

U.S. DISTRICT COURT
DISTRICT OF COLORADO

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GREVILLE J. LANGHAM
CLERK

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF COLORADO

04 - F - 2409 (CS)

Civil Action No.

CENTER FOR NATIVE ECOSYSTEMS and
BIODIVERSITY CONSERVATION ALLIANCE,

Plaintiffs,

v.

RICK CABLES, in his official capacity as the Regional Forester,
Region 2, United States Forest Service, and
UNITED STATES FOREST SERVICE,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. In this lawsuit, Plaintiffs Center for Native Ecosystems and Biodiversity Conservation Alliance challenge the decision of Defendants Regional Forester Rick Cables and the United States Forest Service to approve livestock grazing in the Pole Mountain area of the Medicine Bow National Forest. The grazing activities are destroying recreation and fishing opportunities, adversely impacting human health and safety, and eliminating the streamside vegetation necessary to sustain an endangered species.

2. Defendants' approval of livestock grazing at Pole Mountain is violating the Clean Water Act (CWA). During at least the last three grazing seasons, livestock have introduced high concentrations of fecal coliform bacteria into several recreationally significant streams and watersheds. Water quality testing indicated these elevated concentrations exceed health and safety standards set by the State of Wyoming. As a result, Defendants are violating their

mandatory duty under the CWA, 33 U.S.C. § 1323(a), to comply with state water quality standards.

3. To remedy these violations, Plaintiffs seek a court order declaring Defendants are violating the CWA. In addition, Plaintiffs request an injunction enjoining approval of livestock grazing in the Pole Mountain area unless and until Defendants take actions to comply with state water quality standards. Absent this relief, Defendants are not only violating the law, but continue to threaten public health and safety and jeopardize wildlife.

JURISDICTION

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 706 (Administrative Procedure Act).

5. Venue is properly before this Court pursuant to 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiff Center for Native Ecosystems (“CNE”) sues on behalf of itself and its members. CNE is a non-profit advocacy organization dedicated to conserving and recovering native and naturally functioning ecosystems in the Rocky Mountain Region. CNE seeks to protect species and their natural communities, including watersheds and riparian habitats. CNE has members in both Colorado and Wyoming that enjoy and use many of the national forests in the Rocky Mountain area, including the Medicine Bow National Forest, for recreation, nature study, and other outdoor opportunities. Members of the CNE have a direct interest in protecting all imperiled species in the region. CNE brings this action on behalf of itself and its adversely affected members to force Defendants to comply with all laws before, during, and after authorizing livestock grazing at Pole Mountain. The above-described educational, scientific, aesthetic, spiritual, and conservation interests of CNE and its members have been, are being, and, unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' action and inaction.

7. Plaintiff Biodiversity Conservation Alliance ("BCA") sues on behalf of itself and its members. BCA is a non-profit corporation with the mission of protecting and restoring biological diversity, habitat for wildlife and fish, rare plants, and roadless lands in the Rocky Mountain region. BCA has members residing in Colorado, Wyoming, Idaho, and Utah, as well as other western states. Members of BCA engage in wildlife viewing, outdoor recreation, and other activities in the Pole Mountain area of the Medicine Bow National Forest and within other National Forests under the jurisdiction of the Forest Service's Rocky Mountain Region and Defendants Rick Cables. Preservation and protection of public lands, including those of the National Forest, are of paramount concern to BCA and its members. The health and survival of watersheds, riparian habitats, and the rare species are an important part of BCA members' aesthetic, scientific, and recreational enjoyment of the Medicine Bow National Forest. BCA brings this action on behalf of itself and its adversely affected members to force Defendants to comply with all laws before, during, and after authorizing livestock grazing at Pole Mountain. The above-described educational, scientific, aesthetic, spiritual, and conservation interests of BCA and its members have been, are being, and, unless this Court grants the requested relief, will continue to be adversely affected and irreparably injured by Defendants' action and inaction.

8. Defendant Rick Cables is sued in his official capacity as the Regional Forester for the Rocky Mountain Region of the U.S. Forest Service. As Regional Forester located in Lakewood, Colorado, Mr. Cables is legally charged with administering grazing on all forest lands in the Rocky Mountain Region (Region 2), including Wyoming, Colorado, and Nebraska. Mr. Cables is the federal official responsible for ensuring that the Forest Service complies with the Clean Water Act and other federal laws with respect to managing livestock grazing in the Pole Mountain area on the Medicine Bow National Forest.

