



United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS

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May 19, 2010

ORDER

WESTERN WATERSHEDS PROJECT,)	WY-050-10-02
WILDEARTH GUARDIANS,)	WY-050-10-04
MEREDITH TAYLOR, TORY TAYLOR,	)	WY-050-10-05
TOM BELL, JOHN CARTER AND MIKE)	
HUDAK	)	Appeal from Field Manager's Final
Appellants	)	Decisions dated March 3, 2010,
v.	)	involving the Antelope Hills, Arapahoe
	)	Creek Common, and Green Mountain
BUREAU OF LAND MANAGEMENT,	)	Allotments, Lander Field Office,
	)	Wyoming
Respondent)	
.....		
JOSHUA ANDERSON,	)	WY-050-10-03
Appellant	)	Appeal from Field Manager's Final
v.	)	Decision dated March 3, 2010,
	)	involving the Arapahoe Creek
BUREAU OF LAND MANAGEMENT,)	Common Allotment, Lander Field
)	Office, Wyoming
Respondent)	

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WWP's Petition for a Partial Stay Granted;
Anderson's Petition for a Partial Stay Denied;
Deadline for Filing Regarding Supplemental Statement of Reasons;
Notice of Telephonic Conference

I. Summary

On March 3, 2010, the Field Manager, Lander Field Office, Bureau of Land Management (BLM), issued three decisions (Final Decisions) renewing 19 ten-year livestock grazing permits held by 16 individuals for the Green Mountain Common Allotment (GMCA). Those decisions collectively divided the GMCA into three allotments, the Arapahoe Creek Common, Antelope Hills, and Green Mountain Allotments, with each decision addressing grazing management of one of the new allotments.

Appellant Joshua Anderson (Anderson) has appealed and petitioned for a partial stay of the Final Decision pertaining to the Arapahoe Creek Common Allotment. He challenges only two provisions of that decision, one setting his active use at 50% of his permitted use and one establishing pasture rotation indicators.

The other appellants (collectively referred to herein as WWP) have appealed and petitioned for a stay of those portions of the Final Decisions authorizing construction of new fences or, in the alternative, for a complete stay of the Final Decisions. BLM opposes both stay petitions.

The Final Decisions are based upon (1) an environmental assessment issued in 2008 (2008 EA) analyzing alternatives for GMCA grazing management, (2) proposed decisions contemplating the authorization of components of each of the analyzed alternatives, and (3) a Finding of No Significant Impact (FONSI) regarding those proposed decisions. After Anderson and others protested the proposed decisions, BLM issued the Final Decisions which authorize the actions contemplated in the proposed decisions with some modifications. For the reasons set forth below, including that there is a likelihood that WWP will succeed on the merits of its claim that the 2008 EA is inadequate under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq*, the appropriate course of action is to grant WWP's petition for a partial stay of the Final Decisions and deny Anderson's stay petition.

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II. Background

The GMCA's boundaries encompass 522,000 acres, including 468,407 acres of public land, located in the Fremont and Sweetwater Counties of southwestern Wyoming. Until the late 1990s, the GMCA was the largest unfenced BLM area in the lower 48 states. Internal fencing had been limited to small pastures of mostly private and state land.

The GMCA lies in a migration corridor used by elk, deer, and pronghorn antelope to travel from the southern end of the Wind River Range to their winter habitat in the Red Desert to the south. Portions of three pronghorn antelope herd units occur in the GMCA, which houses pronghorn throughout the year, with lesser numbers and less wide distribution in the winter. The GMCA is also inhabited by an estimated 250 wild, free-roaming horses in three different herd management areas.

With 38 sage-grouse leks within its boundaries, the GMCA has the second highest sage-grouse lek density in the State of Wyoming. In turn, Wyoming is home to more than half of the remaining sage-grouse in the country. The GMCA also contains core winter habitat for the sage-grouse. The United States Forest Service recently found that listing of the sage-grouse under the Endangered Species Act is warranted but that other priorities prevented presently listing the sage-grouse. 75 Fed. Reg. 3910-01 (Mar. 23, 2010).

The GMCA is also rich in historic resources, the most significant being two different segments of the Oregon/Mormon/California/ Pony Express National Historic Trails (OMCPE Trail). These segments are the main OMCPE Trail, and the Seminole Cutoff (a major variant of the OMCPE Trail). The National Park Service and the BLM have long described the OMCPE Trail and its variants in central and western Wyoming as some of the best remains of these national trails left in the United States. The GMCA also contains two segments of the Rawlins - Fort Washakie Stage Trail.

