



**Western
Watersheds
Project**

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Working to protect and restore Western watersheds

25 May 2010
VIA FAX & Certified Mail

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Interior Board of Land Appeals
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Arlington, Virginia 22203

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Dave Rosenkrance, Field Manager (Email also)
Challis Field Office
Challis Resource Management Area
U.S. Department of the Interior
Bureau of Land Management
1151 Blue Mountain Road
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Appellant: Western Watersheds Project

Re: Notice of Appeal, Petition for Stay, and Statement of Standing 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)

**NOTICE OF APPEAL, PETITION FOR STAY, AND STATEMENT OF
STANDING**

NOTICE OF APPEAL

Pursuant to 43 C.F.R. Part 4 Appellant Western Watersheds Project ("WWP")
hereby appeals the Record Of Decision ("ROD"), Environmental Assessment ("EA")
(EA #: ID-330-2009-EA-3584) and Finding Of No Significant Impacts ("FONSI") for the

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Judd Whitworth – Goldburg Creek Diversion Project by the Challis Field Manager–BLM that grants a 30-year, renewable Right-Of-Way (“ROW”) (IDI-034604) to Judd A. Whitworth of May, Idaho (mailing address in Ellis, Idaho). The ROW is for a new point-of-diversion (“POD”), open conveyance ditch, a buried irrigation pipeline, and an earthen berm. WWP appeals this decision and all associated documents and actions. This appeal is pursuant to all applicable authority, including Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701-1782, and the Bureau of Land Management’s (“BLM’s”) implementing regulations.

The ROD and FONSI are dated April 21, 2010. WWP received them and the EA on April 26, 2010.

The applicant for the irrigation project and BLM ROW, Judd A. Whitworth, had previously applied for an Idaho Department of Water Resources (“IDWR”) water rights transfer (Application #7299) for an additional Point-Of-Diversion (“POD”) upstream of his existing POD in and along Goldburg Creek for his existing water right (IDWR 73-156) (advertised in the *Challis Messenger* on February 21, 2008).

On March 3, 2008, WWP protested this water rights transfer based on the fact that it is contrary to local public interest since only one private interest will obtain any benefits from this project that destroys public lands and their Public Trust natural resource values. IDWR during a December 9, 2008, pre-hearing conference meeting in Challis, Idaho, decided to temporarily suspend the Protest process and will only resume it, if or when the BLM issues the ROW challenged here.

STATEMENT OF STANDING

Western Watersheds Project (“WWP”) is a non-profit membership organization based in Clayton, Idaho, with offices in Boise, Hailey, McCall, and Salmon, Idaho, and in Wyoming, Utah, Arizona, Montana, and California. WWP is dedicated to protecting and conserving the public lands and natural resources of watersheds in the American West.

WWP, as an organization and behalf of its 1,400 members, is concerned with and is active in seeking to protect and improve the wildlife, riparian areas, water quality, fisheries, and other natural resources and ecological values of watersheds throughout the West, including the Goldburg Creek and Pahsimeroi River Watersheds of Central Idaho. WWP is also active in monitoring ecological conditions in the Challis Resource Management Area of the Challis Field Office in the Idaho Falls District of the BLM; in reviewing and commenting upon agency grazing, rights-of-way and other resource decisions, including those at issue here and nearby livestock grazing allotments including the Goldburg Allotment and the Upper Pahsimeroi Allotment, which includes the proposed additional POD, trash rack (“Gooby bubbler” flat-plate design), irrigation conveyance open ditch and pipeline, instream rock weir, earthen berm, and BLM ROWs in and along Goldburg Creek; and in publicizing the adverse ecological effects of irrigation, grazing, and other land management actions in this region.

WWP also participates in the listing process under the Endangered Species Act ("ESA") and petitions the Federal government for species it believes need legal protection based on the best available information including its own monitoring data. WWP has petitioned for listing under ESA the pygmy rabbit and the sage-grouse, which have crucial sagebrush habitat within the Goldburg Creek Watershed. Both sagebrush obligate vertebrate species were under Federal Court-ordered study for listing and legal protection as the result of WWP legal actions and are considered by the BLM as Sensitive Species. Most recently, the USFWS has determined that the sage-grouse is warranted for listing under ESA and the BLM has issued Instructional Memoranda pertaining to sage-grouse conservation and habitat protection. According to the Upper Pahsimeroi-Goldburg Allotment EA (at 38-39, 59), pygmy rabbits and sage-grouse are found within the Upper Pahsimeroi Allotment and the adjacent Goldburg Allotment, both of which contain reaches of Goldburg Creek.