9. Defendant U.S. Forest Service is an agency of the United States. The Forest Service has primary responsibility for managing and protecting public lands within the National Forests.

THE CLEAN WATER ACT

10. Congress adopted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA requires each state to develop and implement water quality standards to protect and enhance the quality of water within the state. 33 U.S.C. § 1313. Water quality standards are designed to protect the beneficial uses of the state's navigable waters. 33 U.S.C. § 1313(c)(2)(A). The state sets the appropriate numerical objectives to ensure attainment of the designated beneficial uses. Id.

11. Section 313 of the CWA provides that “[e]ach department, agency, or instrumentality of the . . . federal government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner.” 33 U.S.C. § 1323(a).

FACTUAL ALLEGATIONS GIVING RISE TO THE CLAIMS FOR RELIEF

A. POLE MOUNTAIN AND ITS NATURAL RESOURCES

12. Pole Mountain is located approximately 10 miles southeast of Laramie, Wyoming, within the Laramie Mountain Range, and the Medicine Bow National Forest. The terrain at Pole Mountain consists of broad, rolling hills that are dissected by drainages running in an east-west direction. Short-grass prairie is the dominant vegetation type, although lodgepole pine, ponderosa pine, limber pine, Douglas fir, and aspen can be found on north facing slopes and drainages. Approximately 5,000 acres of the Sherman Mountains are also contained within the area. These mountains are steep and forested primarily with lodgepole pine.

13. There are approximately 67 miles of stream channels within the Pole Mountain area, almost all of which are contained in ten watersheds: North Branch Lodgepole Creek, Middle Branch Lodgepole Creek, South Lodgepole Creek, North Branch Crow Creek, South

Branch Crow Creek, Middle Crow Creek, South Fork Middle Crow Creek, Horse Creek, North McKechnie Creek, and Brush Creek.

14. In 1996, stream surveys found that majority of these stream channels at Pole Mountain were in adequate condition and rated as in a "Properly Functioning Condition." The State of Wyoming considers these streams important fishery streams. All of the streams in the area, or portions thereof, are classified as Class 3, Class 4, or Class 5 trout streams. Class 3 streams are important trout waters, i.e. fisheries of regional importance. Class 3 streams in the area include all, or portions of: South Lodgepole Creek, Middle Crow Creek, Middle Lodgepole Creek, and North, Lodgepole Creek. Class 4 streams are low production trout waters, i.e. fisheries of local importance, but generally incapable of sustaining substantial fishing pressures. Class 4 streams in the area include all, or portions of: Horse Creek, North Branch Crow Creek, and South Branch Crow Creek. Class 5 streams are very low production trout waters.

15. Other wildlife also abounds at Pole Mountain. Much of the area is considered critical foraging area for elk, mule deer, and Pronghorn antelope. Black bear, mountain lions, beaver, and bighorn sheep are also found at Pole Mountain. Cliff and rock formations provide excellent habitat for raptors, including prairie falcons.

16. The Preble's meadow jumping mouse, listed as a "threatened" species under the ESA, is also present at Pole Mountain. The mouse has been trapped on several occasions in eastern watersheds of the Pole Mountain unit, including branches of Lodgepole Creek and Crow Creek. In 2003, FWS designated critical habitat for the Preble's meadow jumping mouse within the Pole Mountain area, including habitat found on some of the allotments at issue in this case.

17. Pole Mountain provides great recreational opportunities for the public. There are five developed campgrounds, three developed picnic grounds, and one major visitor center. There are also numerous dispersed campsites located along or near the end of the many two-track roads that cover virtually the entire area. Hiking, mountain biking, equestrian, rock climbing, fishing, big game hunting, and wildlife viewing are the main recreational opportunities at Pole Mountain.

