 43 U.S.C. § 1732(a). It is well established that the BLM must satisfy this duty by engaging in a reasoned and informed decision-making process. See Nat’l Wildlife Fed’n v. BLM, 140 IBLA 85, 101 (1997). To prove it has engaged in a reasoned and informed decision-making process, the BLM must show that it has “balanced competing resource values” to insure its actions are in the public interest as defined by FLPMA. Id. at 101; see also 43 U.S.C. § 1702(c) (definition of “multiple use”). Among the multiple use values the BLM must manage for are TES, aquatic, and riparian values or characteristics. By failing to adequately consider the impacts of the proposed action on TES, riparian, and aquatic values, the BLM’s Decision violates FLPMA’s multiple use mandate.

This case is analogous to a recent District of Northern California case. In Center for Biological Diversity v. BLM, plaintiffs challenged a management plan for failure to comply with FLPMA by failing to collect and maintain current inventory data on the public lands, among other claims. There was “extensive evidence in the record indicating the existence of numerous other species found at the [project area], [but] the BLM nevertheless approved the [Recreation Area Management Plan] which does not take these species into consideration.” 422 F.Supp.2d 1115, 1167 (N.D.Cal., 2006). The court concluded “it was arbitrary and capricious to approve the [Plan] with such obviously outdated and inadequate inventories.” Id. at 1168. As detailed above, the Decision here likewise relied on outdated and inaccurate information on the wilderness resource, since the BLM neither collected or updated relevant information on the wilderness resource or analyzed ONDA’s wilderness inventory information. This renders the Decision arbitrary, capricious, and not in accordance with FLPMA, 43 U.S.C. §§ 1711(a), 1732(a), 1732(b).

II. BLM’s Failure to Consider Cumulative Impacts and Effects Violates NEPA, FLPMA, ESA, and MSA.

A. BLM fails to consider the cumulative effects of likely state and Federal actions for the recovery of ESA-listed salmonids and restoration of their historic critical habitats including the year-round reconnect of Goldburg Creek to the Pahsimeroi River and

restoration of its instream flows and natural hydrograph. Recent dramatic examples from the Pahsimeroi River include the 2008 reconnect of Patterson Creek to the Pahsimeroi River and the subsequent colonization by breeding Snake River spring/summer Chinook salmon with the dramatic result of 69 redds in Patterson Creek, which compares to two redds the previous year and a total of 73 redds for the entire Pahsimeroi River in 2006. Restoration partnerships associated with the mitigation of habitat and population damage revolving around the Federal Columbia River Power System ("FCRPS") including The Nature Conservancy ("TNC"), Upper Salmon Basin Watershed Project ("USBWP"), Custer Soil and Water Conservation District ("CSWCD"), Idaho Department of Fish and Game ("IDFG"), Idaho Department of Water Resources ("IDWR"), NMFS, FWS, BPA, BOR, and Native American Tribes. These fisheries restoration partners are very active in the Pahsimeroi River Basin and with the dramatic success at Patterson Creek, are likely to continue and to increase their ecological recovery efforts in the basin in the future. The requirement to consider cumulative effects including other Federal Actions, state, and private is part of the ESA regulations and the ESA Consultation Handbook, which the BLM, NMFS, and FWS should adhere to.

B. BLM violates FLMPA by failing to consider Cumulative Impacts of ongoing irrigation with the proposed system and with historic and current ongoing livestock grazing on the upstream Goldburg Allotment and the Upper Pahsimeroi Allotment, which includes the Action Area or Project site. Adverse effects from livestock grazing in and along Goldburg Creek on the upstream Goldburg Allotment negatively affect the Project site or Action Area as well as the Upper Pahsimeroi Allotment. The BLM in their EA merely mention the permitted grazing but do not fully discuss and analyze the predicted adverse effects to fish, wildlife, and their habitats with the ongoing livestock effects.

It further violates FLPMA by permitting a project that will move the permitted livestock grazing on at least the Upper Pahsimeroi Allotment further away from meeting the Idaho Standards for Rangeland Health ("SRH") and Guidelines for Livestock Grazing Management. In particular for the SRH, Standard 8 (TES), Standard 2 (Riparian Areas and Wetlands), Standard 3(Stream Channel/Floodplain), Standard 4 (Native Plant Communities), and Standard 7 (Water Quality). In the EA, the BLM clearly describes the adverse effects that will produce a downward trend in these standards instead of improving them or maintaining them as required.

