

ADVOCATES for the WEST

Case Notes

A biannual journal of public interest environmental law

Summer 2004

Vol. 1 Issue 2

A Tale of Two Injunctions

Want a glimpse of how current politics affects our public lands and wildlife? Consider this tale of two injunctions won by Advocates for the West this summer:

Grazing in the East Fork Salmon River

The Lower East Fork allotment encompasses about 70,000 acres in central Idaho's Sawtooth National Recreation Area (SNRA), managed by the Forest Service. Much of this area lies within the proposed Boulder-White Clouds wilderness, featuring spectacular high altitude lakes, bighorn sheep, salmon streams, and other natural wonders.

The SNRA was established by Congress to protect the area's wildlife and recreational values. Under Congress' mandate, livestock grazing and other resource industries can only occur on the SNRA if they do not "substantially impair" these primary wildlife and recreation values.

Yet until we filed a lawsuit in 2002, the agency had never even evaluated whether grazing was violating this federal requirement on the Lower East

Fork, and many other SNRA allotments.

As a result of a court order we won in that prior lawsuit, the Forest Service finally issued a full Environmental Impact Statement (EIS) in September 2003 studying the Lower East Fork allotment.

The EIS found that trampling cattle have fouled Frog Lake and many other sensitive streams and lakes, and have harmed unique rare plants that exist only on the SNRA. The EIS also concluded — as many members of the public have long told the Forest Service — that livestock damage interferes with recreational use and enjoyment of these public lands.

Thus, based on this EIS, the Forest Service concluded that it must eliminate grazing in large parts of the Lower East Fork allotment for at least several years, to allow the land to recover and protect wildlife and recreation values under the SNRA Act.

So far, so good.

But one court order is evidently not enough in the current politi-



Advocates for the West won a court order to force the Forest Service to study the impact of livestock grazing in the Sawtooth National Recreation Area. Grazing in the SNRA must not "substantially impair" fish, wildlife and recreation. Photo by Pat Stoll.

cal climate. Rather than close significant portions of the Lower East Fork to grazing as required by the EIS, in May 2004 the Forest Service instead allowed continued grazing there.

We are advised, by confidential sources, that the order to allow continued grazing came from high-level political appointees who now control the Forest Service. Simply put, the Forest Service's grazing management is being directed by politicians and industry, not staff scientists and field managers.

As a result, we filed a new lawsuit and won an injunction from the federal court, ordering the Forest Service to comply with its own analysis and close the Lower East Fork allotment to grazing this year.

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Thank you, Gene Bray!

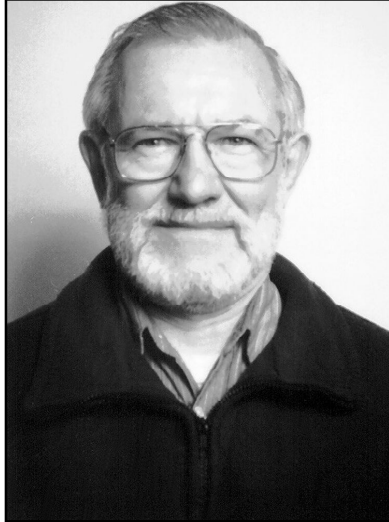
Advocates for the West owes a deep debt of gratitude to **Gene Bray**, a tireless volunteer and one of Idaho's most zealous progressive advocates.

Gene keeps our computer systems running crisply, and also conducts field reconnaissance and research to support our litigation.

"Gene is simply indispensable for our operations," said Laird Lucas, Advocates' Executive Director. "We can't thank him enough for all the work he has done for us."

A midshipman with the Naval Academy class of 1953 and later a qualified submariner, Gene joined IBM as a systems test engineer in 1956, working on the engineering models of IBM's first commercial computer. After 31 years managing various IBM facilities around

the world, Gene retired in 1987 and returned to his home state of Idaho.



Gene Bray, dedicated friend to and volunteer for *Advocates for the West!*

Since then, Gene has helped Boise public schools and many non-profits to modernize their computer and information capabilities. Finding a commonality of purpose that meshed with his life-long interest in conservation of Idaho's natur-

al resources, Gene has been a board member of Western Watersheds Project since 1994, and active supporter of many other Idaho conservation groups. As a key team member of Advocates for the West, Gene's skills and knowledge are invaluable to our work.