B. LIVESTOCK GRAZING IN THE NATIONAL FORESTS

18. Livestock grazing within the National Forest System is guided by both the National Forest Management Act ("NFMA") and the Federal Land Use Policy and Management Act ("FLPMA"). Under NFMA, the Forest Service is obligated to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System," commonly referred to as Forest Plans. 16 U.S.C. § 1604(a). Forest Plans determine resource management direction, the level of resource production and management, the availability and suitability of lands for resource management, and wildlife and habitat conservation requirements. 16 U.S.C. § 1604. Site-specific decisions, including those concerning livestock grazing, must be consistent with the applicable Forest Plan and are regulated by FLPMA. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10; 43 U.S.C. § 1752.

19. The Forest Service authorizes livestock grazing in a National Forest through three separate but related decisions: (1) an allotment management plan ("AMP"); (2) a grazing permit; and (3) annual operating instructions ("AOI"). The Forest Service develops an AMP for each allotment -- a unit of National Forest land. 36 C.F.R. § 222.1. In an AMP, the Forest Service prescribes how grazing operations within an allotment will be conducted to meet multiple-use and other goals and objectives, describes range improvements necessary to meet the objectives, and contains any other grazing instructions, management provisions and objectives necessary to be consistent with a Forest Plan. 36 C.F.R. §§ 222.1(b)(2) and § 222.2(c). An AMP must be tailored to the specific "range condition" of the allotment and "shall be reviewed on a periodic basis to determine whether they have been effective in improving the range condition of the lands involved." 43 U.S.C. § 1752(d); see also 36 C.F.R. § 222.2(b) (AMPs "shall be updated as needed"); 43 U.S.C. § 1902(d) (defining "range conditions"). Allotments are often divided into pasture so as to manage livestock during the grazing season.

20. A grazing permit is a "document authorizing livestock to use National Forest System or other lands under Forest Service control for purposes of livestock production." 36 C.F.R. § 222.1(b)(5); see also 43 U.S.C. § 1752 (a). The term of a grazing permit is ten years.

According to FLPMA regulations and the Forest Service's Grazing Permit Administration Handbook, where a site-specific AMP has been developed for an allotment, the terms of a grazing permit must be consistent with the AMP. 36 C.F.R. § 222.4(a)(7) (requiring permit modification when change made to applicable AMP). The Forest Service can change the terms of an existing permit to "modify the seasons of use, numbers, kind, and class of livestock allowed or the allotment to be used under the permit, because of resource condition, or permittee request." *Id.* § 222.4(a)(8); 43 U.S.C. § 1752(a).

21. Each year, the Forest Service issues AOIs to each permittee within an allotment. The AOI sets forth the dates of the grazing season, rotations within the allotment, the numbers of livestock permitted for the season, monitoring and reporting requirements, and the maximum limits of forage use by livestock (also known as "utilization standards"). See Forest Service's Grazing Permit Administration Handbook. Through an AOI, the Forest Service may modify, on a seasonal basis, the number, kind and class of livestock, the period of use, and specified allotment to protect forest resources and achieve the applicable standards.

C. LIVESTOCK GRAZING AT POLE MOUNTAIN

22. There are approximately 44,703 acres at Pole Mountain that are open to livestock grazing. Defendants have allowed grazing on these public lands since the turn of the last century, with one large pasture that was later divided into allotments with some fences. In the late 1950s and early 1960s, the Forest Service began using the area to study grazing systems. Two allotments were put into a "deferred-rotation" system, whereby one allotment was rested for a grazing season. The rest period limited the overall utilization of vegetation and allowed for new vegetation growth. As a result of this research, more allotments were fenced and divided. Today, there are six cattle and one sheep allotment at Pole Mountain: Green Mountain, North Pasture, Beacon, Crow Creek, Lodgepole, Horse Creek, Ames, and Warren.

23. The 1985 Medicine Bow Forest Plan provides the general conditions for managing the livestock allotments at Pole Mountain, including forage utilization standards,

mitigation requirements, and monitoring requirements. Defendants revised the Forest Plan in 2003. The 2003 revision did not modify the standards and requirements for grazing.

24. In 1999, Defendants revised the AMPs for each allotment at Pole Mountain. The new AMPs allow 2,086 cattle and 1,200 sheep at Pole Mountain from approximately June 1 to October 15. The AMPs breakdown the allotments into pastures and rotate livestock in the pastures throughout the grazing season. The 1999 revised AMPs established goals and objectives for livestock grazing: (1) to ensure that livestock and vegetation management are consistent with the Forest Plan and with applicable laws, regulations, and policies; and (2) to achieve desired conditions, including maintaining satisfactory range conditions, proper stocking and livestock distribution to protect riparian habitats, perennial streams and associated riparian areas in a properly functioning condition, and the vegetative characteristics and habitat needs of the Preble's meadow jumping mouse. The revised AMPs also include management actions consistent with these goals and objectives, including forage utilization standards, rangeland improvements, and monitoring requirements.

