



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Departmental Cases Hearings Division

351 South West Temple, Suite 6.300

Salt Lake City, Utah 84101

TELEPHONE: (801)524-5344

FAX: (801)524-5539

dchd@oha.doi.gov

March 19, 2021

ORDER

WILDLANDS DEFENSE,)	NV-010-21-01
)	
Appellant)	Appeal from Notice of Final
)	Decision dated December 16, 2020,
v.)	involving the Winecup-Gamble
)	Ranch Complex Grazing
BUREAU OF LAND MANAGEMENT,)	Allotments, BLM Wells Field
)	Office, Nevada
Respondent)	

Stay Petition Granted

I. Summary

WildLands Defense (WD) has appealed from and petition for a stay of a December 16, 2020, final decision issued by the Bureau of Land Management (BLM). WD argues, among other things, that BLM violated the National Environmental Policy Act (NEPA).

The Final Decision renews, with modifications, the grazing permit of the Winecup-Gamble Ranch for the HD, Gamble Individual, Dairy Valley, and Pilot Valley Allotments (Allotments) and the grazing permits of Flagg Ranch, Inc. and Kenneth Larsen for the Pilot Valley Allotment. The Final Decision also combines the Dairy Valley Allotment with the Gamble Individual Allotment and authorizes range improvements. For the reasons set forth below, the stay petition is granted.

II. Background

The Allotments are located in northeastern Elko County, Nevada, in the northern Great Basin. They contain the following acreages of public and private lands:

Allotment Name	Public Acres	Private	Total
HD	238,819	147,788	386,607
Gamble Individual	216,939	147,459	364,398
Pilot Valley	43,312	49,909	93,221
Dairy Valley	51,908	38,509	90,417
Totals	550,978	383,665	934,643

The Allotments are home to the Greater Sage-Grouse, a BLM special status species that was petitioned for listing under the Endangered Species Act. The U.S. Fish and Wildlife Service (USFWS) found in 2010 that listing was “warranted but precluded” by other priorities. Sagebrush habitat— which is critically important to sage-grouse, a sagebrush obligate species—and sage-grouse populations have experienced serious long-term and short-term declines throughout the sage-grouse’s range.

To address this decline, BLM issued in 2015 resource management plan amendments, including the Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment (ARMPA), for the various resource areas containing sage-grouse habitat. Goal SSS 1 of the ARMPA is to “[c]onserve, enhance, and restore the sagebrush ecosystem upon which the [sage-grouse] populations depend in an effort to maintain and/or increase their abundance and distribution”

The following table shows the distribution among the Allotments of the 23 sage-grouse leks and the amounts of sage-grouse Habitat Management Areas (HMAs) on BLM-administered lands designated by the ARMPA:

Allotment Name	Total acres	SFA ¹		PHMA ²		GHMA ³		OHMA ⁴		Active/Pending Leks ⁵
		Public acres	%	Public acres	%	Public acres	%	Public acres	%	#
Pilot Valley	93,221	0	0	349	<1	5,168	6	4,794	5	0
Dairy Valley	90,417	21,295	24	28,468	31	10,639	12	6,618	7	8
Gamble Individual	364,398	90,892	25	105,264	29	20,761	6	30,242	8	4
HD	386,607	102,589	27	165,580	43	39,161	10	14,143	4	11

¹SFA: Sagebrush Focal Area (overlaps with other HMAs)

²PHMA: Priority Habitat Management Area

³GHMA: General Habitat Management Area

⁴OHMA: Other Habitat Management Area

⁵2018 Nevada Department of Wildlife lek database

PHMA is land identified as having the highest value to maintaining sustainable sage-grouse populations. Areas of PHMA largely coincide with areas identified as priority areas for conservation in the USFWS’s Conservation Objectives Team report (USFWS 2013). These areas include breeding, late brood-rearing, winter concentration areas and migration or connectivity corridors.

