



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

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October 1, 2007

ORDER

CENTER FOR BIOLOGICAL ) CA-680-07-01
DIVERSITY, THE MOJAVE GROUP OF )
THE SAN GORGONIO CHAPTER OF ) Appeal from the Field Manager's Final
THE SIERRA CLUB, THE NATURAL ) Decision dated July 11, 2007, involving
RESOURCES DEFENSE COUNCIL, ) the Ord Mountain Allotment, Barstow
WESTERN WATERSHEDS PROJECT, ) Field Office, California
AND DESERT SURVIVORS, )
)
Appellants )
)
v. )
)
BUREAU OF LAND MANAGEMENT, )
)
Respondent )

Motion to Dismiss Granted in Part;
Petition for Stay Granted in Part

Appellants have appealed and petitioned for a stay of a final grazing decision (Final Decision) and Finding of No Significant Impact (FONSI) issued by the Bureau of Land Management (BLM) on July 11, 2007. The Final Decision renews the grazing lease for the Ord Mountain Allotment (Allotment) for a period of 10 years, authorizing annual grazing of 3,632 animal unit months (AUMs) of perennial forage by 295 head of cattle and 8 horses.

I. Motion to Dismiss

After Appellants filed their Notice of Appeal and Petition for Stay (Petition for Stay), Respondent filed a Response to Petition for Stay and Motion to Dismiss Appeal for Lack of Standing (Response or Motion to Dismiss). In its Motion to

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Dismiss, Respondent argues that Appellants failed to demonstrate a legally cognizable interest in the Allotment. Appellants filed a response to the Motion to Dismiss which included affidavits from members of the Center for Biological Diversity (CBD), the Mojave Group of the San Geronio Chapter of the Sierra Club (Sierra Club), the Natural Resources Defense Council (NRDC), Western Watersheds Project (WWP), and Desert Survivors.

Under 43 C.F.R. § 4.470(a), a person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge. Interpreting a similar provision at 43 C.F.R. § 4.410, the Interior Board of Land Appeals (Board) has explained that an organization may demonstrate that it is adversely affected by a final decision where at least one of its members is adversely affected by that decision. *Wyoming Outdoor Council*, 153 IBLA 379, 384 (2000); *National Wildlife Federation*, 82 IBLA 303, 307-08 (1984).

A member is adversely affected where that member has actually used the specific land at issue in a given decision and the decision will have adverse effects on the ability of that member to use the land in the future. *Oregon Natural Resources Council*, 78 IBLA 124, 125-126 (1984). The Board has declined to find that an organization is adversely affected by a final decision where the organization's members attest to using only lands in the same general area as the land which is the subject of the final decision. *See Wilderness Watch*, IBLA 2004-291 (Sept. 29, 2004).

The affidavits submitted by members of the CBD, WWP, and Desert Survivors all show that the affiants have visited the Allotment, intend to return, and are likely to be detrimentally affected by the Final Decision. Accordingly, each of these three organizations has demonstrated that it may be adversely affected by the Final Decision and therefore **the Motion to Dismiss is denied with respect to CBD, WWP, and Desert Survivors.**

Affidavits submitted by members of the Sierra Club and the NRDC do not indicate that any of those entities' members have ever visited the Allotment. Instead, the affidavit submitted by a member of the Sierra Club indicates that club members visit the California deserts and West Mojave Planning Area but does not discuss any specific use of the Allotment. The affidavit submitted by a member of the NRDC indicates that its members have general interests in the Allotment as well

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as its flora and fauna but does not attest to the fact that any NRDC member has actually set foot on the Allotment.

Having failed to show member use of the Allotment, the Sierra Club and the NRDC have not demonstrated that any of their members will be adversely affected by the Final Decision within the meaning of 43 C.F.R. § 4.470(a). Therefore, **the Motion to Dismiss is granted to the extent that the Sierra Club and the NRDC are hereby dismissed from this proceeding for lack of standing.**

## II. Petition for Stay

### A. Background

The Allotment, being located in the Mojave Desert, is managed under the March 13, 2006, Record of Decision (ROD) for the West Mojave Plan Amendment (WMP) to the California Desert Conservation Area Plan (CDCA Plan). The purpose of the WMP is to satisfy two needs for: (1) a regional biological strategy to conserve plant and animal species and their habitats and prevent future listings of species as threatened or endangered under the federal Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44, and the California Endangered Species Act (CESA), and (2) an efficient, equitable, and cost-effective process for complying with those laws.