In 1999 BLM completed an environmental assessment (1999 EA) analyzing alternatives for livestock grazing management of the GMCA. On July 23, 1999, coincident with the development of the 1999 EA, BLM made a determination that several of the Wyoming Standards for Rangeland Health (Standards) were not being met on the GMCA. Proper functioning condition (PFC) assessments of riparian

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areas, frequency transects, willow transects, photographs, and professional observation indicated that riparian habitats were mostly in low seral stages and were not producing near their potential.

“Appropriate actions” were identified pursuant to 43 C.F.R. § 4180.2(c) to correct the failure of the allotment to meet all of the Standards. These appropriate actions were included in a BLM decision dated August 31, 1999 (1999 Decision), addressing GMCA grazing management.

The 1999 Decision renewed 6 GMCA grazing permits for a term of 10 years beginning October 1, 1999 and ending September 30, 2009 and modified 14 other GMCA grazing permits. The season of use was to vary by operator, with use for cattle being from May 1 to November 1 or May 15 to November 15 and sheep being yearlong.

An allotment management plan (AMP) was to be prepared in consultation with the permittees and other members of the interested public following implementation of the 1999 Decision. However, the AMP was never prepared.

Under that decision, the GMCA was divided into five use areas (four for cattle and one for sheep) and further sub-divided into 16 pastures. A pasture rotation system and grazing treatments were specified for each use area, which can be summarized as follows:

Use Area	Grazing System	Treatments
Alkali Creek (Sheep)	Spring and fall/winter continuous seasonal grazing	G
Antelope Hills / Picket Lake	Four-pasture deferred rotation grazing	M
Arapahoe	Four-pasture deferred rotation grazing	N
Green Mountain	Four-pasture deferred rotation grazing	N
Happy Springs	Three-pasture deferred rotation grazing	N

Treatment G – Rest summer-long (June 16 through September 15).

Treatment M – Graze key riparian sites at a proper use level of 50 percent on meadow riparian areas early in the summer to allow for re-growth. Graze at 30 - 40

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percent if season will run to September 1. Maintain a stubble height of four to six inches on key riparian sites after planned grazing use.

Treatment N -- Graze key riparian sites at a proper use level of 50 percent on meadow riparian areas early in the summer to allow for re-growth. Graze at 30 - 40 percent if season will run to September 1 - 15. Maintain a stubble height of three to four inches on key riparian sites after planned grazing use.

Frequent riding and herd movement were to be used in controlling livestock distribution.

To further improve distribution and otherwise help balance the needs of grazing permittees and sustainable rangeland health, a schedule of range improvements and water developments was adopted in the 1999 Decision. These improvements included 48 miles of fencing to protect riparian and other sensitive areas and development of 68 springs, pipelines, wells, and reservoirs to provide water for both livestock and wildlife. Of these improvements, 9 miles of riparian fencing, 3 cattle guards, and 18 water developments are yet to be constructed.

Full implementation of the 1999 Decision's management actions was to be accomplished over a ten-year period in three separate phases. Use levels for the initial phase were set at the then current permitted use of 35,910 AUMs for cattle and 11,451 AUMs for sheep, which totals 47,361 AUMs.

However, to allow for flexibility, the decision contemplated that stocking rates would vary and be set each year in an annual operating plan for each permittee. Also, use levels for the interim and long-term phases were to be determined following completion of allotment monitoring and evaluation in 2001 and 2010.

Thus, while permitted use was 47,361 AUMs, active livestock use averaged only 23,811 animal unit months (AUMs) from 1980 through 2006. The average was even lower at 17,370 AUMs from 1999 through 2006.

This lower usage corresponded with drought conditions which persisted from 1999 through 2007. With the exception of Green Mountain and Crooks Mountain, the climate of this area is semiarid cold desert. From 1999 through 2007,

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annual precipitation on the GMCA was considerably below the long-term annual average of 8.90 inches from 1960 through 1998. The severity of the drought was evidenced by a substantial decrease in native vegetation production, the livestock operators taking non-use at times, and decreasing levels of grazing use.

BLM has stated that completion of the water developments authorized in the 1999 Decision but not yet constructed would enable cattle to graze more of the GMCA, raising the available AUMs under one grazing scheme in the long-term by 6,500 over the average use level from 1999 to 2006 (2008 EA at 4-25, 4-29). In other words, additional water sources are still needed to improve livestock distribution on the allotment, increase use of the upland range sites, and raise available AUMs to 23,870 (at least under one grazing scheme).

In 2002, BLM completed a comprehensive rangeland health assessment and evaluation report to determine whether public lands within the GMCA were meeting the Standards. BLM concluded that the Standards for riparian areas and habitat for native species were not being met.

