

**71 (AEC) Well Replacement EA**  
**Protest from Ken Cole, Western Watershed Projects**  
**June 9, 2016**

**Protest Point 1: BLM must analyze these projects in the context of the upcoming Group 2—Inside Desert/Diamond A Subregion allotment permit renewal process—and not before.**

As a condition of the 2005 Stipulated Settlement Agreement in the case of *Western Watersheds Project v. Ellis et al.* (Case No. CV-04-181-S-BLW) (D. Idaho), BLM committed to a process of renewing livestock grazing permits in the Jarbidge Field Office. Since the Group 2--Inside Desert/Diamond A Subregion allotment permit renewal process is a foreseeable part of fully processing the permits, and BLM committed to prioritize the permit renewal as a condition of settlement, BLM cannot analyze and implement these projects outside of that process.

**BLM Response:**

The BLM developed a schedule to consider term grazing permit renewals throughout the Jarbidge Field Office, consistent with the provisions of the 2005 Stipulated Settlement Agreement. Allotments in the JFO have been split into 4 groups based on topography and complexity of resource issues, and permits in each group will be analyzed in turn. The process has begun through data collection, the authoring of rangeland health assessments for Group 1, data collection for Group 2, and public scoping for all term grazing permit renewals in the JFO. The NEPA process for Group 1 was initiated in spring 2016. The 71 Desert Allotment falls within Group 2, for which the NEPA process is not anticipated to begin until summer/fall, 2017.

The 71 (AEC) Well Replacement project does not alter the status quo, which permits up to 3,648 AUMs in the allotment. The well replacement project has independent utility from the grazing permit renewal process. The well replacement provides a reliable water source for livestock and wildlife, consistent with the BLM's water right, and would do so regardless of whatever action that might be taken during the permit renewal process.

Although BLM has no documented instances where the well and associated facilities have failed, the permittee has attempted to maintain the existing well on numerous occasions, as described in the final EA. This project was originally proposed by the permittee to the BLM in 2014 and again in 2015 because the problems associated with the existing well were becoming more frequent and significant.

**Protest Point 2: Decisions to approve livestock fencing and water developments are “connected” to decisions to allow livestock grazing on the allotment.**

Under NEPA, “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 C.F.R. § 1502.4(a). This includes actions that are “connected.” *Id.* at § 1508.25; *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 998–99 (9th Cir. 2004). Actions are connected if they “automatically trigger other actions which may require environmental impact statements; cannot or will not proceed unless other actions are taken previously or simultaneously; or are interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* at § 1508.25(a)(1)(i–iii).

**BLM Response:**

As defined in the 2008 NEPA Handbook under Section 6.5.2.1, “Connected actions are those actions that are ‘closely related’ and ‘should be discussed’ in the same NEPA document (40 CFR 1508.25 (a)(1)). Actions are connected if they automatically trigger other actions that may require an EIS; cannot or will not proceed unless other actions are taken previously or simultaneously; or if the actions are interdependent parts of a larger action and depend upon the larger action for their justification (40 CFR 1508.25 (a)(i, ii, iii)). Connected actions are limited to actions that are currently proposed (ripe for decision). Actions that are not yet proposed are not connected actions, but may need to be analyzed in cumulative effects analysis if they are reasonably foreseeable. If the connected action is also a proposed BLM action, we *recommend* (emphasis added) that you include both actions as aspects of a broader ‘proposal’ (40 CFR 1508.23), analyzed in a single NEPA document.”

Although the proposed action occurs within an allotment that has been publicly scoped for term grazing permit renewal, the JFO has prioritized the grazing allotments by groups and this allotment falls within Group 2. Monitoring data has been collected for Group 2 and rangeland health assessments are scheduled to be written during the summer/fall of 2016. However, NEPA for Group 2 is not anticipated to begin until summer/fall of 2017, so therefore should not be considered “ripe for decision.”

The proposed action is intended to facilitate the current permittee’s ability to fully utilize their existing term grazing permit issued by the BLM, validated by the 2005 SSA and further reinforced by the 2011 Memorandum Decision and Order. In addition, failure to implement the proposed action may also jeopardize the BLM’s ability to fully utilize the existing water right and maintain the requirement of beneficial use as defined by the State of Idaho Department of Water Resources, which states “Beneficial uses include domestic use, irrigation, stock-watering, manufacturing, mining, hydropower, municipal, aquaculture, recreation, as well as fish and wildlife. The amount of the water right is the amount of water put to beneficial use. Because of the beneficial use requirement, a water right (or a portion of a water right) might be lost if it is not used for a continuous five-year period.”