SFAs are a subset of PHMAs that were derived from sage-grouse stronghold areas described by the USFWS in a memorandum to the BLM titled Greater Sage-Grouse: Additional Recommendations to Refine Land Use Allocations in Highly Important Landscapes (USFWS 2014). The memorandum and associated maps provided by the USFWS identify areas that represent recognized strongholds for sage-grouse that have been noted and referenced as having the highest densities of sage-grouse and other criteria important for the persistence of the species.

GHMA is land where some special management will apply to sustain sage-grouse populations; these are areas of occupied seasonally or year-round habitat outside of PHMA. OHMA is land identified as unmapped habitat in the Draft Land Use Plan Amendment (LUPA)/EIS that are within the planning area and contain seasonal or connectivity habitat areas.

The Winecup-Gamble Ranch grazes large herds of cattle on all four Allotments, while the Flagg Ranch, Inc. and Kenneth Larsen graze smaller herds of cattle on the Pilot Valley Allotment only.¹ The Allotments are known as the Winecup-Gamble Complex. In June 2020, BLM completed a land health assessment (LHA) for the Complex.

¹ Kenneth Larsen also grazes a few horses.

In the LHA, a BLM interdisciplinary team (IDT) evaluated whether the Allotments were meeting the applicable rangeland health standards and guidelines (Standards and Guidelines). The IDT recognized that a high proportion of the Allotments is designated habitat for the sage-grouse and that, given the priority to conserve sagebrush habitats for greater sage-grouse, an important part of the strategy in assessing/evaluating the Allotments is to apply a landscape-level approach focused on habitat values required by sage-grouse.

The IDT observed that in the northern Great Basin, fire, annual invasive species, and conifer encroachment are often identified as the top threats to sage-grouse among a myriad of potential threats. In general, the IDT concluded that because all these threats, as well as lack of suitable perennial herbaceous components, particularly perennial forb foliar cover, are present and operating on a relatively large-scale in the Allotments, they are not currently meeting the seasonal habitat needs of sage-grouse.

Also, current livestock grazing was found to have impacted riparian summer/late brood-rearing habitat. The IDT found that the value of riparian areas to wildlife cannot be overstated. In the western U.S., riparian areas comprise less than one percent of the land area yet are used by terrestrial wildlife more than any other habitat type. Riparian areas have been identified as a potential limiting factor for sage-grouse broods in east-central Nevada given their relative scarcity on the landscape (e.g., 2.8 percent cover in east-central Nevada; Atamian et al. 2010). Lentic riparian areas are disproportionately important habitat for sage-grouse broods and numerous other wildlife species and livestock was found to be the cause for various lentic riparian sites not meeting Proper Functioning Condition (PFC).

For instance, of the seven lentic riparian sites evaluated in the Dairy Valley Allotment, two were Suitable (PFC), four were marginal (Functional-at risk (FAR)) and one was rated unsuitable (Nonfunctional (NF)). Using only the PFC indicator of habitat suitability, the Dairy Valley Allotment was found to be marginal as riparian summer/late brood-rearing habitat.

Likewise, the two lentic sites evaluated in the Gamble Individual Allotment were FAR with a downward trend due to current livestock grazing. Stream incision in what was formerly an important wet meadow has resulted in much less available late brood-rearing habitat that is likely of lesser quality due to reduced forb species diversity and its impacts on the associated invertebrate diversity and abundance.

Of the 12 lentic areas assessed for PFC in the HD Allotment, none were found to be suitable and most (66 percent) were found to be unsuitable for sage-grouse broods. The common factors resulting in degraded functionality were current livestock grazing and drought. The fact that none of these sites within the HD allotment were determined to be suitable for sage-grouse broods indicates that a critical, potentially population-limiting habitat component, is inadequate for grouse populations that depend on these habitats and is concerning for the myriad of other species that depend on healthy riparian areas within a larger sagebrush-steppe dominated landscape.

