

Rallying For The Ranch

January 25, 2008

In a 51-page opinion filed December 17, 2007, the United States Tenth Circuit Court of Appeals ruled in favor of the Forest Service and livestock grazing permittees in *Center for Native Ecosystems v. Cables*. This case has been referred to for the past three years as the “Pole Mountain Case” because it involves the Pole Mountain Unit of the Medicine Bow National Forest between Cheyenne and Laramie. This productive rangeland is encompassed within 55,000 acres and supports ten permittees who depend on the Unit for summer pasture in seven allotments. When fully stocked, this area supports some 2,000 cattle and 1,200 sheep for more than four months of the year. I had the privilege of representing the Pole Mountain Cattlemen’s Association along with the Wyoming Stock Growers Association, Wyoming Farm Bureau Federation and Laramie County Farmers Union when they decided to intervene to support the Forest Service. The Wyoming Association of Conservation Districts also intervened in the lawsuit on the side of the Forest Service.

The coalition of environmental plaintiffs which brought the lawsuit alleged that the Forest Service arbitrarily and capriciously continued to issue annual operating instructions (AOIs) for livestock grazing without consulting with the U.S. Fish & Wildlife Service (FWS) regarding impacts to critical habitat for the Prebles meadow jumping mouse and despite exceedences of the Wyoming water quality standard for *fecal coliform* levels in two locations on two separate creeks. These two issues were not interrelated. The Court provided substantial guidance for future reference involving Endangered Species Act compliance, but this article focuses on the Clean Water Act claim.

Section 313 of the Clean Water Act requires all federal agencies “engaged in any activity resulting in, or which may result, in the discharge or runoff of pollutants” to “be subject to, and comply with, all Federal, State, interstate and local requirements, administrative authority, and process and sanctions . . . in the same manner and to the same extent as any nongovernmental entity.” This means federal land management agencies are treated the same as any private landowner in the event that its activities cause “runoff” of pollutants (nonpoint source water pollution) that reach a stream.

Wyoming Department of Environmental Quality has established water quality standards for various classifications of streams, including the streams on Pole Mountain.

Wyoming’s Nonpoint Source Management Plan

(<http://deq.state.wy.us/wqd/watershed/index.asp>) outlines the requirements for landowners in the event that their activities cause a runoff of pollutants which lead to an exceedence of the stream’s water quality standard. In the event of an exceedence of a water quality standard in a stream by a landowner’s activities, the primary requirement is for the

landowner to implement “best management practices” (BMPs) in a “good faith” manner.

BMPs are measures that are “the most technologically and economically feasible means of managing, preventing or reducing nonpoint source pollution.” For livestock grazing, BMPs include any practices which result in adjusting stocking rates, timing, forage utilization, intensity of use, area of use and other factors that can potentially impact water quality. The Nonpoint Source Management Plan requires landowners to not only implement the BMPs, but to also monitor the effectiveness and determine whether any adjustments to the BMPs are warranted. So long as the landowner maintains a good faith effort implementing, monitoring and adjusting BMPs, the Wyoming DEQ will not take other enforcement action despite continuing exceedences of the water quality standard.

In the Pole Mountain case, water quality samples of several creeks on Pole Mountain taken in 2003 revealed that two locations on two separate creeks had exceedences of Wyoming’s standard for *fecal coliform*. In subsequent years, only one of the locations had additional exceedences of the standard based on water quality monitoring data.

As soon as the Forest Service, the permittees and the local conservation districts became aware of the water quality issues, they began implementing “best management practices” (BMPs) to address those issues beginning in 2003 and carrying on to this day. Some of those measures included rehabilitation of off-site livestock and wildlife water sources, creation of additional pastures to control livestock, additional riding and management, public education, consultation with Wyoming Game & Fish on wildlife herd objectives and other actions designed to minimize *fecal coliform* from all potential sources. Additionally, the conservation districts added the Crow Creek headwater areas on Pole Mountain to the already existing Crow Creek Watershed Management Plan addressing water quality issues near Cheyenne to examine and implement comprehensive measures to contend with the water quality issues.

The plaintiffs contended that the Forest Service acted arbitrarily, capriciously or otherwise not in accordance with the law when it issued annual operating instructions (AOIs) for livestock grazing on the Pole Mountain allotments when there were ongoing exceedences in water quality standards. The plaintiffs further contended that mere exceedences of the water quality standard meant that the Forest Service violated Section 313 of the Clean Water Act and that its activities should be halted, with or without implementation of BMPs.

