



# ADVOCATES for the WEST

# Case Notes

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## PROTECTING BIGHORN SHEEP



Rocky Mountain Bighorn Sheep

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### Contact with domestic sheep on public grazing allotments spreads disease and causes bighorn deaths

*Advocates for the West's* Staff Attorney Laurie Rule is leading our fight to protect Rocky Mountain bighorn sheep populations in the West. Already our effort has forced the Forest Service to close a number of "high risk" allotments on the Payette National Forest to domestic sheep grazing, to protect bighorns from catching fatal respiratory disease caused by contact with domestic sheep.



Staff Attorney Laurie Rule

The Rocky Mountain bighorn sheep are truly a western icon, notable for their large curving horns and ability to live in rugged terrain. These bighorn sheep are native to the Hells Canyon area, the Salmon River drainage, the Sawtooth Mountains, and other parts of central Idaho. Historically numbering in the thousands, bighorn populations plummeted in these areas, and were completely eliminated from Hells Canyon, when European settlers entered the scene.

One of the leading causes of the bighorn's decline was the introduction of domestic sheep, which carry diseases that can be fatal to bighorn sheep and cause large die-offs of bighorn populations. Chief among these diseases is pneumonia. Studies demonstrate that contact with domestic sheep significantly increases the likelihood of bighorn sheep contracting pneumonia and dying. Once one animal is stricken, it can transfer the disease to other bighorns within the herd, leading to large die-offs within bighorn populations.

Two factors play a role in this dynamic: (1) individual bighorn sheep, especially young rams looking for mates, will often travel long distances, and (2) bighorns and domestic sheep are attracted to each other because they are gregarious ruminant mammals. These factors substantially increase the chance that bighorn sheep will come into contact with domestic sheep on public lands grazing allotments, and thus increase the likelihood of bighorn mortalities from pneumonia.

Bighorn sheep have been restored to Hells Canyon thanks to reintroduction efforts by state wildlife agencies, but several populations continue to struggle due to disease-related die-offs. The populations closest to domestic sheep

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grazing allotments have either already died-off or have only 20-25 members (a viable population is usually considered to be at least 100 individuals), and have experienced very low reproductive success the last five years. Populations along the main Salmon River also have experienced pneumonia die-offs and remain at low levels. Any further disease impacts to these populations would almost certainly cause their extirpation.

Conservationists, recreationists, and hunting advocates have long tried to convince the Forest Service to change grazing practices to remove domestic sheep from areas near bighorn populations. A few years ago, the Forest Service listened to the experts and closed several domestic sheep allotments in Oregon to protect bighorn sheep. But in Idaho, the agency has refused to take similar actions – despite data showing that bighorn sheep are using areas within or very near several domestic sheep grazing allotments on the Payette National Forest.

In fact, in 2005 the Chief of the Forest Service recognized that the Payette National Forest was not complying with

increased the risk of mortality to bighorns. Their report rated several domestic sheep allotments on the Payette National Forest as “high risk” for disease transmission from domestic sheep to bighorn sheep. Yet despite these conclusions, the Forest Service

continued domestic sheep grazing in the “high risk” allotments would pose unacceptable risks to bighorn.

In response to our injunction motion, the Forest Service abruptly reversed course, and decided to close part or all of



Dean Biggens, USFWS

publicly stated that it would not significantly change domestic sheep grazing for the 2007 season.

On behalf of our client Western Watersheds Project, and coordinating closely with The Wilderness Society and Hells Canyon Preservation Council, *Advocates for the West* thus

filed a lawsuit and injunction motion this spring. We asked the U.S. District Court in Idaho to order the Forest Service to listen to its own

experts and prohibit grazing in the “high risk” allotments where the domestic sheep threaten to spread fatal diseases to bighorn.

We received significant support in this effort from wildlife biologists from Oregon and the Nez Perce Tribe, who confirmed to the court that allowing

five domestic sheep allotments that are in close proximity to bighorn sheep populations: two within the Hells Canyon area and three along the main Salmon River. These closures provide substantial protection to bighorn populations this year.

However, the Forest Service now must come up with a long-term solution to the conflict between domestic sheep and bighorn sheep in Hells Canyon and the Salmon River. *Advocates for the West* is continuing to work with our partners to ensure that the Forest Service complies with its legal duty to protect these bighorn sheep populations.