In general, the IDT found that invasive species, particularly cheatgrass and annual mustards, are present throughout the Allotments and dominate in certain areas where disturbance has been especially intense or chronic, including in the vicinity of range improvements such as wells and pipelines. Desirable native vegetation components exist in a mosaic with areas dominated by undesirable annual species, but because the majority of ecosites are composed of low resistance and resilience sites, the likelihood of further degradation is high given the widespread distribution of annual species, specifically cheatgrass and mustards.

In the LHA, the IDT found that numerous pastures are not meeting Standard 1 (Upland Sites) and the IDT found that current livestock grazing is not a contributing factor to not meeting that Standard. The IDT found that the Pilot Valley Allotment is partially not meeting Standard 2 (Riparian and Wetland Sites) for lentic habitat and current livestock grazing is not a contributing factor. In the Dairy Valley Allotment, the Guidelines are partially not being met for lotic riparian areas.

The Gamble Individual Allotment is not meeting Standard 2 for lotic and lentic riparian habitat. The HD Allotment is not meeting Standard 2 for lentic riparian habitat and is partially not meeting it for lotic riparian habitat. Current livestock grazing is a contributing factor in not meeting this Standard in these Allotments, except with respect to the lotic riparian habitat in the Gamble Individual Allotment.

Standard 3 (Habitat) is partially not being met in the Pilot Valley Allotment. The Dairy Valley and Gamble Individual Allotments are not meeting but are making significant progress towards meeting Standard 3 and the HD Allotment is not meeting Standard 3. For the latter three allotments, current livestock grazing is not in conformance with the Guidelines for lentic riparian areas.

BLM also prepared an environmental assessment (EA) to evaluate alternatives for renewing the grazing permits for the Allotments that would meet, or make significant progress toward meeting, the Standards and Guidelines, goals and objectives of applicable land use plans, including the 2015 Nevada and Northeastern California Greater Sage-Grouse Approved Resource Management Plan Amendment (ARMPA), and other pertinent multiple use objectives for the Allotments. In addition, the BLM issued a Finding of No Significant Impact (FONSI), concluding that no environmental impact statement was required.

The alternatives considered in the EA included Alternative 1: Proposed Action-Outcome Based Grazing Authorization and Alternative 2: Alternate Grazing System. Alternative 1 derived from the fact that BLM chose the Winecup-Gamble Ranch in 2018 to be one of 11 grazing permittees involved in demonstration projects for the Outcome Based Grazing (OBG) Authorization initiative.

In the Final Decision, BLM chose to authorize Alternative 1, but if the OBG initiative is terminated, then BLM would implement Alternative 2. The alternatives differ as to the grazing terms governing the Winecup-Gamble Ranch operation but not as to the grazing terms for the operations of Flag Ranch and Kenneth Larsen.

Both alternatives authorize the following range improvements: approximately 87 miles of pipeline constructed, repaired or buried/protected; 16 miles of fence proposed for riparian enclosures and livestock traps; 55 water tanks constructed or repaired (several associated with the pipelines) to serve as “off-site” water sources away from riparian areas; 6 spring developments (dirt ponds known as “tom ponds”); and 10 wells. Both alternatives also merge the Dairy Valley Allotment into the Gamble Individual Allotment. The range improvements are expected to result in long-term improvement in riparian functionality, vegetation extent or maintenance, soil stability, and sustainability of water flows as grazing pressure is relieved through off-site water projects.

The animal unit months (AUMs) authorized under the permits effective prior to the Final Decision (prior permits) and under the Final Decision are essentially equal:

Allotment	Prior Permits	Final Decision: Alternative 1	Final Decision: Alternative 2
Gamble Individual	17,938	25,166	25,167
Dairy Valley	7,229		
HD	22,748	22,825	22,820

Pilot Valley	5,006	5,006	5,006
--------------	-------	-------	-------

The same AUMs authorized under the prior permits and Alternatives 1 and 2 adopted in the Final Decision are substantially higher than the average annual actual use of the Allotments for the ten-year period of 2010 through 2019.