The listing of the desert tortoise by the U.S. Fish and Wildlife Service (FWS) and the California Department of Fish and Game (CDFG) in 1990 and 1989, respectively, was the initial impetus for the preparation of the WMP. FWS has also listed 12 other Mojave species, and CDFG has listed ten others, with six species being listed by both agencies. Several dozen other plants and animals are at risk of listing in the next few decades. This potential for future listing provided additional motivation for completion of the WMP.

The WMP was also driven by a federal lawsuit filed by some of the Appellants against BLM in 2000. In that lawsuit, Appellants alleged that BLM had failed to consult with FWS regarding the CDCA Plan as a whole in violation of the ESA. That lawsuit resulted in a January 2001 Settlement Agreement (Settlement Agreement). Pursuant to the Settlement Agreement, BLM initiated consultation with FWS on a region-by-region basis within the CDCA. BLM also agreed to implement certain interim measures restricting grazing and other activities on the

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public lands, including the Allotment, pending completion of consultation, land use planning, and issuance of the ROD.

Those interim restrictions included a reduction in the Allotment's authorized grazing use from 3,632 to 2,066 AUMs and the seasonal exclusion of cattle from certain desert tortoise habitat. The previous grazing lease for the Allotment authorized grazing of 3,632 AUMs, expired at the end of the 1999 grazing year (February 28, 2000), and was renewed for a five-year period under the authority of Public Law No. 106-113. The grazing restrictions were implemented by incorporating them into the renewed lease. Response at 7.

Upon expiration of the renewed lease, grazing continued under the authority of Section 9(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 558(c). Although the interim restrictions were to terminate under the Settlement Agreement upon issuance of the ROD, those restrictions continued in effect as part of the grazing scheme authorized under Section 9(c) until issuance of the Final Decision.

The WMP was analyzed in a Final Environmental Impact Report and Statement (Final EIR/S) prepared by BLM (the lead federal agency), the County of San Bernardino, and the City of Barstow. Additional agencies, local jurisdictions, and members of the interested public collaborated in development of the WMP through task forces and other means. In the Final EIR/S, seven alternatives that address compliance with ESA and CESA were considered. On January 9, 2006, the FWS issued a Biological Opinion concluding that the WMP is not likely to destroy or adversely modify critical habitat of the desert tortoise.

The public also participated in BLM's development of an Environmental Assessment CA-680-07-01 (EA) analyzing the action taken in the Final Decision and alternatives thereto. That EA was tiered to the Final EIR/S for the WMP. In the EA, BLM analyzed four alternatives, including the proposed action which BLM selected for implementation in the Final Decision. The remaining three alternatives considered in the EA were a no-action alternative, a no-grazing alternative, and a limited-grazing alternative. On March 16, 2007, BLM sought concurrence from the FWS regarding implementation of the EA's proposed action. On July 2, 2007, FWS issued a letter of concurrence indicating that additional formal consultation was not required prior to implementation of the EA's proposed action.

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Consistent with the WMP, and BLM's analysis in the EA, the Final Decision imposes utilization limits and other restrictions to protect threatened and sensitive species, including the Mojave population of the threatened desert tortoise. Appellants have appealed and petitioned to stay the effects of the Final Decision, arguing that the actions authorized in the Final Decision violate the APA, the ESA, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and the Federal Land Policy Management Act (FLPMA), 43 U.S.C. §§ 1701-1785.

## B. Discussion

To prevail on its Petition for Stay, Appellants must show, in accordance with 43 C.F.R. § 4.471(c), sufficient justification based on the relative harm to the parties if the stay is granted or denied, the likelihood of Appellants' success on the merits, the likelihood of immediate and irreparable harm if the stay is not granted, and whether the public interest favors the granting of the stay. As the parties seeking the stay, Appellants bear the burden of demonstrating that a stay is warranted under each of the regulatory criteria. *See* 43 C.F.R. § 4.471(d); *Oregon Natural Resources Council*, 148 IBLA 186, 188 (1993).

To achieve success on the merits, Appellants must meet their burden to demonstrate, by a preponderance of the evidence, that the Final Decision is unreasonable or does not substantially comply with the provisions of the Federal grazing regulations found at 43 C.F.R. part 4100. *See* 43 C.F.R. § 4.480(b); *Eason v. BLM*, 127 IBLA 259, 262 (1993). A BLM decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis. *Wayne D. Klump v. BLM*, 124 IBLA 176, 182 (1992).