Appellant brings this Appeal on its own behalf and on behalf of its members and staff, many of whom regularly enjoy and intend to continue to enjoy the public lands in the Idaho Falls District's Challis Field Office and the Challis Resource Management Area, including Goldburg Creek (project area), the Upper Pahsimeroi Allotment (includes the project area), the Goldburg Allotment (includes upstream reaches of Goldburg Creek and its tributary Big Gulch) and downstream reaches of Goldburg Creek and the mainstem Pahsimeroi River, and their tributaries, for educational, recreational, spiritual, and scientific activities including wildlife watching and angling.

The decision would harm the Appellant and its members by dewatering Goldburg Creek, degrading the wildlife habitat and dependent biota of the project area (and upstream and downstream reaches) in Custer County, leading to degraded experiences by the Appellant and its members on return trips to Goldburg Creek, the Upper Pahsimeroi Allotment, the adjacent Goldburg Allotment, and the Pahsimeroi River.

Appellant's members will also be procedurally harmed by BLM's failure to follow the procedures required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and its implementing regulations, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1782, and its implementing regulations, the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and its implementing regulations, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, and its implementing regulations, and the Data Quality Act ("DQA"), 44 U.S.C. §§ 3504(d)(1) and 3516, and its implementing regulations. WWP asks BLM to withdraw the Decision to issue the 30-year, renewable ROW for Whitworth's irrigation diversion and conveyance project and instead, to prepare NEPA and ESA documentation that adequately and properly address the above-described issues and those brought forward in this appeal and its forthcoming Statement of Reasons.

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 its forthcoming 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 hereby petitions for a stay of the challenged decision. WWP respectfully requests the IBLA to stay this contested decision until the appeal is resolved.

I. The Likelihood of Irreparable Harm Favors Issuance of a Stay.

This project will cause irreparable harm because it will dewater a 1.1-mile reach of stream that is Snake River spring/summer Chinook salmon designated critical habitat and proposed for designation as bull trout critical habitat. It is also occupied habitat for bull trout and Westslope cutthroat trout, and historically occupied habitat for Snake River Basin steelhead and Snake River spring/summer Chinook salmon. Other trout species also occupy the reach that will be dewatered, and upstream of the dewatered reach, there is occupied habitat in Goldburg Creek, and its tributary, Big Gulch, for bull trout and Westslope cutthroat trout. Such harm to endangered species is one of the most serious types of irreparable harm.

By employing a trash rack instead of a National Marine Fisheries Service ("NMFS") criteria fish screen for juvenile and adult salmonids, the new POD and diversion works may cause take, including lethal take, of ESA-listed bull trout and Westslope cutthroat trout, a Sensitive Species.

The project may also cause irreparable harm because pygmy rabbit (Sensitive Species) burrows are at risk of collapse by the use of heavy equipment and trucks for the installation, operation, and annual (spring and winter) maintenance of the diversion project. Pygmy rabbits and sage-grouse, and other Sensitive Species, will be disturbed during all phases of the diversion project for the 30-year (renewable) life of the project.

The project will do the following:

1. Dewater 1.1 miles of Goldburg Creek.
2. Add an additional POD to an existing private irrigation system that is operational, downstream of BLM-managed Public Lands, without eliminating the existing POD.
3. Destroy 15 feet of natural streambank of Goldburg Creek on BLM-managed Public Lands and replace it with riprap and diversion works (POD, headgate, open conveyance ditch, Gooby bubbler trash rack, earthen berm).
4. Construct an instream rock weir made of native Goldburg Creek stream materials. The weir will be annually built and dismantled, and maintained in the stream bottom.
5. Construct an earthen berm to protect the POD, headgate, trash rack, and open conveyance ditch.

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6. Construct a buried irrigation water conveyance pipeline (~1 mile) across BLM-managed Public Lands.

This will cause the following impacts on the stream:

1. During the construction phase of the diversion project, sediment loads will be increased in Goldburg Creek, adding to existing problems associated with livestock grazing. The sediment loads are associated with removal of natural stream bank; removal of native riparian vegetation; construction of an earthen berm; installation of an additional POD, trash rack, headgate, and open conveyance ditch; construction of a buried conveyance pipeline; annual earthen plug installation and removal at the confluence of the conveyance ditch and the disturbance of upland and riparian vegetation and soils during installation, operations, and maintenance of the diversion system; increased heavy equipment and truck traffic; and livestock grazing effects accentuated with ground, vegetation, and stream bank disturbances.