The average annual actual use for the now combined Gamble Individual and Dairy Valley Allotments was 16,654 AUMs (12,732 + 3,922), about 34 percent lower than the 25,166 AUMs authorized under the prior permit and the Final Decision. Similarly, the average annual actual use for the HD Allotment was 15,965 AUMs, about 30 percent lower than the 22,748 AUMs authorized under the prior permit and Final Decision. For the Pilot Valley Allotment, the average annual actual use of 4,678 AUMs was closer to the 5,006 AUMs authorized under the prior permits and Final Decision, but still 9 percent lower.

Despite the fact that the Allotments are not meeting the Standards and Guidelines and that livestock grazing is a contributing factor to not meeting Standards 2 and 3, neither the EA nor the LHA discuss the fact that the actual use figures for the Allotments are generally substantially lower than the AUMs authorized under the prior permits and Alternatives 1 and 2 adopted in the Final Decision. In fact, the EA goes farther than silence on the subject and actively misleads the public.

In the EA, BLM considered an alternative (Alternative 3) which BLM characterizes as “reduc[ing] AUMs by 30% and, consequently, grazing pressure on degraded riparian areas.” EA at 30. However, that “reduction” of 30 percent is illusory because it is a reduction of the authorized AUMs by 30 percent, resulting in authorized AUMs still higher than the average annual actual use.²

Despite the failures to meet the Standards and Guidelines and serious riparian area problems caused by grazing, the Final Decision actually increases AUMs by authorizing amounts more than 30 percent greater than average annual

² Under Alternative 3, the grazing strategies would be the same as those under Alternative 2, with the exception of hot season dates; in the pastures noted as having degraded riparian conditions, if these pastures are grazed in the spring, livestock use must end by June 15 and livestock use can start on September 15 if grazed in the fall.

actual use. This increase in AUMs is never addressed in the EA nor are the impacts of the increase.

To move the Allotments towards meeting the Standards and Guidelines and other resource management objectives, BLM relies heavily upon implementation of the OBG. OBG uses a Grazing Response Index (GRI) as a tool for adaptively managing the landscape and for monitoring implementation. It allows the flexibility to make management adjustments between and within grazing years and, according to BLM, is expected to lead to attainment of key management objectives for the Allotments as well as objectives from land use plans such as those prescribed by the ARMPA.

GRI scores are based on frequency (the number of times forage plants are defoliated during the grazing period), intensity (light, moderate, or heavy defoliation), opportunity (the opportunity of a plant to grow before use or regrow after use in the current growing season), and precipitation. During the growing season, the GRI index emphasizes the need for plants to have enough leaf material available to grow or re-grow from photosynthesis rather than relying on stored carbohydrates in the roots. In the dormant season, competing concerns drive management. On the one hand, dormant season grazing is often beneficial for managing areas which have accumulated too much decadent vegetation that shades growth points of plants and is highly flammable and for reducing reliance on expensive hay production. On the other hand, repeated heavy dormant season grazing can be detrimental; the removal of too much vegetation, too often, can expose the soil to wind, sun or rain (causing accelerated drying or compaction), reduce important winter vegetation for wildlife, and remove thermal cover and aerial protection for small mammals and birds. Because of these competing demands, Alternative 1 applies GRI to both growing season and dormant season grazing.

Alternative 1 allows for grazing with goats or sheep which may be used as tools for fuels and noxious weed management and one full growing season rest based on the GRI. The overarching strategies that will be used in the management of grazing for the objectives are:

- vary the time of year that a use area is grazed (i.e. avoid grazing the same place at the same time of year in subsequent years);
- allow perennial grasses to periodically go through an entire growing season and produce a mature seed crop without grazing pressure;

- avoid intensity levels that exceed moderate use during the growing season; and
- use dormant season grazing, Temporary Non-Renewable (TNR) animal unit months (AUMs), and/or the provisions of the Nevada Targeted and Prescribed Grazing Environmental Assessment (Targeted Grazing EA) to manage residual dry matter and decrease reliance on hay production.

These grazing strategies will be implemented by setting sideboards using the GRI, which include high target average GRI scores, and by tracking grazing management carefully. Attaining the scores would promote maintenance and improvement of the plant communities.