25. The AMPs also require the issuance of AOIs prior to each grazing season. The AOIs prescribe the annual conditions applicable to each allotment.

26. During the AMP revision process, Defendants consulted with the U.S. Fish and Wildlife Service (FWS) regarding grazing impacts on the Preble's meadow jumping mouse, as required under the Endangered Species Act (ESA). Defendants prepared a biological assessment that claimed the mouse was not "likely to be adversely affected" by grazing on the allotments because, although the mouse's riparian habitat was present, the Preble's mouse had not been found at Pole Mountain at that time. Defendants also determined that if the mouse was present, livestock grazing as authorized through the AMPs would not impact the mouse provided the permittees achieved the forage utilization standards. FWS concurred with this determination in an October 19, 1998 letter, thereby completing the ESA consultation process. Since 1998, the mouse has been found within the allotments at Pole Mountain.

27. In May 1999, Defendants renewed 10-year grazing permits for all permittees on the seven allotments. The permits provide Defendants with discretion to modify livestock grazing within the allotments. The permits expressly provide that “[t]he number, kind, and class of livestock, period of use, and grazing allotment specified in the permit may be modified when determined by the Forest Officer in charge to be needed for resource protection.” The permits also state that “when in the judgment of the Forest Officer in charge, the forage is not ready to be grazed at the beginning of the designated grazing season, the permittee, upon request of the Forest Officer, will defer placing livestock on the grazing allotment to avoid damages to the resources.” Similarly, “the permittee will remove livestock . . . before expiration of the designated grazing season upon request of the Forest Officer when it is apparent that further grazing will damage the resources.”

28. Since 1999, Defendants have issued AOIs to each of the Pole Mountain permittees. The AOIs have incorporated the terms and standards contained in the AMPs and grazing permits. Although permissible, there have been no major changes to the terms contained in the AOIs between the 1999 and 2004 grazing seasons.

D. THE ADVERSE CONDITIONS AT POLE MOUNTAIN

29. The Rocky Mountain region is in the midst of an extended drought. The summer of 2004 marked the fifth straight year of below average participation in Colorado, Wyoming, and Montana. In the Rocky Mountain region, rarely does drought end quickly. After prolonged drought conditions, a period of 2 to 4 years of average or above average rainfall may be required to makeup for lost precipitation during the drought. During this recovery period, growth of vegetation, particularly of native plants, can continue to be hampered. At Pole Mountain, drought conditions have caused a reduction in forage production and water availability. Absent adequate water, there is a lack of forage to sustain both native wildlife and domesticated livestock.

30. In 2000, drought conditions prompted the Forest Service’s Rocky Mountain Region to issue “Drought Guidelines” to all regional Forests. These guidelines provided “some

helpful options” to address drought conditions, including the resting of pastures for a season to allow new vegetation to grow. However, these guidelines were not re-issued after the 2000 grazing season, even though the drought continues in the Rocky Mountain region. Since 2000, neither pastures nor allotments at Pole Mountain have been rested to address the drought conditions.

31. Between 1999 and 2004, forage utilization standards and stubble height standards contained in the AMPs have been exceeded in several areas on the allotments. Defendants have acknowledged that severe drought conditions have contributed to over-utilization of forage on the allotments. Due to less forage production in recent years, exceeding the utilization standards can occur at the beginning of the grazing season within a pasture.

32. At Pole Mountain, current grazing practices and management have impaired several streams and creeks. These exceedences violate the State of Wyoming’s water quality standards. Wyoming Statute (W.S.) 35-11-301 states that “[n]o person, except when authorized by a permit issued [by the State], shall . . . [a]lter the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state .” Section 27 of Wyoming’s Water Quality Rules and Regulations states that “[d]uring the entire year, fecal coliform concentrations shall not exceed a geometric mean of 200 organisms per 100 milliliters . . . , nor shall the geometric mean of 3 separate samples collected within a 24-hour period exceed 400 organisms per 100 milliliters in any Wyoming surface water.”