Gene has been called upon to cure virus-infected laptops; guide Advocates' staffers down the South Fork Boise canyon and the Lower Salmon River; create, maintain, and upgrade

our computer network; teach technical service reps what they don't know about their products; and create GPS waypoints and maps for litigation. Thank you, Gene, for all your help!

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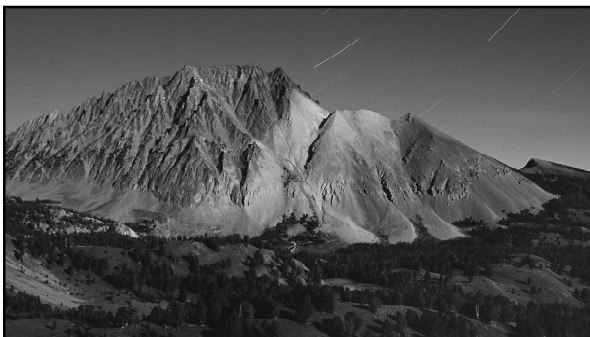
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Advocates for the West is a public interest environmental law firm. We partner with client conservation groups in Idaho and other western states to preserve and protect the unique natural resources of the West.

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Left: Castle Peak in the Boulder/White Cloud Mountains, Central Idaho. Photo by Pat Stoll.

All photos in this issue, unless otherwise credited, are by Pat Stoll and can be viewed in living color at: www.stollnmoments.com.



IDAHO'S BIG WILD: YELLOWSTONE-TO-YUKON CORRIDOR

Lawsuits filed to stop irresponsible logging in Clearwater Basin

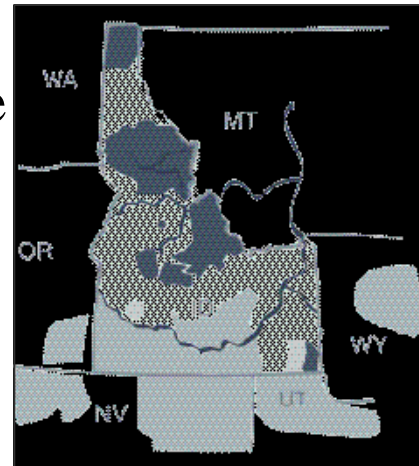


Representing Idaho Conservation League, we filed suit to block BLM and Forest Service plans to log 9 million board feet in the South Fork Clearwater River basin. The agencies plan to cut old growth forest within the stream-side "buffers" put in place to protect threatened salmon and steelhead — while claiming "no significant environmental impact."

For the Ecology Center and Friends of the Clearwater, a separate case challenges massive planned clearcuts in the Lolo Creek basin — where again the Forest Service claims the destruction of 2,000 acres of goshawk habitat will have "no significant impact." Our motion to halt these sales is pending.

u In the foothills of the Boulder-White Cloud mountains, we have challenged grazing mismanagement on two BLM allotments. Across the west, BLM justifies

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Advocates for the West Program Areas

- Yellowstone to Yukon
- Inland Waters
- Sagebrush Sea
- Energy & Clean Communities

PROTECTING THE SAGEBRUSH SEA

Judge orders study of grazing harms to Nevada grouse



In August, Advocates for the West won a resounding victory from Judge McKibben of Nevada's federal court, requiring BLM to prepare a full Environmental Impact Statement for grazing across nearly 1.5 million acres in central Nevada. These public lands include wilderness areas as well as habitat for the imperiled sage grouse and nearly 250 species of wildlife. BLM had authorized increased grazing levels without examining the likely harm to sage grouse and other sensitive wildlife from degradation of their habitat. This is the first time a federal judge has reversed a grazing decision to protect sage grouse, and demanded an EIS to examine the impacts of grazing on grouse.

u Advocates has won an early round in its

bout with rogue Wyoming rancher Frank Robbins. Last September, we filed suit in Washington, D.C., to overturn his cozy deal with high-level BLM officials, which gave him special grazing privileges. After we filed suit, BLM rescinded the agreement; and Robbins decided not to graze on public land in 2004. Despite Robbins' checkered history of grazing violations and overuse, BLM still refuses to revoke his permits, and even unlawfully renewed one of them this past spring. Soon after we filed

suit, Robbins asked the court to move the case back to Wyoming.