Precipitation is highly variable in this region and directly affects annual production of forage. This can drastically affect the annual carrying capacity of the Allotments within a given year. Accounting for this variation while minimizing the fluctuations in AUMs would be accomplished with four primary strategies:

- plan grazing to create reserves of forage (forage banks) that can be used to mitigate for drought or fire conditions while avoiding excessive fuel loads when feasible;
- match species of livestock to accompany long-term trends in market and climate conditions;
- strategically position new range improvements (e.g., water, fencing, temporary fencing) to support expanded flexibility and increased resiliency to unfavorable conditions; and
- utilize TNR AUMs and/or the provisions of the Targeted Grazing EA to reduce the risk of fire when significant residual dry matter exists on the ranch and the permitted AUMs have been met.

In certain circumstances, the desire to manage fuel loads may exceed the total permitted AUMs. Thresholds and responses are outlined to create a process for authorizing TNR AUMs to reduce fuel loads.

Under Alternative 2, the measures to move the Allotments towards meeting the Standards and Guidelines and other resource management objectives include rotating livestock through the HD and Gamble Individual Allotments in compliance with the following pasture restrictions:

- for the principal pastures containing riparian areas where livestock grazing was identified as a contributing factor to non-attainment of the Standards and

- Guidelines, livestock will not be grazed during the full duration of the hot season (July 1 through September 15) more than one year out of four. If these pastures are grazed in the spring, livestock use must end by July 15. Livestock use can start September 1 if the pastures are grazed in the fall;
- annual use in each pasture will be limited to the calculated carrying capacities identified in the original Allotment Management Plans. A carrying capacity analysis will be conducted once every five years to re-adjust AUM ratings per pasture; and
 - livestock turnout in all native pastures will be deferred until after the end of the growing season (July 1) at least two years out of four.

Also, if a target utilization of 50 percent on key forage species at key areas is exceeded, the AUMs in that pasture will be reduced the following year.

III. Discussion

To prevail on a stay petition, the petitioner must show, in accordance with 43 C.F.R. § 4.471(c), sufficient justification based on four criteria:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) The likelihood of the petitioner's success on the merits;
- (3) The likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) Whether the public interest favors the granting of the stay.

The petitioner bears the burden of demonstrating that a stay is warranted under each of the regulatory criteria. *See* 43 C.F.R. § 4.471(d); *W. Wesley Wallace*, 156 IBLA 277, 278 (2002); *Oregon Natural Resources Council*, 148 IBLA 186, 188 (1999). Although the petitioner is not required to prove each criterion with certainty, the petitioner must show that it likely meets each criterion. *Pueblo of San Felipe*, 187 IBLA 342, 345 (2016). The four-criteria test is not a wooden one, as relief may be granted with either a high probability of success and some injury, or vice versa. *Oregon Natural Desert Association*, 135 IBLA 389, 393 (1996). Based upon a preliminary review of the record and pleadings, and as more fully explained below, the petition for a stay must be granted because WWP has met each of the criteria.

A. Likelihood of Success on the Merits

To achieve success on the merits, the petitioner must establish “that the decision fails to “substantially comply with the Department’s grazing regulations or that, by a preponderance of the evidence, the decision is unreasonable and thus

lacks a rational basis." *Hanley Ranch Partnership et al v. BLM*, 183 IBLA 184, 198 (2013); *see also* 43 C.F.R. § 4.480(b). A likelihood of success on the merits does not require that the probability of success be free from doubt but may be shown by presenting a reasonable basis for challenging the legal or factual soundness of the agency's decision. *Pueblo of San Felipe*, 187 IBLA at 346. This standard will ordinarily be satisfied if the petitioner raises questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and more deliberative investigation. *Wyoming Outdoor Council Inc.*, 153 IBLA 379, 388 (2000).