C. BLM violates ESA in its Section 7 Consultation by failing to consider historic and ongoing grazing management and its potential for adverse modification and/or adverse effects on stream reaches and riparian areas that are designated and proposed designated critical habitats as well as adverse effects and potentially jeopardizing ESA-listed species such as the Columbia Basin bull trout DPS in the Pahsimeroi River Sub-Unit of the Salmon River Basin Critical Habitat Unit (Unit #27). In its consultations with the FWS and NMFS, the BLM could have considered the effects and possible mitigating modification to ongoing grazing on the Upper Pahsimeroi and Goldburg Allotments as part of the proposed Federal Action, or at least accounted for the adverse effects of livestock grazing as part of the Environmental Baseline, before evaluating how much "free-board" exists for the proposed Project without reaching the Jeopardy and/or

Adverse Modification levels of effects. Merely mentioning the two allotments in the EA (at 10) without including their effects into the analyses does not meet the intent or requirements of ESA consultation, nor NEPA.

Also, the ongoing and historic grazing on both allotments are interrelated and interdependent as are their adverse effects with the proposed Project, which delivers irrigation water to Whitworth Ranches for the production of livestock forage and irrigating private pasturelands, one part of the entire livestock production business by the applicant, Judd Whitworth.

D. Likewise, BLM fails under its MSA responsibilities to Chinook salmon and their Essential Fish Habitat (“EFH”) in and along Goldburg Creek.

III. BLM’s Failure to Conform with the Challis Resource Management Plan and Comply with the RMP’s Conditions for Granting New Rights-Of-Way for Water Diversions from Public Lands.

BLM fails to meet any of the four requirements (all have to be met – note the use of the word “and” for each condition in the language of the RMP) for granting new ROWs for water diversions, as listed by them in their EA (at 5) as taken from the Challis Resource Management Plan (“RMP”). (USDI-BLM 1999, 35 Goal 3, #8).

“New rights-of-way for water to be diverted from public land by a private claimant would only be granted if:

- (a) the diversion facility is controllable, measurable, and/or designed to divert, at most, the amount of water permitted in the water right, and
- (b) the diversion would have no significant impact on existing resource values, and
- (c) granting the right-of-way would not adversely affect achievement of riparian management or aquatic objectives, and
- (d) when appropriate, the diversion facility is designed and constructed in accordance with the latest fish screening and bypass criteria.”

In regards to Criterion (a), the requirement of diverting the amount permitted by the water right is not met. In fact, because the original POD will still be in place and operational, the BLM cannot guarantee that the applicant will not take twice as much water from Goldburg Creek as he is entitled to by simultaneously using both PODs for his irrigation system. The BLM does not indicate that they will be regularly inspecting the PODs and the quantity of water diverted throughout the irrigation seasons. This criterion is not met and therefore the proposed ROW does not conform to the RMP.

In regard to Criterion (b), the requirement of having no significant impact on existing resource values, the BLM in their EA clearly admits to risks of fish impingement, obstructed fish passage, elevated water temperatures, increased sediment loads including fine sediments, damaged riparian vegetation, increased heavy truck and

equipment traffic, decreased flows and even complete dewatering of 1.1 miles of Goldburg Creek, loss of aquatic cover habitat and decreased water depths, regular disturbance of the stream bed, destruction of the stream bank, destruction of sage-steppe vegetation and its dependent wildlife species, increased problems with noxious weeds and other invasive plant species, and others listed in this and WWP's other documents with this appeal that are associated with the construction, operations, and regular maintenance/repairs of the Goldburg Creek Irrigation Project. There will also be significant impacts to visual resources with the installation and operations of an instream rock weir, a Gooby trash rack, an open earthen ditch, an earthen berm, a buried pipeline, destruction of natural stream bank and replacement with stone riprap, destruction of riparian and upland vegetation, and significantly increased traffic on an existing two-track road. Clearly this criterion is not met, and therefore the proposed ROW does not conform to the RMP.

In regards to the third criterion from the Challis RMP, the BLM readily admits in the EA (at 15-19, 22, 23, 24-25) that this Project will not only not help it meet its riparian management and aquatic objectives, it will actually do the reverse and move further away from the legally mandated management objectives. Once again, the failure to meet Criterion (c) should have been enough for the BLM to deny the Applicant's request for a 30-year renewable ROW and installation, maintenance and operations of his proposed irrigation system across BLM-managed public lands.

The final or fourth criterion, Criterion (d) is also not met by the proposed Project. Instead of using the latest and best fish screening and bypass criteria as approved, designed, and scientifically evaluated by the NMFS, the BLM is proposing to allow installation of a substandard Gooby bubbler trash rack that even in the EA (at 18-19), the BLM clearly admits may harm or kill fish, including threatened bull trout and sensitive Westslope cutthroat trout, does not meet NMFS fish screening criteria, does not meet NMFS escape criterion, does not meet NMFS fish passage criteria for all life stages of salmonids, and may eventually have to be replaced with a more suitable fish screen. The BLM even describe how a trash rack as proposed was tested by the FWS in Abernathy Fish Technological Center and how it failed miserably. Again, with the failure to meet Criterion (d), the BLM, in conformation with their Challis RMP, should have denied the permit application as submitted by the Applicant, but they did not.