***Studies demonstrate that contact with domestic sheep significantly increases the likelihood of bighorn sheep contracting pneumonia and dying***

environmental laws because it continued to authorize domestic sheep grazing near bighorn populations, violating its duty to protect and manage for viable populations of wildlife species. Even the Forest Service’s own report issued in 2006 concluded that contact between domestic sheep and bighorn sheep

**To find out more about this subject, read “Sheep v. Sheep” in the Oct. 1 issue of High Country News at [www.HCN.org](http://www.HCN.org).**



# CASE UPDATE: FALL 2007

## KEEPING THE “PUBLIC” IN OUR PUBLIC LANDS

### Sweeping Win Protects 160 Million Acres From Industry Abuse

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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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In a scathing June 2007 decision, U.S. District Judge B. Lynn Winmill in Idaho ruled that the Bureau of Land Management violated multiple federal laws when it issued new regulations governing livestock grazing on 160 million acres of public lands across the West; and he permanently precluded BLM from ever implementing the unlawful regulations.

The regulations would have gutted ecological requirements to protect public lands from grazing harm, especially streams and other sensitive areas. They also would have given livestock operators new ownership and control over public lands resources, including water rights and range projects.

As reported in our Fall 2006 newsletter, these regulations were adopted by the Bush Administration at the insistence of the livestock industry and Western politicians, including Idaho Senator Larry Craig.

But we won preliminary injunctions last fall to stop BLM from putting the regulations into effect temporarily, while we presented our legal challenges in court (see Fall 2006 newsletter). Over the past year, we filed extensive briefs before the court detailing the ways in which BLM violated federal laws in adopting the regulations.

The June 2007 decision expanded upon and makes permanent our prior victories. Voicing sharp criticism of BLM's rulemaking, Judge

Winmill held that BLM violated the Endangered Species Act, the National Environmental Policy Act, and the Federal Land Policy and Management Act when it adopted the new regulations without adequate analysis of their likely environmental damages – and without disclosing to the public the true consequences the regulations would have in preventing BLM from properly managing livestock grazing on public lands.

**The Grazing Regulations decision is available on our website at [www.AdvocatesWest.org](http://www.AdvocatesWest.org). It's good reading!**

The court was particularly troubled by BLM's efforts to exclude the public from grazing management decisions across the West. Judge Winmill emphasized that public input cannot “be jettisoned simply to reduce the agency's workload.” He also held that the Bush Administration wrongly suppressed the views of its own scientists, who warned that the new regulations would cripple BLM's ability to protect vital wildlife habitat and water quality from grazing damage.

This case has national significance – not only in protecting 160 million acres of public lands in the West, but in affirming that the health of our public lands depends on strong public involvement in how they are managed.



# ANOTHER OWYHEE GRAZING WIN

## Nickel Creek Victory Proves That BLM Does Not Follow Science In Its Grazing Management

Another recent *Advocates for the West* victory underscores that BLM is not able to manage livestock grazing on public lands according to range science and ecological principles – thus allowing unacceptable damage to streams, upland habitats, soils, and fish and wildlife populations.

**This case is unprecedented in putting BLM’s grazing management on trial – and in ruling that BLM is violating the basic “range management” principles taught at schools around the West.**

This win involves the 7,000 acre Nickel Creek allotment, which is part of BLM’s Owyhee Resource Area in southwestern Idaho. Nickel Creek has stunning canyons, large upland habitats, and a host of important species including bighorn sheep, sage grouse, and redband trout.

In response to an earlier court injunction requiring analysis of grazing impacts across the Owyhees, BLM studied conditions on the Nickel Creek allotment and found extensive grazing degradation of streams, native plants, soils, and sensitive species habitats. But under pressure from the livestock permittees and their sympathizers in the agency, BLM refused to change grazing levels in response to these findings.

Representing our client Western Watersheds Project, we filed an

administrative appeal of this decision, resulting in a 15 day trial before an Administrative Law Judge in the Department of Interior. Senior Staff Attorney Todd Tucci and Executive Director Laird Lucas handled the trial. Expert testimony was given by WWP staff Dr. John Carter and Katie Fite, substantiating the harms that grazing has caused to the public lands and natural resources of the Nickel Creek allotment – and also explaining the modern scientific principles relating to the ecology of the area and grazing management. We also grilled BLM staff and the ranchers on cross-examination, to further prove our case.