But in a ruling issued last month, the D.C. Court declined, noting that the case has "national, not merely local, interest."

u In April, Advocates for the West filed new litigation seeking to protect Slickspot peppergrass under the Endangered Species Act. U.S. Fish & Wildlife Service biologists concluded that this rare desert flower — found only in southern Idaho — is in danger of extinction due to impacts from grazing, off road vehicles and other human actions. But the Idaho livestock industry used political pressure to force FWS to deny protection for this species. The case is brought on behalf of Western Watersheds Project, and is pending in Idaho federal court.

Grazing case to be decided in D.C.

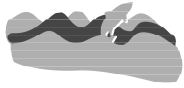
"[P]laintiffs provide evidence that the issues involved in the present case have national implications, namely that the settlement agreement will encourage other Western ranchers to try to circumvent local BLM officials and deal directly with Interior Department officials in Washington D.C. Such issues are of national, not merely local, interest."

-- Hon. Henry Kennedy Jr., U.S. District Court for the District of Columbia



INLAND WATER RESTORATION

Advocates stops sediment dumping into the South Fork Salmon River; Idaho Power dam operations questioned



After years of poor road maintenance practices that clogged mountain streams with sediment, a central Idaho county has agreed to change its ways in order to avoid a lawsuit. During routine grading of county roads, Valley County has been dumping sediment into the South Fork of the Salmon River and its tributaries, strongholds for steelhead, salmon, and bull trout.

Advocates for the West sent the county a notice-of-intent-to-sue letter under the Clean Water Act and Endangered Species Act to stop these irresponsible practices. To avoid litigation, Valley County will enter a Memorandum of Understanding with the Forest Service requiring the county to use best management practices designed to eliminate any sediment input into roadside waters.

Advocates is in federal court seeking Endangered Species Act protection for Montana fluvial Arctic grayling, which once inhabited over 1,200 miles of stream in the upper Missouri River basin, but now is limited to a mere 50-mile stretch in the basin's Big Hole River. The continued drought in the West has resulted in low water levels and high temperatures, thus causing further declines of the grayling to the lowest point in 15 years. This spring, excessive water diversions for forage crops caused the river to drop to such a low level that most of the grayling's spawning habitat was left high and dry. This grayling has been in the bureaucratic queue for ESA protection for over 20 years.

Our work for Idaho Rivers United pushing for environmental protections at Idaho Power's many hydropower dams on the Snake River is ramping up. The Federal Energy Regulatory Commission issued new 30-year licenses for four dams on the Mid-Snake.

Despite a lengthy process, FERC decided not to impose any mitigation measures for white sturgeon until Idaho Power formulates a sturgeon plan – and that process will be done outside of public purview. These dams are the primary reason for the decline



Hells Canyon Dams Complex on the Snake River is up for a 30-year license. *Advocates for the West* represents Idaho Rivers United in demanding that Idaho Power Company act as a responsible steward of our public waters.

of white sturgeon, the largest freshwater fish in North America, historically reaching 18 feet long and 1,300 pounds. But since their habitat has been fragmented, they no longer reach these awesome sizes.

Elsewhere, FERC is rightly requiring Idaho Power to study ways to control water temperature at the Hells Canyon 3-dam complex. We also continue to work collaboratively with Avista Corporation in relicensing the Spokane River dams in Idaho and Washington, with an eye toward restoring native fish through improved river flows and water quality.



ENERGY & HEALTHY COMMUNITIES

Advocates takes on Idaho's Third Largest Polluter to Protect Air Quality in Magic Valley



Our work on behalf of Idaho Conservation League challenging massive

dairies in southern Idaho is winning results and supporters. In May, Advocates filed suit under the Clean Air Act against the proposed 6,600 cow "K&W" Dairy. Our threat of litigation under CERCLA (the "Superfund" law) forced another huge dairy to report its releases of toxic substances to the state and federal agencies, which revealed that dairy to be Idaho's third largest

toxic polluter in 2003 (behind Potlatch Corp., and Amalgamated Sugar's Paul, Idaho facility).

u We also wrapped up a Clean Water Act enforcement case against a feedlot operator in Weiser, Idaho through a good settlement agreement. To resolve allegations he was dumping feedlot waste into the Snake River via a pipe, the owner has agreed to set aside funds for drinking water systems for local residents, help finance a wetland restoration project, and make numerous other operational changes on the feedlot.

