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## W. Watersheds Project v. Kraayenbrink, Nos. CV-05-297-E-BLW, CV-06-275-E-BLW, 2007 WL 1667618 (D. Idaho June 8, 2007)

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W. Watersheds Project v. Kraayenbrink, Nos. CV-05-297-E-BLW, CV-06-275-E-BLW,  
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In determining forfeiture of a water right, the court explained that it may grant equitable relief when water rights are subject to forfeiture (nonuse for any five successive years) if transfer applicants attempted to transfer the rights during the nonuse, a governmental entity thwarted the transfer, and the balance of hardships favored the applicant. The court agreed with the State Engineer in granting the Thomas transfer application because Pyramid submitted insufficient evidence showing nonuse for five consecutive years. In reversing some of the transfer grants in Rambling River Ranches, however, the court explained that no thwarted attempt occurred, and in the remanding two parcels, the court stated that the State Engineer's findings could not determine whether the five year period passed without a thwarted attempt. Most of the parcels in this transfer application passed the third rule of abandonment.

The court fully affirmed the State Engineer's decision in seven of the ten grant applications and partially affirmed three of the ten applications. The court reversed the State Engineer's decision for parcels of three of the applications and remanded the parcels of one application for further consideration.

*Adam Hernandez*

#### UNITED STATES DISTRICT COURTS

**W. Watersheds Project v. Kraayenbrink, Nos. CV-05-297-E-BLW, CV-06-275-E-BLW, 2007 WL 1667618 (D. Idaho June 8, 2007)** (holding as it relates to water rights: (1) the BLM must disclose conflicts between its experts concerning the possible impacts of granting grazing permit holders title to water rights; and (2) the BLM must consult with the FWS regarding the potential adverse effect such a change in title of water rights may have on threatened and endangered species).

Congress passed the Federal Land Policy and Management Act ("FLPMA") to improve the degraded conditions of rangelands and their accompanying riparian areas in the United States. In 1995, the Bureau of Land Management ("BLM") promulgated regulations to administer the nation's rangelands and govern grazing in compliance with FLPMA. In 2006, the BLM began the process of promulgating new regulations, making major changes to the 1995 regulations. As relevant to western water issues, the 2006 regulations decreased public input and allowed permit holders, not the United States, to hold title to water rights on the rangelands.

The BLM circulated a Draft Environmental Impact Statement ("ARC-DEIS") internally that indicated the proposed regulations would result in a decrease in the condition of the nation's rangelands and accompanying riparian areas. In addition, the ARC-DEIS stated changes in water rights ownership would likely decrease the BLM's regulatory authority over water allotments, resulting in long-term im-

pacts to wildlife. Without explanation, when the BLM released the regulations' Draft Environmental Impact Statement ("DEIS") for publication, the BLM removed the statements reflecting the negative impact of the regulations on riparian conditions. Contrarily, the DEIS and the Final Environmental Impact Statement ("FEIS") stated the regulations would have little or no impact on wildlife. After releasing the FEIS, the BLM issued an Addendum to respond to the Fish and Wildlife Service's ("FWS") comments that the FEIS did not address. Still, neither the FEIS nor the Addendum explained why the BLM omitted and changed the original statements. The BLM issued its final rule adopting the regulations in July of 2006.

In response, Western Watersheds Project ("WWP") brought suit against the BLM, facially challenging the legality of 2006 regulations under the National Environmental Policy Act ("NEPA"), FLPMA, and the Endangered Species Act ("ESA"). WWP argued that: (1) the BLM violated NEPA by suppressing expert opinions concerning the potential adverse impact of the new regulations on the riparian areas; (2) the 2006 regulations are facially invalid because they restrict public input, a requirement for regulations under FLPMA; and (3) the BLM violated ESA by failing to consult with the FWS when the regulations may adversely affect endangered and threatened species. The United States District Court for the District of Idaho agreed with WWP on all three arguments.

First, the court found that the BLM did not adequately explain its actions in removing language originally found in the ARC-DEIS from the DEIS and FEIS that indicated the regulations' likely decrease the conditions of riparian areas. As such, the court held that by failing to reveal the conflict between its experts in its NEPA documents, the BLM violated NEPA.

Second, because the FLPMA requires that its implementing regulations provide the public with adequate notice and opportunity for input and comments regarding the management of the nation's rangelands, the court concluded that the 2006 Regulations' restriction of such input was invalid. The court also rejected the BLM's argument that the revisions allow the agency to seek public input, holding that the language of FLPMA is mandatory, not discretionary.

In addition, the Court agreed with WWP's third argument, finding that the BLM violated ESA by failing to consult with the FWS when the regulations may have an adverse affect on a threatened or endangered species. Under the new regulations, the owner of the water rights would shift from the United States to an owner whose interests in water would be for cattle, potentially limiting sensitive species' access to water. As such, when compounded by the regulations' decrease in BLM oversight and public participation, the regulations may result in an adverse affect on threatened and endangered species, triggering agen-

cy consultation. Because the BLM did not engage consultation with the FWS, the agency violated ESA.

As a result of finding the BLM violated NEPA, FLPMA, and ESA, the Court enjoined the 2006 regulations.

*Elizabeth Dawson*

**United States v. Washington, No. C01-0047Z, 2007 WL 3273545 (W.D. Wash. Nov. 2, 2007)** (holding that the moving parties' proposed Settlement Agreement satisfied the standard for judicial approval and offered a practical solution for all water users).

The United States initiated this action on behalf of the Lummi Indian Nation. The United States sought a declaration that the Treaty of Point Elliott implicitly reserved to the Lummi Nation rights to surface water and groundwater in the Lummi Peninsula (the "Case Area") that are superior or equivalent to the rights of other water users. The United States and the Lummi Indian Nation together with the Washington State Department of Ecology ("Ecology"), Whatcom County, assorted Water Associations, and various property owners reached a Settlement Agreement that addressed three primary issues: division of water, management of the aquifer, and dispute resolution. The United States District Court for the Western District of Washington conditionally approved the Settlement Agreement upon the determination that the Settlement Agreement was essentially fair, adequate, and reasonable.

The Settlement Agreement equitably apportioned the available groundwater on the Lummi Peninsula without regard to the seniority or vesting of water rights. Non-Lummi defendants owned approximately twenty percent of the land within the Case Area and the Settlement Agreement apportioned twenty-four percent of the safe yield to them, with Ecology determining the allocations. In the Settlement Agreement, the Lummi Nation retained the right to all groundwater in the Case Area for any purpose permitted under federal or tribal law, provided that it was not otherwise subject to allocation by Ecology or other non-Lummi water users and that the chloride levels remained within an acceptable range. By dividing Ecology's allotment, the Settlement Agreement provided water for every existing home in the Case Area and allowed for a realistic amount of additional construction. Thus, the agreement secured new development water rights not provided for under federal and state law, where water rights depend on actual use. The court, however, directed the parties to revise the Settlement Agreement to reflect that the water reserved to the Lummi Nation may not exceed those amounts that other settlement agreements and service arrangements do not govern.

The Settlement Agreement explicitly addressed the effect of transferring property from non-Lummi to Lummi ownership or vice versa and provided a safety net in the event of saltwater intrusion. In addi-