WD argues that BLM failed to comply with NEPA, 42 U.S.C. §§ 4321 - 4370h (2012), because the EA fails to take a "hard look" at the environmental impact of the Proposed Action, Alternative 1, adopted in the Final Decision and fails to consider a reasonable range of alternatives. A preliminary review of the record shows that there is a likelihood that WD will succeed on the merits of these arguments, thus satisfying the likelihood of success criterion.

Among other things, NEPA requires that an environmental impact statement (EIS) be prepared for any proposed "major Federal action[] significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (2)(C). Concerning BLM's responsibilities under NEPA, the Interior Board of Land Appeals (Board) has said that

[a] Federal agency must take a "hard look" at the environmental consequences of its proposed actions. . . . In reviewing whether BLM has taken a "hard look," the Board examines whether the record establishes that BLM made a careful review of environmental issues, identified relevant areas of environmental concern, and whether its final determination was reasonable.

Vulcan Power Co., 143 IBLA 10 (1998). *See Friends of the Nestucca Coast Association*, 144 IBLA 341, 356-57 (1998), *appeal filed sub nom. Coast Range Assoc. v. Shuford*, Civ. No. 98-819-JO (D. Or. July 7, 1998).

Rocky Mountain Pipeline Trades Council, 149 IBLA 388, 398-99 (1999).

NEPA also requires that BLM consider "appropriate alternatives" to the proposed action as well as their environmental consequences. *See* 42 U.S.C. § 4332(2)(E); 40 C.F.R. §§ 1501.2(c) and 1508.9(b); *City of Aurora v. Hunt*, 749 F. 2d 1457,

1466 (10th Cir. 1984); *Larry Thompson*, 151 IBLA 208, 219 (1999). "Such alternatives should include reasonable alternatives to a proposed action, which will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact. 40 C.F.R. § 1500.2(e)." *Headwaters, Inc. v. BLM*, 914 F. 2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. BLM*, 749 F. 2d at 1466- 67. To prevail on their assertion that BLM's range of alternatives was unlawfully narrow, WD must meet its burden of showing that another alternative would meet the purposes of the proposed action, be feasible, and have lesser impacts. See *Great Basin Mine Watch*, 159 IBLA 324, 354-55 (2003).

A "rule of reason" approach applies to both the range of alternatives and the extent to which each alternative must be addressed. *In re Stratton Hog Timber Sale*, 160 IBLA 329, 337 (2004). All reasonable alternatives must be considered and obvious alternatives may not be ignored. *Id.*

WD's argument that BLM failed to take a "hard look" at the environmental impacts of the Proposed Action is based on, among other things, the EA's silence as to the critical fact that the authorized use contemplated in the Proposed Action and adopted in the Final Decision is higher than the actual use of the Allotments. WD contends that this silence precludes a proper evaluation of all of the alternatives.

BLM asserts in its briefs that WD offers no evidentiary support for this critical fact and ignores the LHA, which provides ten years of actual use data that illustrates how the Final Decision does not authorize such a result. BLM's assertion is simply false.

The data in the LHA shows that the average annual actual use for the now combined Gamble Individual and Dairy Valley Allotments is about 34 percent lower than the 25,166 AUMs authorized under the both the Final Decision and the prior permit. Similarly, the average annual actual use for the HD Allotment is about 30 percent lower than the 22,748 AUMs authorized under the Final Decision and prior permit. For the Pilot Valley Allotment, the average annual actual use is closer to the 5,006 AUMs authorized under the prior permits and Final Decision, but still 9 percent lower.

Based on this same critical fact, WD also claims that BLM failed to consider an alternative with significantly reduced grazing, an alternative that would meet the purposes of the Proposed Action, is feasible, and has lesser impacts. This claim is part of a broader argument that BLM failed to consider a reasonable range of alternatives to the Proposed Action.