In a 125-page decision, the Administrative Law Judge ruled for us on every scientific point we raised, holding that BLM

acted unreasonably and contrary to modern range science in refusing to change grazing management in order to protect Nickel Creek’s public lands and resources. The judge instructed BLM to implement much more restrictive grazing – or no grazing at all – in order to be consistent with prevailing ecological and range science principles, and to protect the public lands of the Nickel Creek allotment from further damage.

*Advocates for the West* and WWP will now be presenting similar challenges to equally inadequate BLM grazing decisions elsewhere in Idaho and other western states.



Senior Staff Attorney Todd Tucci



Sheep Creek Canyon, Owyhee Mountains

Greg Jahn



# GIVING THE PYGMY RABBIT SOME BREATHING ROOM

## Another Victory Overturns The Administration's Refusal To Follow The ESA

In yet another court victory, *Advocates for the West's* Senior Staff Attorney Todd Tucci won a recent ruling from Judge Edward Lodge of the U.S. District Court in Idaho, holding that U.S. Fish and Wildlife Service acted arbitrarily and contrary to the Endangered Species Act (ESA) when it rejected a Western Watersheds Project petition to list the pygmy rabbit as endangered or threatened.

Judge Lodge is not known for his environmental leanings, and typically rules against conservation groups that are assigned him in their cases. But even he was troubled by the Service's refusal to follow the ESA in evaluating whether the pygmy rabbit deserves protection.



Pygmy Rabbit

Michael Durham, Oregon Zoo

Small enough that an adult can fit into your hand, the pygmy rabbit is an adorable creature – and one that is deeply in trouble. Pygmy rabbits are sagebrush-dependent species, and have suffered serious loss of populations as the sagebrush ecosystem of the Interior West has been degraded and fragmented over recent decades. Livestock grazing, in particular,

harms pygmy rabbits, both through direct impacts, like trampling their burrows; and indirectly, by degrading sagebrush and native grasses.

WWP's Biodiversity Director Katie Fite spent several months compiling all available data on the plight of the pygmy rabbit, and presented her findings to the U.S. Fish and Wildlife Service in a petition that amply established the species deserves ESA listing as an endangered species. But the Service simply rejected the petition as not containing adequate information to suggest that ESA listing might be warranted.

The Service's rejection of the pygmy rabbit listing petition is just one more example of this Administration's systematic effort to prevent the ESA from being applied to protect deserving species. Fortunately, Judge Lodge agreed with us that the Service misapplied the ESA in rejecting the petition, and ordered the agency to make a new decision within 90 days.

Working with WWP, we will continue to press the Service to live up to its requirements under the ESA, and protect the pygmy rabbit from further declines and possible extinction.

## WE DON'T WIN EVERY CASE

### A Couple Recent – And Rare – Losses

*Advocates for the West* has a strong track record of success in our legal actions on behalf of the conservation community. We work closely as partners with our clients to identify priorities, develop facts and science, and bring cases with strong legal merit to the courts.

But we often push the boundaries of environmental law, and sometimes we are assigned unfriendly judges. These factors mean we will lose cases now and again.

One recent loss was delivered by Judge Lodge in Idaho – the same judge who ruled for us in the pygmy rabbit case. In another ESA listing case, he rejected our arguments that the U.S. Fish and Wildlife Service misapplied the facts and law when it refused to consider listing the Interior Mountain Quail as an endangered or threatened species. This is despite the fact that Interior Mountain Quail have been virtually exterminated from Idaho and eastern Oregon. The judge bought the Service's argument that healthier quail populations in the western Cascades means they should not receive ESA protection. We intend to appeal this ruling.

Another recent loss came from U.S. District Judge B. Lynn Winmill – the judge who ruled for us in the BLM grazing regulations case, and in many other environmental cases. In late September, Judge Winmill denied our request for an injunction to prevent BLM from

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conducting a “prescribed burn” on over 3200 acres of the Castlehead Lambert allotment in the Owyhees. BLM determined to undertake this project without any environmental review whatsoever, and despite the fact that the 47,000 acre Tongue Complex wildfire scorched



**Burned Juniper,  
Tongue Complex Fire**  
Katie Fite, WWP

parts of the same area in the Owyhees just weeks before.

We only learned of BLM’s intent

a few days prior to the burn, and rushed to court. We presented photographs and expert testimony that the Castlehead fire, in connection with the Tongue Complex fire, would likely result in soil erosion and cheatgrass invasions, which BLM has refused to study – or even acknowledge – thus violating the National Environmental Policy Act.