33. During the 2002 grazing season, the State of Wyoming found that fecal coliform in water samples collected from North Branch Crow Creek exceeded the state standard. During the 2003 grazing season, the State of Wyoming found that fecal coliform in water samples collected from both North Branch North Fork Crow Creek and Middle Crow Creek exceeded the standards. In 2004, Defendants collected water samples indicating the water quality standards for fecal coliform have been exceeded at North Branch North Fork Crow Creek and Middle Fork Crow Creek during the 2004 grazing season. The State of Wyoming has determined that the

single largest contributor to these violations is fecal waste from livestock on the Pole Mountain allotments.

34. Between 2001 and 2003, Defendants have documented that forage utilization and stubble height standards have been exceeded within the Green Mountain and Crow Creek allotments. Forage (grasses and willows) utilization in these areas is between 60 and 91 percent; whereas the AMP standard is between 45-55 percent. Since 2002, the utilization standards have been violated on at least one occasion on each of the 4 pastures in the Green Mountain Allotment. Since 2002, utilization standards in the AMP have been violated on at least one occasion on 4 of the 7 pastures in the Crow Creek Allotment. These allotments and pastures contain critical habitat for the Preble's meadow jumping mouse.

35. Since 2000, Defendants have not implemented the 2000 Drought Guidelines. Defendants have not rested for a season any of the pastures that have contributed to state water quality violations or where utilization or stubble height standards have been exceeded. Defendants have not take any other actions to keep livestock out of riparian areas where water violations or over-utilization continues to occur each grazing season.

FIRST CLAIM FOR RELIEF

36. Each and every allegation set forth in this Complaint is incorporated herein by reference.

37. Section 313 of the CWA requires Defendants to comply with state water quality standards. 33 U.S.C. § 1323(a). Defendants have jurisdiction over the Medicine Bow National Forest and the forestlands where livestock grazing occurs at Pole Mountain. Defendants authorize grazing within the seven allotments at Pole Mountain. Such authorization occurs through the AMPs, permits, and/or AOIs. Defendants' authorization of livestock grazing has resulted, and is resulting, in the discharge and/or runoff of pollutants in violation of state water quality standards for the past three years. Defendants have known about these violations since the 2002 grazing season. Plaintiffs and the State of Wyoming have provided Defendants with

the results of water quality testing indicating these violations. Defendants have performed their own testing confirming water quality violations from livestock grazing.

38. Defendants have not complied with, and continue not to comply with, state water quality standards for the Pole Mountain livestock grazing allotments in violation of section 313(a) of the CWA. By continuing to allow livestock grazing at Pole Mountain through the AMPs, permits and/or AOIs in violation of section 313(a) of the CWA, Defendants' AMPs, permits and AOIs are arbitrary and capricious, constitute an abuse of discretion, and are not in accordance with law, required by law within the meaning of the Administrative Procedure Act. 5 U.S.C. § 706(2). In addition, by issuing AOIs for the Pole Mountain livestock grazing allotments despite violations of state water quality standards, Defendants are engaged in a pattern and practice that violates the CWA.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court enter judgment against Defendants providing the following relief:

1. Declare Defendants' authorization of livestock grazing in the Pole Mountain grazing allotments through the AMPs, permits and/or AOIs violates the Clean Water Act;
2. Declare Defendants are engaged in a pattern and practice that violates the Clean Water Act;
3. Order Defendants through an injunction to manage the livestock grazing allotments at Pole Mountain in compliance with the Clean Water Act;
4. Order Defendants through an injunction to cease their unlawful pattern and practice;
5. Enjoin Defendants from authorizing livestock grazing on any and all of the allotments at Pole Mountain until Defendants comply with the Clean Water Act;
6. Award Plaintiff's costs, including reasonable attorneys' fees and expert witness fees; and
7. Provide such other relief as the court deems just and proper.

Respectfully submitted,

Dated: 11/19/04



Mike Harris
Neil Levine
Earthjustice
1400 Glenarm Place, Ste. 300
Denver, CO 80202
Telephone: 303-623-9466
Facsimile: 303-623-8083

Attorneys for Plaintiffs