WD is correct that BLM failed to consider a reduced-grazing alternative. The purported reduced-grazing alternative in the EA is Alternative 3. BLM characterizes that alternative as “reduc[ing] AUMs by 30% and, consequently, grazing pressure on degraded riparian areas.” EA at 30. However, that “reduction” of 30 percent is illusory because it is a reduction of the authorized AUMs by 30 percent,³ resulting in authorized AUMs still higher than the average annual actual use. See *Western Watersheds Project v. Salazar*, 843 F.Supp.2d 1105, 1114 (

Thus, despite the grazing-caused failures to meet the Standards and Guidelines and serious riparian area problems, the EA did not consider a reduced grazing alternative. Nor did the EA mention that the Proposed Action adopted in the Final Decision actually increases AUMs by authorizing amounts more than 30 percent greater than average annual actual use. Most importantly, the EA does not acknowledge nor analyze the impacts of such an increase.

Under these circumstances, WD has shown a likelihood of success on the merits of its arguments that BLM failed to take a “hard look” at the environmental impacts of the Proposed Action and failed to consider a reasonable range of alternatives.

B. Relative Harm and Likelihood of Immediate and Irreparable Harm

If a stay of the Final Decision were granted, grazing would continue at the level of use authorized by the prior permits. See 43 C.F.R. § 4160.3(d) (2005).⁴ Because the authorized AUMs under the prior permits and those under the Final Decision are the same, a stay would result in no change to the number of authorized AUMs.

³ As previously noted, the 30 percent “reduction” does not apply to the Pilot Valley Allotment.

⁴ The BLM grazing regulations set forth at 43 C.F.R. part 4100 *et seq.* were amended effective August 11, 2006. See 71 Fed. Reg. 39402 (July 12, 2006). However, implementation of those regulatory amendments has been enjoined. *Western Watersheds Project v. Kraayenbrink, et al.*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd in relevant part*, 632 F.3d 472, (9th Cir. 2011), *cert. denied*, 132 S.Ct. 366 (2011). Hence, if a stay were granted, grazing would occur pursuant to 43 C.F.R. § 4160.3(d) (2005) during the pendency of the appeal.

However, granting a stay would prevent implementation of the extensive amount of range improvements authorized in the Final Decision, which have many immediate negative impacts, including those recognized as major threats to sage-grouse. Those major threats are fragmenting sage-grouse habitat and exacerbating the substantial nonnative, invasive species problem by spreading those species through surface disturbance and redistribution of livestock.

The ARMPA provisions manifest an intent to control the spread and effects of nonnative, invasive plant species through numerous methods, particularly by minimizing unnecessary surface disturbance. There are also several objectives addressing habitat fragmentation. “The ARMPA [is designed to] reduce habitat disturbance and fragmentation by limiting surface-disturbing activities” ARMPA at I-12.

For instance, the ARMPA guidance for range improvement projects directs review of Objective SSS 4 when reviewing and analyzing projects and activities proposed in sage-grouse habitat. That objective states:

In PHMAs and GHMAs, apply the concept of “avoid, minimize, and compensatory mitigation” for all human disturbance in areas not already excluded or closed, so as to avoid adverse effects on [sage-grouse] and its habitat. The first priority will be to avoid new disturbance; where this is not feasible, the second priority will be to minimize and mitigate any new disturbance

Similarly, the ARMPA Required Design Feature Gen 12 requires BLM to “[c]ontrol the spread and effects on nonnative, invasive plant species (e.g., by . . . minimize[ing] unnecessary surface disturbance . . .).”

Controlling the spread of invasives in riparian areas is of particular concern. ARMPA Objective VEG 11 states: “In riparian and wet meadow areas, inventory, monitor, and control invasive species in PHMAs and GHMAs.”

Nevertheless, the Final Decision authorizes numerous surface-disturbing developments in riparian areas, including the “tom ponds.” The ARMPA Management Decision LG 19 has this to say about ponds in riparian areas:

In PHMAs and GHMAs, remove livestock ponds built in perennial channels that are negatively impacting riparian habitats, either directly or indirectly, unless riparian access is able to be controlled and

negative impacts effectively mitigated (e.g.; water gap fence to pond), and do not permit new ones to be built in these areas subject to valid existing rights.