2. With increased sediment loads, there will be an accompanying decrease in flushing flows with the dewatering of Goldburg Creek for a 1.1-mile reach. Will result in less pool cover; less predator avoidance habitat for fishes; loss of nursery, food production, and juvenile rearing habitats; increased fine sediment embeddedness in stream gravels; and loss of support of designated water uses for coldwater biota and salmonid spawning.

3. Increased water temperatures associated with decreased shade because of riparian vegetation removal and decreased stream depths with dewatering. This is particularly significant for bull trout, which require colder, clearer, and cleaner stream waters than other salmonids.

4. Increased fecal coliform bacteria and other water-borne pathogens associated with domestic livestock grazing with a significant decrease in dilution with dewatering of 1.1 miles of Goldburg Creek. Also true for other pollutants associated with livestock grazing such as nitrates, phosphates, and ammonia.

5. Further genetic isolation of threatened bull trout and imperiled native Westslope cutthroat trout populations in upstream reaches of Goldburg Creek and its tributary, Big Gulch, with dewatering of 1.1 miles of Goldburg Creek.

6. Increased risk of extinction of local populations of bull trout and Westslope cutthroat trout with creation of fish barrier with 1.1-mile dewatered reach.

7. Declines in riparian and aquatic production of invertebrate prey for Goldburg Creek salmonids with a subsequent decline in fish production, survival, and growth.

8. Significant declines in bank stability and riparian vegetation health, diversity, and ecological function with the dewatering of 1.1 miles of Goldburg Creek.

9. Potential for twice as much water from Goldburg Creek being diverted at any one time since the existing POD for the private irrigation system will still be functional.

10. Increased likelihood of blooms of noxious algal blooms and mats, odors, water discoloration, and alterations in water taste in violation of the narrative water quality standards under the CWA and the Idaho State Surface Water Quality Standards.

11. Increased likelihood of invasion and spread of noxious weeds to the detriment of native riparian and upland plants and to the water quality and channel stability of Goldburg Creek.

II. The Relative Harm to the Parties Favors Issuance of a Stay.

WWP and its members, who actively recreate on the public lands on and surrounding the project area, will be harmed if this final decision is permitted to proceed. Implementation of this decision will result in a violation of Federal laws and regulations, as well as the loss of the ability of WWP and its members to experience the land in question without viewing and experiencing ongoing degradation of important public resources and values. If this flawed decision is implemented, the losses to the public will be significant and may be long-term and/or irreversible. This runs directly counter to FLPMA's requirement that the BLM manage the public lands in a manner **"that will best meet the present and future needs of the American people" and "without permanent impairment of the productivity of the land and the quality of the environment."** 43 U.S.C. § 1702(c). (emphasis added). If the BLM is permitted to proceed with its unlawful final decision, this would allow the agency to avoid its duty to **"prevent unnecessary or undue degradation of the lands."** Id. § 1732(b).

Most significantly, the decision seeks to implement projects that will degrade the fish and wildlife populations including several BLM Sensitive Species, stream and riparian habitats, water quality, and other values of the project area (see section I above), and which are not necessary and will result in disturbance to documented Public Trust natural resource values, further fragmentation of sage-steppe wildlife habitat, invasion and spread of noxious weeds to the detriment of native plant species, causing further impairment to water quality, and potentially destroy critical nitrogen-fixing microbiotic crusts. Losses of soil and crusts, native vegetation, and native wildlife habitat, as well as degradation to the Public Trust natural resources, are irreparable. WWP's members were also procedurally harmed by the BLM's failure to follow the procedures required by the National Environmental Policy Act. The result of issuance of a stay of this decision will be the prevention of direct harm to WWP, its members and their interests because of the violation of Federal statutory and regulatory provisions on which WWP relies.

Conversely, the relative harm to the BLM and the applicant, should the Office of Hearings and Appeals ("OHA") grant the requested stay, is minimal to nonexistent. There is no immediate or emergency need for the BLM to grant the Goldberg Creek Diversion ROWs. In fact, there is actually no need for the BLM to grant the Goldberg Creek Diversion ROWs since the existing POD, water conveyance, and private irrigation system are operative.

The only possible reason to proceed with the project prior to a determination of its legality would be to preserve the grantee's financial interests. This interest does not rise above the public's interest in ensuring that decisions comply with Federal environmental laws. At most, a stay will require the agency to hold off on granting the ROW until this appeal can proceed on the merits and potentially until the agency prepares a fully-informed analysis and decision as required by NEPA—and one that will avoid causing **"unnecessary or undue degradation,"** as required by FLPMA.

