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October 3, 2019

ORDER

WESTERN WATERSHEDS PROJECT,	)	AZ-P030-19-01
	)	
Appellant	)	Notice of Appeal and Petition for
	)	Stay from June 20, 2019 for the
v.	)	Horseshoe Allotment issued by
	)	BLM Acting Field Manager,
BUREAU OF LAND MANAGEMENT,	)	Hassayampa Field Office, Arizona
	)	
Respondent	)	
	)	
	)	

Petition for Stay Granted

I. Introduction

Western Watersheds Project ("WWP") has filed a petition to stay the Notice of Final Decision ("Final Decision") issued by the Bureau of Land Management ("BLM") on June 20, 2019. The Final Decision renewed grazing use within the Horseshoe Allotment ("Allotment"), modified the terms and conditions, and authorized a number of new range projects. BLM opposes WWP's stay petition. For the reasons discussed in detail herein, the petition to stay the Final Decision is hereby granted.

II. Background

The Allotment is located in the southeastern portion of Yavapai County, Arizona, approximately 40 miles north of Phoenix. It is situated within the Agua Fria National Monument ("AFNM") of the Bradshaw-Harquahala planning area. The AFNM contains an array of historical resources as well as one of the most significant systems of later prehistoric sites in the American Southwest. The

Allotment consists of 29,851 acres of federally-managed lands and about 200 acres of private lands. It has been separated into 11 pastures and includes approximately 17 miles of riparian habitat.

In 2011, the Arizona Game and Fish Department ("AGFD") purchased the headquarters for the Horseshoe Ranch, consisting of about 200 acres along the Agua Fria River. In 2012, the AGFD leased the ranch to the J.H. Cattle Company ("J.H. Cattle") operated by John Holbrook. At that time, grazing resumed within the Horseshoe Allotment as well as the neighboring Copper Creek Allotment. The current grazing lease authorizes year-round grazing within the Allotment by 381 cattle, which is the equivalent of 4,572 animal unit months ("AUMs"). J.H. Cattle Company has not used the full amount of its grazing authorization within the Allotment since obtaining the lease.

Based on monitoring data collected between 2014 and 2018, BLM completed a Land Health Evaluation ("LHE") for the Allotment that analyzed the three Arizona Land Health Standards ("Standards"). BLM found that Standard 1 (upland sites) was being met across the Allotment. However, the Allotment was not meeting Standard 2 (riparian and wetland sites), with most riparian areas and the Agua Fria River "functioning at risk." BLM determined that drought and wildfire likely contributed to the lack of proper functioning in riparian areas rather than current livestock grazing management. Standard 3 (desired resource conditions) was being achieved in most of the upland areas and all of the riparian areas in the Allotment.

To analyze livestock grazing within the Horseshoe Allotment, BLM's interdisciplinary team developed and analyzed three alternatives as part of a November 2018 environmental assessment ("EA"): (1) the proposed action; (2) a no action alternative; and (3) a no grazing alternative. Although BLM also considered a reduced grazing alternative, it was eliminated from detailed analysis because the proposed action would give managers flexibility to adjust stocking rates based upon resource conditions.

The proposed action would allow for renewed grazing use for a period of 10 years, with terms and conditions developed as part of the proposed Coordinated Resource Management Plan ("CRMP"), along with a number of new range projects. The no action alternative would allow current livestock grazing management to continue as it has for the past six years – since J.H. Cattle first started grazing within the Allotment. Under the no grazing alternative, livestock grazing would be eliminated from the BLM-administered lands within the Allotment.

Along with the EA, BLM also issued a finding of no significant impact ("FONSI"). The BLM field manager concluded, based on information contained in the EA, that the proposed action did not constitute a major federal action having a significant impact on the human environment. Therefore, an environmental impact statement ("EIS") was not prepared.