IV. BLM Violates FLPMA by Not Meeting the Conditions of ROWs.

Under FLPMA, ROWs require the following:

1. SEC. 505. [43 U.S.C. 1765] Each right-of-way shall contain-
(a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; . . .
2. The proposed ROW does not minimize damage to fish habitat, and in fact, according to the BLM in the EA (at 15-19), will actually significantly damage fish

habitat in and around Goldburg Creek, which includes its Riparian Habitat Conservation Area ("RHCA").

3. In violation of FLPMA, the final decision to issue the 30-year, renewable ROW with all described improvements, operations, and maintenance violated the "Undue Degradation Mandate" of FLPMA. BLM has **violated FLPMA by allowing undue degradation and purposeful destruction of soils, vegetation, and habitats** for wintering big game, pygmy rabbits, sage-grouse, Columbia spotted frogs, Westslope cutthroat trout, bull trout, and other important and sensitive animal and plant species described here and in the EA.

The Decision also violates the BLM's Sensitive Species Policy for sage-grouse, pygmy rabbits, bull trout, and Westslope cutthroat trout by harming species of concern as well as their habitats during the installation, operations, and maintenance and repairs of this unnecessary irrigation project that is not in the Public Interest.

As the lead Federal Action Agency, the BLM assumes the responsibilities of ensuring that the legal and regulatory mandates of the NRCS is also met, since they did not comply with ESA and NEPA for this project. The Project as proposed is contrary to the legislative intent and programmatic priorities of the EQIP program, managed by NRCS under the National Farm Bill. Under EQIP and the Farm Bill, while aide is given to private livestock and crop producers, like the Applicant, it is not at the cost of threatened and endangered species and their protected habitats, such as bull trout, Snake River spring/summer Chinook salmon, and Snake River Basin steelhead or those proposed for ESA-protections such as sage-grouse, pygmy rabbits, Columbia spotted frogs, and Westslope cutthroat trout. The purpose of the EQIP program is to promote at-risk species habitat conservation, and while energy conservation is a recent addition to the national farm assistance program, it is not supposed to be at the cost of at-risk species. WWP believes the NRCS was misled by information provided by the applicant on how his proposed project would benefit bull trout and other aquatic and riparian species and not the damage projected by WWP and the BLM in its own EA.

WWP asks the Office of Hearings and Appeals ("OHA") to remand the Decision for the issuance of the 30-year, renewable ROW for the Goldburg Creek diversion project back to the BLM and order them to prepare comprehensive NEPA, ESA, and CWA documentation that adequately and properly address the above-described issues and those brought forward in this appeal and this Statement of Reasons, and which comply with all relevant statutory and regulatory requirements.

PETITION FOR STAY

Pursuant to 43 C.F.R. §§ 4.21, 2801.10, 4.413, and 4.471, WWP previously petitioned for a stay of the challenged decision. WWP respectfully requests the IBLA to stay this contested decision until the appeal is resolved based on the requirements of a stay previously submitted and the above Statement of Reasons.

As previously stated, the Public Interest favors a Stay until the appeal is resolved.

CONCLUSION

WWP believes the granting of a Stay in this matter serves the interest of the health of ecosystems, native biota and the public on Idaho's public wildlands and prevents unnecessary, irreversible, and irretrievable losses to ESA-listed fish, Designated Critical Habitat, Proposed Designated Critical Habitat, public wildlands, Goldburg Creek, and other valuable public natural resources. Therefore, WWP respectfully requests the IBLA to issue an order granting WWP's Petition for Stay.

WWP respectfully requests the IBLA to also issue an order granting WWP's Appeal.

Respectfully,
s/ Larry Zuckerman

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Central Idaho Director
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served true and accurate copies of Appellant Western Watersheds Project's foregoing Statement of Facts and Statement of Reasons on the parties herein, this 10th day of June, 2010, to:

Interior Board of Land Appeals
Office of Hearings and Appeals
801 North Quincy St., Suite 300
Arlington, VA 22203-1905

[VIA FAX AND CERT. MAIL,
RETURN RECEIPT REQUESTED]

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Challis Field Office
Bureau of Land Management
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Challis, Idaho 83226

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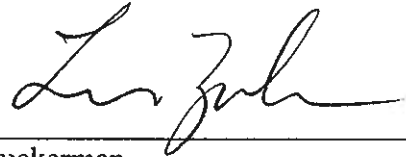
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Russ Holder, Assistant Field Supervisor
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[VIA CERT. MAIL,
RETURN RECEIPT REQUESTED]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 10th day of June, 2010.



Larry Zuckerman
Western Watersheds Project
Salmon, Idaho