But in light of BLM’s accelerated schedule to light the fire given changing weather conditions, Judge Winmill had very little time to review our claims, and was concerned about the lack of time. Because courts typically must defer to agency scientific expertise, he followed that path here.

This decision illustrates how heavy a burden we must carry in challenging federal agency actions in court. We will only win when we can show a court that an agency disregarded the facts, ignored relevant science, or misapplied the law.

The fact that *Advocates for the West* does win most its cases only underscores how often our land management agencies and regulators are not complying with science and law – a sad fact indeed.

# Using Science To Enforce The Law

## Monitoring Grazing Impacts On Public Lands

Monitoring the actual effects of livestock grazing on native vegetation is one of the tools that *Advocates*

*for the West* is increasingly using to win in our grazing cases – with the invaluable assistance of volunteer Gene Bray, and our expert Stuart Murray of High Desert Ecology consultants.

To monitor grazing use, Gene has designed and constructed sturdy steel “utilization cages” which allow native vegetation to grow free from livestock browsing. Gene is a long-time engineer, has his own metal shop, and created these cages using designs that he improved on. Gene also built a tool to take out into the field, allowing him to ship the cages in flat pieces and then bend them into shape once there.

Gene has now built dozens of these utilization cages, which he, Stuart, and other WWP staff have distributed around BLM grazing allotments in the Jarbidge

Resource Area of southern Idaho, as well as other BLM and Forest Service allotments



Gene Bray installing utilization cages

in eastern Oregon, western Wyoming, and northern Utah.

After the utilization cages are in place, Stuart, Gene or others will return to them annually to cut and weigh the vegetation that has

grown up inside them – thus providing a “baseline” of how well the native grasses, wildflowers and shrubs have done in the absence of grazing impacts. These results can then be compared to similar measurements taken outside the cages, in order to precisely quantify how much vegetation has been utilized by livestock grazing.

Scientific research demonstrates that livestock utilization of even 30% of annual growth can harm the productivity of native grasses and wildflowers. The BLM and Forest Service typically impose 40% or 50% utilization limits in their grazing permits – which is too high, according to the science. But even then they rarely monitor carefully to ensure these limits are met.

Through the careful field work of Stuart, Gene, and many other staff and volunteers, we are able to determine precisely what utilization is occurring – and make sure the agencies enforce the utilization limits to prevent overgrazing.



Gene Bray and Stuart Murray



# Welcome To New Staff!

It is with great pleasure that we welcome **Beth Richards** as a new Staff Attorney with *Advocates for the West*; and **Jennifer Bremer** as our new Office Manager and Marketing Director.



**Beth Richards**

Beth comes to us after graduating at the top of her class from Wyoming Law School in 2005 and serving as a judicial law clerk the last two years. During 2006-07, Beth worked

for Judge Stephen Trott on the U.S. Court of Appeals for the Ninth Circuit; and the year before that for Justice Linda Copple Trout on the Idaho Supreme Court. Beth is a long-time resident of Driggs, Idaho, and is passionate about protecting the West's public lands and wildlife. She will be working primarily on our Sagebrush Sea Project. Welcome Beth!

Jennifer joined us in April 2007, and is responsible for our website and marketing materials, as well as making sure our office runs smoothly. Jennifer earned her BA from University of Minnesota in 1992, and completed the year-long Wilderness and Civilization



**Jennifer Bremer and Reilly**

program at the University of Montana in 2003. Over the last decade, Jennifer worked as a senior project manager with leading advertising firms in Minneapolis, Los Angeles and San Francisco. We hope to utilize her experience and skills to better inform our supporters and the public about the importance of protecting our natural heritage in Idaho and throughout the West.

# Thanks To Our Summer Interns

We also give a big thanks to **Emily Stark** and **Katie Strong** for their fine work with us as law clerks this past summer.

Emily drove all the way from Vermont Law School to spend the summer with us, and is now in her third year back in Vermont. Emily focused on the Boise River, developing the law and facts for Clean Water Act enforcement actions.

Katie joined us from Lewis and Clark Law School in Portland, Oregon, where she is also now in her third year.



**Emily Stark and Katie Strong**

Katie developed innovative legal claims to protect Wilderness Study Areas in Idaho from

degradation by excessive grazing and other impacts, which we will be using soon in new cases.

Both Emily and Katie demonstrated first-rate legal abilities, and commitment to using their abilities for the environment. We greatly appreciate their contributions and wish them luck in their legal careers. Thanks Emily & Katie!



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