Dairy-air in the press

The Twin Falls Times-News reported on June 29, 2004 that local residents in Filer, Idaho want immediate solutions for dairy odor problems:

"That became apparent when the group broke out in a rousing round of applause for Idaho Conservation League spokeswoman Lauren McLean after she promised the dairy industry the organization will continue to force Clean Air Act issues through lawsuits."

Success in Idaho Power Rate Case

On behalf of NW Energy Coalition, we intervened in the recent Idaho Power rate case at the Idaho PUC to promote conservation and energy efficiency. Under current rate design, Idaho Power makes more money if it sells more power, even though most of its costs of providing service (building transmission lines, providing customer service, etc.) do not change with increases or decreases in energy consumption.

This system creates tension between the Company's obligations to shareholders and customers — a natural barrier to investment in conservation programs that would decrease electricity sales. Yet those programs would be cheaper for customers, improve the overall efficiency of the grid, and protect the environment.

With key witness Ralph Cavanagh of NRDC, we proposed a new sys-

tem wherein Idaho Power gets more assurance that its fixed costs of service will be paid for, regardless of whether electricity consumption increases or decreases due to conservation programs. The PUC, industrial customers, and Idaho Power itself agreed that a careful look at this proposal is worthwhile, and has started a series of technical workshops to be held this fall to work out details, with possible new rate designs for 2005.

We also submitted testimony of NW Energy Coalition's Nancy Hirsh to support a request by low-income community advocates to boost home weatherization funding by Idaho Power from about \$250,000 to \$1.2 million annually. The Commission approved the request in its entirety, allowing the Idaho Community Action agencies to cut energy use in hundreds more low-income homes each year.

YELLOWSTONE TO YUKON CORRIDOR

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intensive grazing levels by claiming range "improvements" (such as fences, water troughs, pipelines, and ponds) will keep cattle spread out and prevent resource damage. But extensive fieldwork by Gene Bray (see profile on page 2) of Western Watersheds Project, proved most of these "improvements" on the Spud and Marco Creek allotments are broken down, non-functional, or even non-existent; and that the allotments' few water sources do not supply enough to support the permitted number of cattle. Our suit demands that BLM ensure all these improvements are functional before authorizing grazing each year.



A Tale of Two Injunctions

from page 1

But that injunction was not issued until late June, after many livestock had been turned out for grazing. And despite the Forest Service's promises that livestock would be tightly regulated, it took four weeks for all the cows to be located and removed, violating the injunction.

As a result, the Lower East Fork allotment has again suffered grazing damage this year — even though the Forest Service decided almost a year ago to close it; and even though the federal courts also ordered it to be closed.

Still, things would have been much worse without our injunction. Livestock would otherwise be allowed to continue grazing on the Lower East Fork allotment through September 2004, causing much further damage.

Let us hope that, next year, the Forest Service will abide by the two court orders, the SNRA Act, and its own analysis in the EIS; and keep the Lower East Fork allotment closed to grazing's harmful impacts. And let us hope that, next time, politics will not interfere, as it did this year.

Corporate Grazing in the Jarbidge Resource Area

Our second tale of politics and law in the management of public lands comes out of the Jarbidge Resource Area in southern Idaho.

Occupying 1.6 million acres of lands managed by BLM, this region includes the stunning canyons of the Jarbidge and Bruneau rivers, sagebrush uplands that are home to sage grouse and antelope, and rare plants including the imperiled Slickspot peppergrass. But like virtu-



The sensitive, desert ecosystem of southeast Idaho and northern Nevada can't seem to get a break — from bombs or cattle. Photo by Pat Stoll.

ally all public lands (including many Wilderness areas, and even Grand Teton National Park), the Jarbidge country is open for livestock grazing.

Long-term grazing permits in the Jarbidge are based on the BLM's 1987 Jarbidge land management plan, which was intended to insure that grazing does not destroy wild-

life habitat and native plants. But since the mid-1990s, the BLM has taken up the habit of issuing annual "temporary" permits to allow increased grazing above the long-term permit levels, in response to the corporate ranchers' demands. In truth, there was nothing "temporary" about this practice, as the permits were issued routinely every year.