The Final Decision issued on June 20, 2019, authorizing the proposed action as described in the EA. As part of the Final Decision, the grazing lessee is authorized to continue grazing at the previous use levels of 381 cattle year-round for a total of 4,572 AUMs. The Final Decision also institutes new terms and conditions and identifies eleven specific range projects:

1. Reconstruction of corrals in the Double Tank and Joe's Hill pastures;

2. Fencing for the realignment of the North River and South River pastures, and fencing to exclude cattle from the Agua Fria River in the Boone pasture and Silver Creek in the Double Tank pasture.

3. Fencing the wildlife-only troughs in the New Mill and Perry Mill pastures;

4. Several additional livestock water facilities;

5. Three new wells in the North River, Double Tank, and Boone pastures;

6. Five pipelines in the North River, South River, New Mill, Joe's Hill, Lousy, Upper Agua Fria, and Boone Tank pastures;

7. Seventeen 500 gallon watering troughs, five 10,000 gallon storage tanks, and three wildlife-only troughs in the North River, South River, New Mill, Perry Mill, Joe's Hill, Lousy, Upper Agua Fria, and Boone Tank pastures

8. Installation of wildlife escape ramps on all water troughs and tanks with open tops located on public lands within the Allotment;

9. Removal of unnecessary pasture fencing and existing steel pipelines to suspend surface water diversions from the Agua Fria River and Indian Creek within the Double Tank and Boone pastures;

10. Installation of a cattle guard on Bloody Basin Road in North River pasture; and

11. Installation of three, five-acre vegetation research plots in the uplands of North River, New Mill, and Joe's Hill pastures to evaluate vegetation treatments on non-native and invasive grass species. Treatments may include the use of herbicides, mechanical, or biological methods.

WWP has appealed and petitioned for a stay of the Final Decision. WWP argues that BLM violated: (1) the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-87; (2) the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70h; and (3) the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706.

III. Discussion

To prevail on a stay petition, the appellant must show sufficient justification based on the following 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.

43 C.F.R. § 4.471(c). The burden of demonstrating that a stay is warranted under each of the regulatory factors rests with the appellant. *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 it is not necessary to prove each factor with certainty, the appellant must show that it likely meets each of the four factors. *Pueblo of San Felipe*, 187 IBLA 342, 345 (2016). The failure to satisfy any one of the four stay criteria will result in denial of the stay petition. *See Jerri Tillett*, 188 IBLA 384, 385 (2016); *Western Oil Exploration Co.*, 189 IBLA 48, 49 (2016).

Based upon a preliminary review of the record and pleadings, and as more fully discussed below, the regulatory stay criteria support the entry of a stay of the Final Decision during the pendency of this appeal.

A. Relative Harm and Likelihood of Immediate and Irreparable Harm

As acknowledged by WWP, if a stay is implemented, authorized grazing will remain unchanged because the Final Decision did not alter cattle numbers or AUM

levels from the previous lease. 43 C.F.R. § 4160.3(d).[1] However, a stay would prevent the immediate construction, modification, and installation of the eleven specifically-enumerated range projects authorized by the Final Decision.

WWP argues in its appeal and stay petition that the Final Decision authorizes "new industrial-scale livestock infrastructure" and claims that:

> [A] stay would . . . preclude the construction of the following range infrastructure that will cause physical changes on the ground and significantly increase resource damage to areas that were previously not heavily impacted by livestock use: installation of 7.9 new miles of fencing, including fencing in riparian areas; installation of 19.4 miles of new water pipeline; installation of 2 new wells, four tanks and sixteen new troughs. Final EA at Table 4. The new wells would produce up to 150,000-200,000 gallons of water per year, creating a significant impact on nearby natural water resources and requiring the use of a class 8 (3 axle) vehicle for construction in habitat for species that should be protected by the Endangered Species Act. The installation of pipelines will require trenches up to two-feet deep in some areas. All of this was authorized without any analysis of the impacts to hydrological function. Further ecological impacts from the three "study plots" will begin when BLM begins to use chemicals and mechanical equipment in these plots, including six different types of herbicides and livestock as biological control agents.

