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## **MEMORANDUM**

**TO: LIVESTOCK INDUSTRY AND INTERESTED PARTIES**

**VIA: E-MAIL**

**FROM: KAREN BUDD FALEN  
BUDD-FALEN LAW OFFICES, LLC**

**DATE: SEPTEMBER 1, 2009**

**RE: BUREAU OF LAND MANAGEMENT CATEGORICAL  
EXCLUSION INSTRUCTION MEMORANDUM BASED UPON  
WESTERN WATERSHEDS PROJECT V. LANE**

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Below please find a press release/letter to the editor regarding the Bureau of Land Management's Instruction Memorandum dated August 21, 2009 discontinuing the use of Categorical Exclusions for term grazing permit renewal in all cases.

## **INTRODUCTION**

On August 21, 2009, the Bureau of Land Management ("BLM") issued an instruction memorandum ("IM") which "immediately and permanently" stopped all BLM field offices from issuing term grazing permit renewals based upon categorical exclusions ("CE"). According to the IM, the nation-wide discontinuance of the use of CEs for term grazing permit renewal was required by a settlement agreement in an Idaho Federal District Court case entitled Western Watersheds Project v. Lane, No. 07-cv-394-BLW. Although according to the court's website, the settlement agreement was "restricted," this firm was able to acquire a copy. The terms of the settlement agreement mandate a discontinuance of the use of CEs for term grazing permit renewals nationwide regardless of circumstance. Additionally, the U.S. Justice Department paid Western Watersheds Project ("WWP") \$43,000 in fees pursuant to the Equal Access to Justice Act.

## **PROBLEMS WITH THE LITIGATION AND SETTLEMENT**

There are several things about this settlement agreement which should concern the livestock industry. First, there were no intervenors in this litigation, thus no one to advocate the livestock industry's points, legal arguments and concerns. While I agree that money is tight, and certainly no one can guarantee that there would have been a different outcome if ranchers were represented in the case, it may have made a difference and certainly the outcome would not have been worse.

Second, there will be no use of categorical exclusions to renew term grazing permits, regardless of the factual circumstances. That will amount to significantly more paperwork for the BLM. I guarantee, however, that the WWP will not stop here. I have been involved in a significant number of cases related to BLM permits where the environmental groups argue that if the NEPA compliance is not completed before the term permit expires, grazing should be eliminated from the allotment. This would be an untenable position for permittees. The BLM admits that it is woefully behind completing its NEPA compliance paperwork, even on the smallest of permits and even when the rangeland conditions are in excellent condition. However, WWP and other environmental groups are arguing that if the NEPA paperwork is not completed before the end of the ten year term, livestock grazing has to be eliminated from the allotment until NEPA is done. Do not kid yourselves, it is not the compliance with NEPA that the environmental groups want; it is the elimination of livestock grazing.

Third, the restriction on acquiring the settlement agreement is concerning. Settlement agreements, particularly those involving an entire program of the federal government as well as attorney fees paid from agency budgets, should not be restricted from public view particularly in an administration that pledged more "transparency and an open government."

Finally, WWP was paid \$43,000 for this case. This case was not "won," but settled. The settlement agreement specifically states that it is based upon compromise and that there is no admission by any party to any fact or claim. The attorney fees payment was premised upon the Equal Access to Justice Act ("EAJA"). EAJA only applies in those cases with a "prevailing party" and when the federal government's position is "not substantially justified." The EAJA requirements are directly contrary to the language in the settlement agreement, but the federal government voluntarily paid \$43,000 from the BLM's budget to WWP. If anything, those funds should be used for the additional NEPA compliance which the settlement agreement and the IM now require.

## **LITIGATION HISTORY**

The initial litigation in WWP v. Lane was filed in the Idaho Federal District Court on September 21, 2007. The case was assigned to Judge Lodge. WWP moved to reassign the case to Judge Winmill, a motion which the Justice Department did not oppose. The complaint dealt ONLY with a BLM proposed prescribed burn on the Castlehead Lambert grazing allotment. The BLM used a categorical exclusion to analyze the proposed burn. WWP also filed a motion for temporary restraining order attempting to stop the prescribed burn. That motion for temporary restraining order

was denied.

On December 11, 2007, WWP amended its Complaint against the BLM. The amended Complaint continued to allege that the prescribed fire on the Castlehead Lambert allotment was unlawful (despite the fact that the prescribed burn had already been completed), and included three new allegations. The WWP contended that the BLM's adoption of both the range management and hazardous fuels reduction CE instruction memorandums violated the procedural requirements of the Administrative Procedure Act and National Environmental Policy Act. The WWP did not complain that the CE violated substantive law in all cases, rather that the BLM failed to follow the proper process for authorizing the CEs. The WWP also claimed that the CEs were unlawfully applied to seven grazing allotments in Idaho. There is no mention in the amended Complaint of any term permit renewals on any Nevada allotments.

On May 27, 2008, the Court made a docket entry that the claim in the amended Complaint that was the only subject of the original litigation was moot, and that the issue regarding the use of categorical exclusions relating to hazardous fuels reduction was the subject of other separate litigation. With regard to the WWP's claims against the seven grazing permit renewals in Idaho and the BLM's adoption of the grazing permit renewal categorical exclusion instruction memorandum, Judge Winmill ordered the case to continue. On June 30, 2008, the Justice Department filed its administrative record for the two remaining claims. On January 15, 2009, the WWP filed its Motion for Partial Summary Judgment. The WWP and Justice Department moved to stay the remainder of the briefing in this litigation. On July 17, 2009, the parties stipulated to dismissal of the litigation. The settlement agreement included a requirement to withdraw the instruction memorandums allowing categorical exclusions for hazardous fuel reduction and term grazing permit renewals in all circumstances. The instruction memorandum was issued on August 21, 2009. The settlement agreement also ordered that the term permit renewals for the seven allotments in Idaho be withdrawn. Additionally the settlement included an order to withdraw eight other term permit renewals in Nevada, although there is no mention of these permit renewals in either the original or amended Complaints. Finally, the settlement agreement stipulated that \$43,000 would be electronically transferred to Laird Lucas' law firm account in settlement for attorney fees.

Should you have any questions please do not hesitate to contact me.

Enclosure(s)