Corporate ranchers — led by Simplot Livestock, the single largest public lands rancher in the United States — have long dominated this region. BLM's Jarbidge office has consistently bowed to the ranchers' demands for more and more livestock grazing — and the public has subsidized these corporate grazing operations to the tune of hundreds of thousands of dollars in recent years alone. Indeed, one rancher's sweetheart deal with the Air Force and BLM was featured on NBC's "Fleecing of America."

In 2002, we filed a lawsuit challenging this practice of issuing "temporary" annual permits. And we won that lawsuit in 2003, when BLM agreed not to issue further temporary increased grazing, at least until it performed environmental analysis as required by the National Environmental Policy Act.

But again, one lawsuit victory is not enough in this political climate. The corporate ranchers went straight to Senator Larry Craig for help after we won the prior case. He attached a "rider" to the BLM's 2004 appropriations bill,

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Court to BLM: Protect Fish From Irrigation Diversions

Advocates for the West won an important ruling from the U.S. District Court in March 2004, holding that BLM has the authority to regulate historic irrigation diversions on public lands in the Upper Salmon basin to protect threatened fish.

There are hundreds of private diversions and ditches on public lands in the Upper Salmon basin that harm salmon, steelhead and bull trout — all protected under the Endangered Species Act.

The diversions typically use crude rock, wood, or gravel obstructions to block streams entirely, and frequently divert all the stream water into ditches running to private lands. The diversions obstruct fish migration, dewater the streams, and “entrain” fish into ditches, where they die.

Yet the BLM has claimed here — as it has across the West — that it is powerless to improve how these diversions are operated if they started before 1976 (when the Federal Land Policy and Management Act was passed).

On behalf of Western Watersheds Project, we challenged that legal position, and won. The district court agreed with us that Congress has given BLM authority to order changes in how historic diversions are operated — such as by requiring fish



Idaho's wild salmon & steelhead, which once returned in the tens of thousands to inland rivers and streams like the Selway (pictured here), are blocked by dozens of dams and diversions that halt their migration. Photo by Pat Stoll.

screens to prevent fish from entering ditches in the first place, or by demanding efficient pipelines instead of leaky ditches. These measures would protect listed fish, while still allowing the irrigators to obtain needed water.

The federal government is now preparing an appeal of this ruling, which will likely set precedent affecting many other states — and could force BLM to improve diversions across the Upper Salmon basin and other regions with endangered fish. To see the Court's ruling, check our website at www.AdvocatesWest.org.

A Tale of Two Injunctions

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which BLM claims requires it to issue the temporary grazing permits in 2004 as it has in recent years.

In April 2004, we learned that BLM issued new “temporary” grazing without any public notice or input, and without any environmental analysis at all, relying on the appropriations rider.

But we noticed that the language of the rider does not, in fact, condone this blatant violation of the environmental laws. And the legislative history indicates the rider would not, in fact, waive environmental laws and requirements as BLM argued — which is no doubt why it was passed with little public notice.

So we filed a new lawsuit, winning a preliminary injunction in June and a permanent ruling in August 2004, barring BLM from implementing the temporary grazing increases until it conforms with environmental law requirements, as preserved under the appropriations rider.

With the current absence of political checks-and-balances in Washington, D.C., there is no doubt the corporate ranchers will seek another legislative “fix” to overcome this second court victory.

But for this year, at least, the rule of law has prevailed over sheer political might. For more information on our work to protect the SNRA and the Jarbidge Resource Area, see our website: www.AdvocatesWest.org.



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The mission of Advocates for the West is to use law and advocacy to restore streams and watersheds, protect public lands and wildlife and ensure sustainable communities in Idaho and other western states.

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At Work with the Conservation Community

Our clients include:

- Idaho Conservation League
- Western Watersheds Project
- Idaho Rivers United
- Committee for the High Desert
- Selkirk Conservation Alliance
- Friends of the Clearwater
- NW Energy Coalition
- Renewable Northwest Project
- Greater Yellowstone Coalition
- Center for Biological Diversity
- Defenders of Wildlife
- The Wilderness Society
- American Wildlands
- Valley Advocates for Responsible Development