In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties it has been held that "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 740 (2d Cir. 1953), quoted in *Placid Oil Co. v. United States Department of the Interior*, 491 F. Supp. 895, 905 (N. D. Texas 1980).

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*Wyoming Outdoor Council Inc.*, 153 IBLA 379, 388 (2000) (quoting *Sierra Club*, 108 IBLA 381, 384-85 (1989)). Based upon a preliminary review of the record and pleadings, and as more fully discussed below, I find that Appellants have met their burden of showing that a partial stay is warranted under the regulatory criteria, meaning that the level of use authorized by the Final Decision should be stayed.

### 1. Likelihood of Success on the Merits

Appellants have demonstrated a likelihood of success on the merits with regard to their argument that the Final Decision violates 43 C.F.R. § 4130.3-1 by authorizing a level of grazing use (3,632 AUMs) above the estimated carrying capacity of the Allotment. Section 4130.3-1 unequivocally states that "authorized livestock grazing use shall not exceed the livestock carrying capacity of the allotment."

Appellants' argument is based on BLM's own statement that "[t]he average carrying capacity for this allotment is estimated to range from 40 to 60 acres/AUM." EA at 34. The Allotment consists of 136,167 acres of public land, 15,542 acres of private land, and 3,221 acres of state land, for a total of 154,949 acres of land. EA at 31. Assuming that the average carrying capacity of land on the allotment is 50 acres/AUM (i.e., the midpoint of BLM's estimated range of 40 to 60 acres/AUM), then 181,600 acres would be required to produce the 3,632 AUMs authorized by the Final Decision ( $50 \times 3,632 = 181,600$ ). This figure is 45,433 acres more than the Allotment's public land acreage. Even at the most productive end of BLM's estimated carrying capacity range, 40 acres/AUM, the acreage required to satisfy the authorized grazing use of 3,632 AUMs (145,280 acres) exceeds the public land acreage of 136,167 by 9,113 acres. Thus, the authorized AUMs do exceed BLM's estimated carrying capacity for the public land.

In the Final Decision, and in response to Appellants' assertion that 3,632 AUMs exceeds BLM's estimated carrying capacity for the Allotment, BLM writes: "The estimate in the EA is just that, an estimate. The methodology used to determine carrying capacities contained in the CDCA plan are [sic] not at our disposal and would require a monumental effort to duplicate. Stocking rates adjustments and areas of use are determined through monitoring." Final Decision at 6.

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BLM's explanation for authorizing grazing use which exceeds its own estimate of carrying capacity is inadequate. BLM cannot escape accountability for its own carrying capacity estimates by stating that it is unable to recount its own methodology. BLM cannot escape accountability for the level of AUMs authorized in the Final Decision by explaining that stocking rates will be determined by monitoring.

Throughout the EA, BLM seems to suggest that the level of AUMs authorized by the Final Decision is irrelevant in view of the utilization thresholds, terms, conditions, and stipulations incorporated into the Final Decision which, BLM argues, will safeguard the environment. However, there are no exceptions to the regulatory prohibition against authorized grazing use exceeding carrying capacity, see 43 C.F.R. § 4130.3-1(a), and therefore Appellants are likely to succeed on the merits of their argument that the Final Decision violates § 4130.3-1(a).

Appellants have also shown a sufficient likelihood of success in arguing that BLM violated NEPA to the extent that the Final Decision authorizes grazing use in excess of carrying capacity.

[NEPA] procedures are designed to "insure a fully informed and well-considered decision." Vermont Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). NEPA does not require agencies to elevate environmental concerns over other appropriate considerations. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). Rather, NEPA only requires that an agency take a "hard look" at the environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). NEPA assures that decision-makers are fully apprised of the likely effects of alternative courses of action so that their selections represent informed decisions. In re Bryant Eagle Timber Sale, 133 IBLA 25, 29 (1995).

*Southern Utah Wilderness Alliance*, 157 IBLA 150, 170 (2002), *rev'd on other grounds*, 237 F. Supp. 2d 48 (2002). Additionally, "[a]n agency is required to provide enough detail in a NEPA document to establish that it has taken a good-faith, objective, hard look at the environmental consequences of the proposed actions." *Utah Wilderness*

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*Association*, 140 IBLA 147, 152 (1997) (quoting *Committee for Idaho's High Desert*, SEC 92-ID 101, at 11).