**Protest Point 3: Approving livestock developments prior to permit renewal will prejudice or predetermine the outcome of the permit renewal EA.**

The approval and implementation of these projects now would unduly influence the outcome of the Group 2--Inside Desert/Diamond A Subregion allotment permit renewal process. Until it issues a decision, an agency shall not take action concerning a proposal that “would limit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a)(2); *see also* § 1502.2(e) (“[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision”). By implementing these and other livestock projects, BLM would be more likely to base its final grazing decisions around the new water sources, enclosure areas, pipelines, and fencing. Thus, its analysis of carrying capacity, timing, rotations, and other aspects of grazing will take the new facilities into account, and likely result in authorization of inflated grazing levels. BLM’s objective analysis of stocking rate, season of use, use of riders, and impacts to sensitive species will be skewed. BLM will be required to objectively analyze a reduced- and no-grazing alternative before renewing permits. *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1150

(9th Cir. 2013). But its objectivity in doing so is very likely to be compromised by the host of newly approved grazing facilities. Thus, BLM's approval of these fencing and water projects is a prior commitment of resources that will predetermine or prejudice the outcome of the permit renewal EA.

**BLM Response:**

The action authorized by the decision is the replacement of a malfunctioning well. It will not result in additional range facilities, nor will it allow other developments such as fences, pipes or troughs. It essentially maintains the status quo—providing a water source for livestock and livestock that has existed for many years.

Many factors determine whether or under what circumstances the BLM will permit livestock grazing within the allotment, and water availability is only one of them. It may be that when the time comes for BLM to consider applications for renewal of grazing permits on the 71 Allotment, BLM's vegetation management objectives, or its commitment to improve habitat for sage-grouse may outweigh the benefits of livestock grazing.

Furthermore, the BLM acquired stockwater rights in 1983, a property interest that the BLM would be interested in maintaining for wildlife in any case. Replacing a malfunctioning well will avoid degradation to range resources by restoring reliable water sources. Therefore, replacing the well will not limit the BLM's consideration of either reduced grazing or no grazing in its NEPA analysis for grazing permit renewal for the 71 Allotment.

**Protest Point 4: BLM is segmenting clearly related projects that may have cumulatively significant effects.**

This project is part of the infrastructure planned for the 71 Desert allotment and is being analyzed before—and entirely apart from—the permit renewal process, as described above. Under NEPA, an agency must analyze multiple actions together in a single environmental analysis if they are “cumulative actions.” 40 C.F.R. § 1508.25. Cumulative actions are those “which when viewed with other proposed actions have cumulatively significant impacts.” *Id.* at § 1508.25(a)(2). The “purpose of this requirement is to prevent an agency from dividing a project into multiple actions, each of which has an insignificant environmental impact, but which collectively have a substantial impact.” *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). As the NEPA regulations state, “[s]ignificance cannot be avoided by . . . breaking [an action] into small component parts. *Id.* at § 1508.27(7).

Here, there is a strong appearance that BLM is segmenting clearly related projects into component parts. Cumulatively, these various projects may have significant effects on sagegrouse and drought-stressed resources. BLM will therefore violate NEPA if it does not analyze them all together in the same NEPA document.

**BLM Response:**

The cumulative effects analysis was completed by inventorying all past, present and reasonably foreseeable future actions for each of the applicable resources potentially impacted by the proposed action. The preliminary and final EA contained analyses of the affected environment,

environmental effects and cumulative effects. The cumulative effects and geographic boundaries for the cumulative effects analysis area (CEAA) are described on page 14 and illustrated by Map 2 on page 21 of the final EA.

Regarding the portion of the protest point that states “This project is part of the infrastructure planned for the 71 Desert allotment...” the proposed action is to replace an already existing rangeland improvement infrastructure that is failing, not to implement a new rangeland improvement project. The well replacement is intended to facilitate current authorized livestock grazing. The well replacement and conditions in the allotment will be analyzed in the rangeland health assessment and determination that will precede the Group 2 NEPA document. Furthermore, the conditions of the allotment as a whole will be included in the affected environment section of the Group 2 NEPA document. Thus, maintenance of the status quo ante does not result in improper segmentation.

Regarding the assertion that “...these various projects may have significant effects on sagegrouse...”, the proposed action is located within a previously disturbed area that contains no sagebrush, is located in “Important” habitat management areas as defined by the Greater Sage-Grouse Approved Resource Management Plan Amendments for the Great Basin Region, 2015 (ARMPA) and is 4.5 miles from the closest lek. The nearest area of sagebrush habitat is 0.5 miles east of the project area and is 31 acres in size. Other areas of sagebrush habitat are at least 1 mile away from the project area. Cumulative impact analysis determined that the proposed action would not have impacts to Greater Sage-Grouse.