

Superior Court of the State of Washington
For Thurston County
Family and Juvenile Court

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Richard A. Stophy, Judge
Department No. 2
Wm. Thomas McPhee, Judge
Department No. 3
Richard D. Hicks, Judge
Department No. 4
Christine A. Pomeroy, Judge
Department No. 5
Gary E. Tabor, Judge
Department No. 6
Chris Wickham, Judge
Department No. 7
Anne Hirsch, Judge
Department No. 8



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January 28, 2009

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RE: *Herman v. Washington Department of Fish and Wildlife and
Washington Cattlemen's Association*
Thurston County Superior Court Cause No. 08-2-00276-1

Dear Counsel:

This Court heard argument on the Petition for Judicial Review in the above-named case on December 12, 2008. The decision of the Court follows.

Plaintiffs filed a Complaint for Declaratory and Injunctive Relief; Petition for Judicial Review; or Alternative Petition for Writ of Prohibition February 7, 2008 in this action. Washington Department of Fish and Wildlife ("Fish and Wildlife") and Jeffrey Koenings, Fish and Wildlife Director, were named as Defendants. Subsequently, Washington Cattlemen's Association intervened.

FILED
SUPERIOR COURT
THURSTON COUNTY WA
2009 JAN 28 AM 10:00
JETT J. GOULD, CLERK
BY _____
DEPUTY

The initial Complaint challenged the adoption of a Memorandum of Understanding (the "MOU") between Fish and Wildlife and the Cattlemen's Association that would allow grazing to occur on land managed by Fish and Wildlife. On May 19, 2008, a Supplemental Complaint for Declaratory and Injunctive Relief; Petition for Judicial Review; or Alternative Petition for Writ of Prohibition was filed challenging the MOU and also a permit issued by Fish and Wildlife to allow grazing on the Quilomene/Whiskey Dick Wildlife Area.

By agreement of the parties, the Court took up only the validity of the permit at the hearing on December 12. Plaintiffs had filed a Motion for Partial Summary Judgment on this issue.

The land at issue in this case is referred to as "the Skookumchuk lands." It is an area within the Quilomene/Whiskey Dick Wildlife Area, which is managed by Defendant Fish and Wildlife. The Wildlife Area is about 15 miles east of Ellensburg in eastern Kittitas County, bordering the Columbia River. It is home to the sage grouse, a state threatened species. Populations of the grouse are found in two small areas in the state. The Skookumchuk lands lie between these two areas and could serve as a bridge between the two areas. There are other rare and threatened plant and animal species in the Skookumchuk lands.

In April, 2008 Fish and Wildlife released a grazing plan and permit authorizing up to 160 cattle to graze on five pastures within the Skookumchuk lands. There was no public notification, comment period, or hearing process for this permit. No environmental analysis under SEPA was conducted.

The issue before the Court is whether a SEPA analysis was required under the law.

Although Plaintiffs filed a motion for summary judgment, this is a petition for judicial review and the Court under the Administrative Procedures Act makes final orders based on the record of the agency below as part of the review process but not necessarily as a form of summary judgment. There is no significant disagreement regarding the record below. All parties agree that the permit in question was issued without following the requirements of SEPA. All parties also agree that an environmental impact statement ("EIS") "shall be prepared ... for ... major actions having a probable significant, adverse environmental impact." RCW 43.21C.031

Defendants and Intervenor Cattleman's Association maintain that the permit at issue in this case was "categorically exempt" from SEPA. RCW 43.21C.031 provides in pertinent part:

... Actions categorically exempt under RCW 43.21C.110(1)(a) do not require environmental review of the preparation of an environmental impact statement under this chapter....

RCW 43.21C.110(a) gives the Department of Ecology the responsibility to determine "[c]ategories of governmental actions which are not to be considered as potential major actions significantly affecting the quality of the environment The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment. The rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review."

Pursuant to that statutory authority, the Department of Ecology has adopted various regulations establishing categorical exemptions to SEPA. The rule applicable to this case is the "grazing exemption" set forth in WAC 197-11-800(24)(a):

(24) Natural resources management. In addition to the other exemptions contained in this section, the following natural resource management activities shall be exempt:

- (a) issuance of new grazing leases covering a section of land or less; and issuance of all grazing leases for land that has been subject to a grazing lease within the previous ten years.

The parties agree that the area of land at issue in this case is more than a section. Therefore, the permit issued would be exempt from SEPA only if it is for land "that has been subject to a grazing lease within the previous ten years."

The parties further agree and the record establishes that the Skookumchuk lands were recently acquired by Fish and Wildlife from a private entity. Prior to acquisition, grazing occurred on the property. The record does not contain evidence of a lease.

Fish and Wildlife and intervenors Cattleman's Association argue that the tradition in this area of the state is for ranchers to obtain permission to graze from landowners but

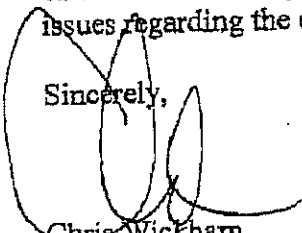
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typically there is no written lease. The question, then, is what is a "grazing lease" for purposes of the regulation?

There is no definition within the regulations. RCW 19.36.010 bars enforceability of certain oral agreements. Although it applies to "[e]very agreement that by its terms is not to be performed in one year from the making thereof", it is possible to have an oral grazing lease for less than a year. Thus the term "lease" could apply to oral and written leases. The difficulty with oral agreements in general and with an oral lease in this case in particular is the ability to prove the lease.

In this case, Fish and Wildlife suggests the Court infer the existence of a lease by the evidence of grazing. However, to allow use of the categorical exemption on the evidence of grazing alone would permit an exemption for land "that has been grazed within the previous ten years." This interpretation makes the term "lease" surplusage, and is therefore contrary to standard rules of construction. As there is no evidence of a lease in the record, the issuance of a grazing permit for this area is not covered by the list of categorical exemptions and the issuance of a permit without following the requirements of SEPA was clearly erroneous. Judgment is granted to Plaintiffs on this issue. All issues regarding the enforceability of the Memorandum of Understanding are reserved.

Sincerely,



Chris Wickham
Superior Court Judge

cc: Court File