Where, as here, the level of AUMs authorized by a Final Decision exceeds BLM's own carrying capacity estimates and those estimates are not shown to be unreliable, it is not possible to conclude that BLM has made a fully informed decision or taken, as required by NEPA, a "hard look" at the level of use authorized by the Final Decision. Consequently, Appellants are likely to succeed on the merits of their NEPA argument.

## 2. Relative Harm to the Parties and Likelihood of Immediate and Irreparable Harm

An analysis of the relative harm to the parties if a stay is granted or denied and the likelihood of immediate and irreparable harm if a stay is not granted favors staying the level of use authorized by the Final Decision but not the rest of the decision. This conclusion is based, in part, upon the likelihood that a stay of the level of authorized use will not cause BLM or the lessee any harm during the relatively short period of time it should take to resolve Appellants' appeal.

No harm is likely because if such a stay is granted, authorized use will be reduced to the 2,066 AUMs authorized in the preceding year, *see* 43 C.F.R. § 4160.3(d) (2005),<sup>1</sup> and BLM has acknowledged that it is unlikely that the lessee's

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<sup>1</sup>The BLM grazing regulations at 43 C.F.R. Part 4100 *et seq.* were amended effective August 11, 2006. *See* 71 Fed. Reg. 39402 (July 12, 2006). On June 8, 2007, the United States District Court for the District of Idaho issued an Order enjoining in all respects the BLM regulations set forth in the Federal Register of July 12, 2006, 43 C.F.R. Part 4100 *et seq.* *Western Watersheds Project v. Kraayenbrink, et al.*, No. CV-05-297-E-BLW, 2007 U.S. Dist. LEXIS 41973, at \* 63 (D. Idaho June 8, 2007). Subsequently, on June 15, 2007, BLM's Assistant Director of Renewable Resources and Planning issued Instruction Memorandum 2007-137 which directed all western BLM field offices (excluding Alaska offices) not to implement any of the amendments to 43 C.F.R. Part 4100 *et seq.* set forth in Fed. Reg. 39402 (July 12, 2006). Accordingly, for purposes of this Order, it is understood that if a stay were granted, grazing would occur pursuant to 43 C.F.R. § 4160.3(d) (2005) during the pendency of the appeal.

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cattle would consume more than 2,066 AUMs, regardless of the level of authorized use. See Response at 11; EA at 36. In its Response, BLM writes:

Appellants argue that the 2007 decision [Final Decision] increases grazing use. It does not. It may increase authorized use from that in the settlement agreement but it also retains the same level of authorized use that this lessee has historically held, but not always used. Actual use of the allotment has varied over time. In the 2006 grazing year for example, lessee's cattle consumed 258 AUMs and only 25 cows were stocked on the allotment. In 2005, 94 cows consumed 562 AUMs. . . . Appellants must fear that actual use will increase to the 2007 and earlier historically authorized use levels. But Appellants provide no evidence to support this fear. Indeed, the actual grazing use for the past two years comes nowhere near the amount of use authorized by the expired settlement agreement. . . .

Response at 11.

One section of the EA discusses the impacts of the four proposed alternatives on livestock grazing. EA at 31-34. In that section of the EA, and in reference to the impacts of the no-action alternative (i.e., grazing under the interim restrictions), BLM writes: "This would not be impacting to the lessee's operation because this operation has been under these interim stipulations for the past five years and internal fencing has been constructed to facilitate the exclusion period." EA at 36.

In contrast to the likelihood of no harm resulting from a stay of the level of use authorized by the Final Decision, harm is likely if such a partial stay is not granted and that harm is likely to be immediate and irreparable. This follows from the fact that BLM likely violated NEPA, as discussed in the section of this Order addressing Appellants' likelihood of success on the merits.

[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. \* \* \*

It is appropriate for [a tribunal] to recognize this type of injury in a NEPA case, for it reflects the very

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theory upon which NEPA is based – a theory aimed at presenting governmental decision-makers with relevant environmental data before they commit themselves to a course of action. This is not to say that a likely NEPA violation automatically calls for an injunction [or stay]; the balance of harms may point the other way.

\* \* \* [T]he harm [caused by a NEPA violation] consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an [adequate] analysis (with prior public comment) of the likely effects of their decision upon the environment. \* \* \* [A tribunal] should take account of the potentially irreparable nature of this decisionmaking risk to the environment when considering a request for preliminary injunction or [stay].