Appeal and Stay Petition at 2, 22. Although WWP's appeal and stay petition does not contain an extensive discussion of the harms, it sufficiently identifies the likely harms associated with the numerous infrastructure projects and livestock redistribution on soils, cultural resources, vegetation, and riparian areas. *See* Appeal and Stay Petition at 6-7, 12-13, 23.

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[1] BLM's 2006 amendments to the grazing regulations, 71 Fed. Reg. 39402 (July 12, 2006), were enjoined in their entirety by court order. *See 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*, 565 U.S. 928 (2011). Thus, citations to the grazing regulations will be to the 2005 Code of Federal Regulations, unless otherwise indicated.

Specifically, WWP asserts that construction of these new projects will result in immediate and irreparable harm by causing "considerable on-the-ground damage to natural resources and attracting livestock to areas that have previously not been subject to concentrated livestock use." Appeal and Petition at 23. As acknowledged in the EA, installation of the new wells, storage tanks, pipelines, troughs, and fences will result in localized damage to vegetation and soils in and around construction sites. *See, e.g.*, EA at 25-26, 28-29, 39. Once constructed, soils near the new water sources would experience increased soil compaction and erosion potential. EA at 39. Livestock may also use new fence lines as travel corridors, leading to increased vegetation trampling. EA at 26, 39. In riparian areas, the EA notes that fence construction activities could temporarily increase sediment loads and damage riparian vegetation. *See* EA at 28. Although the EA touts the benefits associated with the redistribution of livestock after construction of the additional range projects, WWP faults BLM for failing to adequately analyze the impacts associated with increased grazing pressure on "drier, more vulnerable uplands." *See* Final Decision at 4 (Protest Point II).

The on-the-ground impacts associated with the implementation of these range projects would begin immediately upon the commencement of construction. According to the Final Decision, many of the water-related projects are slated for construction between October 1 and June 1. *See* Final Decision at 16. If WWP ultimately prevails, removal of these new facilities would result in additional environmental damage and may prove to be impractical or financially unfeasible. Because the EA does not contain a breakdown of the estimated expenses or cost allocations, the financial implications cannot be fully considered or analyzed as part of this stay petition. However, the environmental impacts to soil, vegetation, and riparian areas associated with the construction and implementation of such a large number of range projects are not disputed and have been recognized as part of the EA's analysis. The sheer number and variety of new projects authorized by the Final Decision, as well as their likely environmental impacts, supports a finding of irreparable harm.

Given that authorized grazing levels would remain the same whether the petition for a stay is granted or denied, there does not appear to be any direct harm to the permittee associated with a stay. BLM argues that the agency will be harmed by a stay because the new terms and conditions are intended to ensure that resource conditions continue to meet or make progress towards meeting the Arizona standards for rangeland health. *See* BLM's Opposition at 6. According to the LHE, however, the Allotment is generally meeting Standards 1 and 3 and the failure to meet Standard 2 has been attributed to drought and wildfire. *See* LHE at 43-44; EA

at 2, 23, 27; Final Decision at 17. BLM's briefing failed to identify any specific harms that will ensue if the range projects and new terms and conditions are stayed during the relatively short period of time necessary to resolve this appeal.

Thus, on balance, the harms that will likely result from the eleven new range projects outweighs any harms associated with delayed implementation. As a consequence, both the relative harms and the likelihood of immediate and irreparable harm to the environment associated with the numerous range projects favor the granting of a stay pending the resolution of this appeal.

B. Likelihood of Success

To achieve success on the merits, an appellant 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 P'ship v. BLM*, 183 IBLA 184, 198 (2013); *see also* 43 C.F.R. § 4.480(b). For an appellant to demonstrate a likelihood of success on the merits, it need not show that the probability of success is free from doubt. *Pueblo of San Felipe*, 187 IBLA at 346. Instead, an appellant "need only present a reasonable basis for challenging the legal or factual soundness of the agency's decision." *Id.* This standard will ordinarily be satisfied if the appellant raises questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and more deliberative investigation. *Wy. Outdoor Council*, 153 IBLA 379, 388 (2000).