III. Appellant's Likelihood of Success on the Merits Favors Issuance of a Stay.

WWP will establish in its forthcoming Statement of Reasons that it likely will succeed on the merits of this appeal based on the BLM's:

(1) under NEPA, refusal to consider in the decision direct and cumulative impacts of this project in conjunction with livestock grazing; refusal to consider a full-range of alternatives and to provide the required "hard look", including denying the request because it is against the Public Interest and violates the Public Trust; and improper decision not to prepare an EIS for a project that may significantly affect the quality of the human environment;;

(2) under ESA, refusal to consider in the decision cumulative effects of public and private livestock grazing and diversion of Goldburg Creek water for irrigating pastures and crops used to feed livestock on listed fish species; allowance for adverse modification of designated critical habitats and adverse effects to Essential Fish Habitat in Goldburg Creek and within its Riparian Habitat Conservation Area ("RHCA"); allowance of a trash rack as a substandard fish screen that is likely to allow Section 9 ESA take of listed salmonids that is not legally exempt and might result in lethal take of ESA-listed salmonids;

(3) under FLPMA, ignoring the requirements of FLPMA and the Challis RMP for issuing new ROWs for water diversions by private parties from BLM-managed Public Lands; refusal to follow the requirements of FLPMA, the Challis RMP, the CWA, and the Idaho State Surface Water Standards by allowing further degradation of streams that are listed as impaired on Idaho's 303(d) list and that have TMDLs prescribed; refusal to comply with FLPMA and its own Sensitive Species Policy by allowing the adverse modification of proposed designated critical habitat for bull trout while the FWS is considering it; failure to protect the Public Interest and Public Trust natural resources by allowing the loss of recreation, scientific, wildlife viewing, angling, and other public opportunities on BLM-managed lands and with the weak promise (no guarantees) of some water replacement in Goldburg Creek from possible water savings associated with increased irrigation diversion, conveyance, and application efficiencies on private agricultural lands with no public access in an area that does not and will not support bull trout and other salmonids and that is not dedicated to supporting wildlife, sensitive species, good water quality, outdoor recreation, scenic, and other values; and failure to ensure that with two PODs that the water user will not take twice as much water from Goldburg Creek as diverted currently one mile downstream from the proposed POD.

IV. The Public Interest Favors Issuance of a Stay.

Finally, the public interest favors granting the requested stay. The project area will be degraded irreparably if the BLM is allowed to implement its final decision. This is not in the public interest. Rather, placing the public interest above private financial interests, and ensuring fully informed, balanced multiple-use decision-making in compliance with NEPA, FLPMA and other federal laws, is in the best interest of the

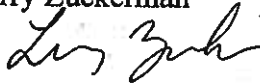
public. In addition, the public interest as expressed by Congress in NEPA and FLPMA will be harmed if the BLM is permitted to act in contravention of federal laws and regulations intended to protect public resources. FLPMA clearly recognizes the national interest in preserving and protecting wildlife and the wilderness resource for future generations. See 43 U.S.C. § 1701(2), (8). See also, Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) (agency violation of statute "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law"); Sierra Club v. Lujan, 716 F. Supp. 1289, 1293. (D. Ariz., 1989) (where environmental laws have been violated and harm to environment is imminent, "[t]he public interest is obvious" and an injunction should issue); Patriot v. U.S. Dep't of Housing and Urban Dev., 963 F.Supp. 1, 6 (D.D.C. 1997) ("the public interest is best served by having federal agencies comply with the requirements of federal law").

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. Therefore, WWP respectfully requests the IBLA to issue an order granting WWP's Petition for Stay.

Respectfully,

s/ Larry Zuckerman



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served true and accurate copies of Appellant Western Watersheds Project's foregoing Notice of Appeal, Statement of Standing, and Petition for Stay on the parties herein, this 26th day of May, 2010, to:

Interior Board of Land Appeals
Office of Hearings and Appeals
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Arlington, VA 22203-1905

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

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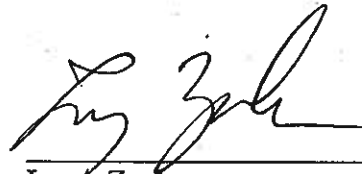
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Judd A. Whitworth
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[VIA CERT. MAIL,
RETURN RECEIPT REQUESTED]

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

DATED this 26th day of May, 2010.



Larry Zuckerman
Western Watersheds Project
Salmon, Idaho

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