The Forest Service and intervenors contended that Wyoming’s Nonpoint Source Management Plan only requires BMP implementation coupled with monitoring and assessment of effectiveness in reducing, managing or eliminating *fecal coliform* in the identified stream reaches.

The Court agreed with the Forest Service and intervenors. The Court held that

Wyoming's water quality regulations require landowners to "control" nonpoint source water pollution by implementing BMPs. The Court recognized that BMP implementation may not necessarily stop nonpoint source pollution from causing an exceedence of the water quality standard, and that all that is required is for the landowner to continue to work with the Wyoming DEQ to modify BMPs and continue to monitor. Finally, the Court stated, "[i]n any event, so long as BMPs have been implemented, the state agency has no authority to take enforcement action, and the Forest Service cannot be said to have failed to comply with state requirements 'in the same manner, and to the same extent as any nongovernmental entity.'"

The Court's ruling comports with the plain and obvious language of Section 313 of the Clean Water Act. However, as with any litigation, there is always danger. The real goal of the plaintiffs in this case was to get the Court to rule that whenever an activity under the control of a federal agency results in the exceedence of the state water quality standard there is a violation of Section 313 and the activity must be stopped regardless of whether BMPs have been implemented. In fact, what the plaintiffs sought was to halt activities even before BMPs have been given a chance to control nonpoint source pollution.

Had the plaintiffs prevailed in this argument, every activity which requires federal agency approval would be in jeopardy of being halted for water quality exceedences. These activities include every conceivable management activity on the land, including not only grazing permits, but timber management, road building, recreational trails and facilities, and similar activities. The Court saw through the plaintiffs' arguments and upheld the Clean Water Act exactly as written by Congress and implemented by Wyoming.

The Court's decision does not mean that we can rest on our laurels. The plaintiffs and other environmental groups have for years sought to implement harsh regulation of nonpoint source water pollution through lawsuits and legislation. Each time they have been rebuffed and nonpoint source pollution remains unregulated under the Clean Water Act except to the extent individual states have set up various management or permitting schemes. We will need to maintain our vigilance as individuals and through our industry organizations to ensure that bad laws are stopped before they are passed.

The Western Watersheds Project staffers have been on grazing allotments in western Wyoming collecting water quality data in an effort to find or create problems for agencies and permittees. We can expect these activities to continue despite the Court's ruling on Pole Mountain and they will likely find some water quality problems. What happens next will depend on each and every one of us who gets targeted.

In the Pole Mountain case, the Forest Service, permittees, and the conservation districts worked together cooperatively and took immediate actions to identify the problem, identify BMPs and implement them, expand the Crow Creek Watershed Plan and help the

Forest Service out by intervening in the lawsuit. These efforts paid off as shown by the Court's recognition that the Forest Service did exactly what the Clean Water Act required and that there were improvements to water quality even in the short time period involved. Each case is a serious matter and we know that the enviros are stockpiling data and money to try again, and we know they will as long as they exist.

So what can we do? First of all, keep the federal agency on your side. In the Pole Mountain case, the Forest Service did not make onerous demands of the permittees with respect to BMPs and we were able to fight on the same side. Second, the permittees did not bury their heads in the sand and deny there was a problem. They stepped up their management efforts, implemented some livestock use reductions (due purely to drought and lack of forage), were open to new management options, and generally worked with the Forest Service to implement other BMPs. Third, the conservation districts acquired funding and put forth the effort to rehabilitate stock and wildlife water sources to draw animals into the uplands, conducted water quality sampling, expanded the scope of the Crow Creek Watershed Plan, educated the public to minimize human impacts, and were instrumental in providing cohesion to all of the efforts. Fourth, once the battle was on, the permittees, Wyoming Stock Growers Association, Wyoming Farm Bureau Federation, Laramie County Farmers Union and the Wyoming Association of Conservation Districts intervened in the lawsuit to protect their interests and to support the Forest Service for doing the right thing.

What it all boils down to is that when one ranch is under attack, all of our ranches are under attack. Each attack instigated by environmental conflict groups will require hard work, technical assistance, industry cohesion and probably money. Our ranches and lifestyles are worth every bit of it.