*Sierra Club v. Marsh*, 872 F.2d 479, 500-01 (1<sup>st</sup> Cir. 1989) (quoting *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952 (1<sup>st</sup> Cir. 1983)); see also *Injunctions Under NEPA After Weinberger v. Romero-Barcelo And Amoco Production Co. v. Village of Gambell*, 5 Wis. Env'tl. L. J. 1 (1998).

Thus, immediate and irreparable harm will likely occur if a partial stay is not granted by virtue of the apparent NEPA violation. Additionally, significant portions of the Allotment are designated as critical habitat for listed species. Other portions of the Allotment are failing to meet the applicable standards for rangeland health. Under these circumstances, the potential for grazing in excess of BLM's estimated carrying capacity poses an unacceptable risk of immediate and irreparable harm and a stay of the authorized use level is warranted.

However, there is no likelihood of immediate and irreparable harm if the rest of the Final Decision is not stayed and the balance of harms does not favor such a stay. This is so because the Final Decision imposes new terms and conditions which are beneficial to both BLM and Appellants, given that they are designed to protect rangeland resources better than the interim restrictions first imposed by the Settlement Agreement.

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As explained by BLM in the EA, the grazing practices first prescribed by the Settlement Agreement have contributed to rangeland problems as follows:

Over the past thirteen years this allotment has had a utilization threshold of 40% of current year's growth on all forage species. The plant communities that have been exposed to these grazing practices typically exhibit high utilization levels (see table 14) on key species, poor age class distribution, poor recruitment of key species, a reduction in the production [of] palatable species (key species) and an overall reduction in species diversity. These grazing practices are primarily responsible for non-achievement of the Native Species standard on 10% of the allotment and the subsequent degradation of desert tortoise habitat.

EA at 45. BLM concluded: "Overall, this grazing regime has resulted in no discernable, beneficial effects to native plant communities however no direct measurements or quantitative data has been collected to verify this." EA at 36.

To address resource and habitat concerns, the Final Decision imposes terms, conditions, and stipulations designed to better distribute and manage cattle grazing throughout the Allotment. For example, under the Final Decision, areas failing to meet native species standards are closed to grazing during the spring and fall to facilitate growth during critical growing periods. EA at 20. The Final Decision forecloses the possibility that any temporary non-renewable grazing permits will be issued in Desert Wildlife Management Areas below the elevation of 4,000 feet. Additionally, for key species, the Final Decision establishes utilization limits as low as 25 percent. Final Decision at 15; EA at 47. The Final Decision also imposes a stipulation that triggers cattle exclusion areas when ephemeral forage production is less than 230 lbs/acre. Final Decision at 15-16; EA at 20.

These and other provisions of the Final Decision appear to be well-reasoned measures designed to protect desert resources and habitat. Thus, with the exception of the level of authorized use, the record to date does not demonstrate that the balance of harm weighs in favor of granting a stay.

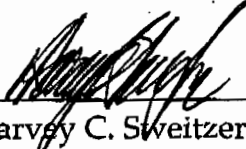
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### 3. The Public Interest

Finally, the public interest favors granting a partial stay. Before BLM authorizes a level of grazing use above the Allotment's estimated carrying capacity in apparent violation of 43 C.F.R. § 4130.3-1(a), the issue of whether BLM complied with that section and NEPA should be fairly litigated and deliberately investigated to insure that the purposes of that section and NEPA are served. Given that BLM likely erred in authorizing a use level above estimated carrying capacity and fails to adequately address this situation in the EA, there is a substantial risk that the Final Decision is not a well-informed decision and that BLM would have chosen other actions to make progress towards fulfillment of the objectives and standards for the Allotment.

#### C. Conclusion

Based upon the foregoing, **Appellants' Petition for Stay is partially granted in that the level of use authorized by the Final Decision is stayed. Therefore, during the pendency of the appeal, the authorized annual use will be 2,066 AUMs. Appellants' Petition for Stay is partially denied in that the remainder of the Final Decision is not stayed.**

  
\_\_\_\_\_  
Harvey C. Sweitzer  
Administrative Law Judge

#### Appeal Information

Any person who has a right to appeal under 43 C.F.R. § 4.410 or other applicable regulation may appeal the partial grant and partial denial of the Petition for Stay to the Interior Board of Land Appeals. The notice of appeal must be filed with the office of the Administrative Law Judge who issued the order within 30 days of receiving the order, and a copy of the notice must be served on every other party.

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In accordance with 43 C.F.R. § 4.478(c), the Board will issue an expedited briefing schedule and decide the appeal promptly.

See page 14 for distribution.

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Distribution

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