Of the 90.8 miles of lotic riparian habitat and 1,564 acres of lentic riparian habitat identified by BLM, 11.34 miles of lotic riparian habitat (12.5 percent) and 352 acres of lentic habitat (22.5 percent) were found to be in proper functioning condition (PFC). The remaining 79.42 miles (87.5 percent) of lotic riparian habitat and 1,212 acres of lentic riparian habitat (77.5 percent) were determined to be Non-Functional or Functional-at-Risk with a downward or unknown trend. Thus, riparian health was determined to be the highest priority goal and the biggest rangeland health issue on the allotment.

Monitoring from 1999 to 2001 following initiation of grazing practices to improve riparian habitat conditions indicated that:

- Adequate regrowth of riparian vegetation to promote reproduction and improve vigor of desirable species did not occur following grazing;
- residual stubble height of riparian vegetation remained below adequate levels for soil stabilization and structure for species diversity;
- bare ground was higher than expected in riparian areas, indicating below adequate levels of cover for soil stabilization;

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- there were high amounts of litter to live vegetation in riparian areas, indicating heavy utilization of riparian vegetation inhibiting riparian recovery;
- there were high amounts of upland species occurring in riparian habitats, indicating drying of riparian habitats;
- vigor of young and mature willows remained poor throughout the period;
- canopy cover remained constant throughout the period; and
- willows density remained nearly constant throughout the period of 1997 to 2000; in 2001 willow density improved at the transects, apparently responding to the August/early September removal of livestock.

Based on the items identified above, BLM found that the Standard for riparian areas was not being met, and concluded that significant progress was not being made towards meeting that standard, because the grazing management was not providing sufficient rest and recovery time. Even with a deferred rotation system, there had been essentially season long grazing on most riparian areas, resulting in heavy and severe utilization. This was attributable, at least in part, to a failure to remove livestock from pastures when the utilization or stubble height limits were reached.

In 2005, BLM renewed two GMCA permits under the authority provided under Public Law 108-108 (appropriation rider). Appeals to the Interior Board of Land Appeals were filed protesting the renewal of permits without an environmental assessment. As part of the agreement settling the appeals, BLM agreed to complete an AMP for the GMCA by no later than December 31, 2007.

BLM has not yet prepared an AMP, but it did complete the 2008 EA analyzing various alternatives for livestock grazing management within the GMCA. That EA analyzed four alternative management actions in detail.

Under Alternative 1, the no-action alternative, management under the 1999 Decision would continue, including completion of the planned but unconstructed water developments. BLM estimated the following usage for the initial, interim, and long-term periods identified in the 1999 Decision:

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Period	Use Levels	Percent of Permitted Use
Initial (2008 - 2012)	13,030 cattle AUMs 4,350 sheep AUMs	37%
Interim (2013 - 2017)	14,280 cattle AUMs 4,800 sheep AUMs	40%
Long Term (2018 - 2027)	17,880 cattle AUMs 6,000 sheep AUMs	50%

Higher levels of AUMs could be authorized during each period, up to the permitted use of 35,910 cattle AUMs and 11,451 sheep AUMs; but because of several factors, including dry conditions, lack of adequate livestock drinking water and low forage production, BLM anticipated that active use levels would normally be much less than permitted AUMs.

Under Alternative 2, the proposed action, the GMCA would essentially be divided into six smaller allotments, facilitated by construction of 94 miles of permanent fencing, 4 miles of temporary electric fencing, and 35 water developments (springs, pipelines, wells, and reservoirs). The permanent fencing would include the Granite Creek-Rocks Pasture Fence.

No long-term changes in the grazing season or permitted livestock numbers would be made. However, BLM contemplated, as it had for Alternative 1, that active use levels would be less than permitted use because of the same factors and that annual active AUM levels would rise in phases from 17,380, to 23,860, to 34,060.

Alternative 3, the "conservation alternative," would require (a) a BLM intensive suitability study to determine the appropriate carrying capacity for livestock on the GMCA, (b) identification of key areas to monitor, (c) development of thresholds for removal of livestock based on stubble height and willow and stream bank trampling indicators, and (d) removal of livestock from a pasture or the allotment once the thresholds were met. Permitted use would be reduced to 12,160 AUMs, pending the determination of the appropriate carrying capacity.

Alternative 4 would divide the GMCA into two allotments. One allotment would be managed under a one-herd, rest-rotation grazing system. The other allotment would be managed under a deferred-rotation grazing system. Management of both allotments would rely on herding and the grazing season

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would be shortened. The system would be facilitated by 49 water development projects and 28 miles of fences, including 4 miles of permanent fence along the south and west portions of the Crooks Creek Riparian Pasture.