In its appeal and stay petition, WWP alleges violations of NEPA, FLPMA, and the APA. When considering the adequacy of an agency's analysis under NEPA, it is important to remember that NEPA is a procedural statute designed to "insure a fully informed and well-considered decision." *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

> [NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

Or. Natural Res. Council, 116 IBLA 355, 361 n. 6 (1990). Whether BLM has taken a sufficiently "hard look" at the environmental consequences is guided by the "rule of reason." *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000). While an EA need not be

exhaustive, it should contain a "'reasonably thorough discussion'" of "'significant aspects of the probable environmental consequences.'" *Id.* (quoting *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992). Based upon a preliminary review of the record, serious questions exist regarding the adequacy of BLM's consideration of the environmental impacts associated with the range projects, particularly with respect to riparian areas and invasive weeds.

When considering the environmental impacts associated with the new range projects, the EA's analysis generally lacks detailed, site-specific analysis. For instance, when discussing the riparian impacts associated with the three new wells, the EA explained that: "Wells would not have a measurable impact [on] riparian resources." EA at 29. The EA then noted that two of the new wells would be located 1 mile and ½ mile from the closest riparian areas and the third well would be .1 mile from Indian Creek. *Id.* Based on these geographical distances, the EA concluded that the effects on the riparian areas would be negligible or nonexistent. *Id.* As noted by WWP, however, the EA did not expressly consider hydrological impacts. Appeal and Stay Petition at 22. Given the LHE's finding that groundwater pumping and drought were likely having an impact on Indian Creek and that drought was a factor in the Allotment's overall failure to meet Standard 2, the EA's cursory level of analysis raises serious questions warranting further investigation. *See* LHE at 38, 43.

Similarly, although the EA discussed vegetation impacts, BLM chose not to include any specific analysis of noxious and invasive weeds. *See* EA at 21. WWP faults BLM for failing to consider the impacts of invasive weeds associated with the increased grazing pressure on uplands that will likely result from new water developments throughout the Allotment. *See* Appeal and Stay Petition at 12; Final Decision at 5 (Protest Point II). Both the EA and LHE acknowledged that noxious and invasive plant species are present within the Allotment. *See* LHE at 17, 43; EA at 21. Even though the EA acknowledged that livestock could directly affect vegetation, including "allowing for the establishment and/or persistence of weed species" and noted that these impacts would be most apparent near water developments, BLM chose not to undertake a detailed analysis of the environmental impacts of noxious weeds as part of the EA. *Compare* EA at 24 *with* EA at 21. Instead, the EA offered a brief conclusory rationale that "none of the alternatives would significantly increase the potential spread of existing weed populations" and noted that weed populations would be separately addressed under the Phoenix District Integrated Weed Management Plan. EA at 21.

While BLM may be able to provide additional evidence or argument in support of its decision not to analyze noxious weeds or the hydrological impacts of new wells on riparian areas in the EA, it has not done so as part of the pending stay petition. As a result, significant doubts remain regarding the adequacy of BLM's analysis that require further investigation. Given that these questions are serious and significant enough to warrant more deliberative investigation, they also provide a reasonable basis for finding a likelihood of success on the merits sufficient to support the imposition of a stay.

C. Public Interest

When a serious controversy exists, the public has an interest in preserving the status quo until the merits can be fully considered. *See Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980). Given the significant questions surrounding the adequacy of the EA's analysis and the harms that will ensue from the immediate construction of such a large number of new range projects, the public interest favors a stay of the Final Decision so that BLM's decision-making process can be fairly and deliberately investigated to ensure compliance with the applicable statutes and regulations.

IV. Conclusion

For the reasons discussed herein, **the petition for a stay of the Final Decision is hereby 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 10 for distribution.

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