The EA acknowledges that these ponds would require heavy equipment use and removal of vegetation surrounding the spring/seep down to bare dirt. The EA further notes that construction of the “tom ponds” would have the greatest opportunity for increased erosion and sedimentation within riparian habitats in the short term.

In the EA, BLM recognizes these and many other negative impacts of the range improvements to vegetation and riparian areas, including the potential—through extensive ground disturbance—to spread nonnative, invasives. The Final Decision includes measures designed to mitigate the spread but the extensive range improvements can only exacerbate the wide-spread nonnative, invasives problem at least in the short term, and most likely much longer. While BLM predicts improvement in range conditions over the long term under the Final Decision, there is likely to be a short-term spread of nonnative invasives and the record indicates that reversing such worsened conditions can be a very difficult and long-term process.

This situation dovetails with the observation of Federal courts that environmental injury is often permanent or long-lasting and therefore irreparable. *Or. Natural Desert Ass’n v. McDaniel*, 2011 U.S. Dist. LEXIS 100815, at *15 (D. Or.) (citing *Cal. Ex rel. Lockyer v. USDA*, 575 F.3d 999, 1020 (9th Cir. 2009)); *but see Heal Utah and Sierra Club* 191 IBLA 103, 107 (2017) (constructing a pipeline causes temporary environmental harm that is not irreparable). The likelihood of spreading invasives in this case constitutes a likelihood of long-lasting and irreparable harm to sage-grouse and its habitat and WD’s interests in those resources.

This conclusion is further supported by the fact that WD is shown a likelihood of succeeding on its claim that BLM violated NEPA. Federal courts and the Board have recognized that procedural violations of NEPA support claims of irreparable injury. *See Friends of Animals*, 188 IBLA 394, 401 (2016).⁵

⁵ While Federal courts and the Board have also emphasized that a procedural violation of NEPA is not alone sufficient to establish irreparable injury, *see Friends of Animals*, 188 IBLA at 401, WD has made the requisite showing of irreparable environmental harm.

As for the relative harm to the parties of granting or denying a stay, the balance of harms favors granting a stay. BLM generally characterizes the negative impacts of the range improvements as short-term harms and concludes that the long-term benefits of the improvements and related grazing management changes outweigh the short-term harms. However, the relevant period for analyzing the balance of harms of granting or denying a stay is the short-term period during which WD's appeal will remain pending. Over that short term, the negative impacts of the extensive range improvements to WWP's interests in range resources, including the sage-grouse and its habitat, outweigh the benefits.

C. Public Interest

Given that a stay is akin to an injunction, the following principle is germane in assessing whether the public interest favors granting a stay: "[g]enerally, the public interest is best served when an injunction is granted in favor of the party suffering the most harm by the denial or grant of the injunction." *Hodges v. Abraham*, 253 F.Supp.2d 846, 874 (D.S.C. 2002), *aff'd* 300 F.3d 432 (4th Cir. 2002). In the present case, the party who will likely suffer the most harm by a ruling against it on the stay petition is WD.

Additionally, where, as here, a serious controversy exists, the public interest favors maintaining the status quo until the merits of that controversy can be fully considered. *See Valdez v. Applegate*, 616 F.2d 570, 572-73 (10th Cir. 1980). Lastly, the Ninth Circuit has recognized "the well-established public interest in preserving nature and avoiding irreparable environmental injury." *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008), *overruled on other grounds by Winter v. NRDC*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)). All of these principles dictate that the public interest favors granting a stay.

IV. Conclusion

Based upon the foregoing, WD's stay petition is granted.



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 this order 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. 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 18 for distribution.

Distributed

By Email and Certified Mail:

Katie Fite
Director of Public Lands
WildLands Defense
P.O. Box 125
Boise, ID 83701
Email: katie@wildlandsdefense.org
(Appellant)

Janelle M. Bogue, Esq.
U.S. Department of the Interior
Office of the Regional Solicitor
Pacific Southwest Region
2800 Cottage Way, Rm. E-1712
Sacramento, CA 95828
Email: janell.bogue@sol.doi.gov
(Counsel for Respondent)