Like Alternatives 1 and 2, Alternative 4 would set the initial active use level low and increase active AUMs in phases, specifically from 12,160, to 23,340, to 28,500. The active use level for the initial period is based on lack of water availability, with use level increasing as wells are developed, making a larger service area available. The low initial active use levels for all the alternatives are also based in part upon the need to recover from drought conditions.

On April 3, 2009, BLM issued an Addendum to the Cumulative Impacts Analysis for the GMCA with regard to the four alternative actions identified in the 2008 EA. That same day BLM also issued the FONSI regarding the 2008 EA and three proposed decisions.

After considering protests to the proposed decisions and consultations with the permittees and interested public, BLM, on March 3, 2010, issued the Final Decisions. With a few modifications, those decisions adopted the actions contemplated in the proposed decisions, authorizing a combination of management actions contained in Alternatives 1-4 of the 2008 EA.

By splitting the GMCA into the three new allotments, some with more than one use area, the Final Decisions essentially adopt the same five use areas created by the 1999 Decision. The Final Decisions also mirror the 1999 Decision in continuing spring and fall usage in the Alkali Creek Sheep Use Area and establishing a 3- or 4-pasture, deferred rotation system for each of the other allotments or use areas.

The Final Decisions authorize 24,970 AUMs of active use,¹ which is less than the full permitted use of over 47,000 AUMs but greater than the average active use of 23,811 AUMs from 1980 through 2006. Even though the Final Decisions, unlike Alternatives 1, 2, and 4 of the 2008 EA, do not contemplate any water developments, the authorized active use is also higher than any active use contemplated under Alternative 1, or the initial and interim active use levels under Alternatives 2 and 4.

¹2,105 AUMs of exchange of use was also authorized.

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The Final Decisions do authorize the construction of about 32 miles of fencing and reduce the periods of authorized grazing use. The authorized fencing includes the Crooks Creek Riparian Pasture Fence within the Arapahoe Creek Common Allotment and the Granite Creek-Rocks Pasture Fence in the Antelope Hills Allotment.

The former will be a permanent fence running about five miles in an east/west direction and one mile in a north/south section, connecting at both ends to existing fence. A version of this fence was contemplated as a component of Alternative 4 of the 2008 EA, but it was described as being only 4 miles long.

The Granite Creek-Rocks Pasture Fence will run about 27 miles in length in the rough shape of a horseshoe and connect at both northern ends to existing fence. The fence will separate a series of riparian sloughs attractive to cattle from the remainder of the new Antelope Hills Allotment. About 11 miles of the 27 miles will be temporary electric fencing used for 60 days each year and then either unfastened from the posts and placed on the ground or removed. This portion of the fence will cross the Seminole Cutoff Trail in two pristine locations, but will be designed to minimize effects on the trail. The remaining miles will consist of permanent barbed-wire fencing.

BLM has recognized that these fences will have adverse effects on sage-grouse that are discussed in more detail elsewhere in this Order. They will also result in soil erosion and compaction, overgrazing, and deteriorating vegetative conditions along the fences caused by livestock, wildlife, and wild horses trailing there and vehicles used to maintain the fences. Other adverse effects will include diminishing the value of the land as open space, interfering with the migration of big game and wild horses, and entrapping pronghorn, particularly those that are young, weak, or otherwise impeded by snowfall.

Like the 1999 Decision, the Final Decisions also include "pasture rotation indicators," including a 6-inch greenline stubble height for riparian vegetation and a 5-inch residual cover for upland vegetation. These are more stringent than the 3- to 6-inch stubble height indicators under the 1999 Decision.

However, the 1999 Decision indicators applied to each pasture in the rotation scheme, whereas the new indicators do not. Under the Final Decisions, the

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permittees of the Green Mountain and Antelope Hills Allotments are not actually required to move their livestock when the new rotation indicators have been reached except in the last pasture of the rotation sequence. For the Arapahoe Creek Common Allotment, stubble height will be used as a move indicator only for the last two pastures in the rotation sequence.

If the move indicators are exceeded on the latter allotment, 10 percent of active use will be suspended in the next grazing year. For the other allotments, there are no enforcement provisions.

Nor are there enforcement provisions for sage-grouse guidelines contained in each Final Decision. Those guidelines put limits on certain activities near leks, in nesting/early brood-rearing habitat, or in winter concentration areas.

Without explanation, the Final Decisions omit two such guidelines which were components of each of the four alternatives considered in detail in the 2008 EA. Those omitted guidelines require, in all suitable sage-grouse nesting/early brood-rearing habitat within a 3-mile radius of the perimeter of an identified lek or in identified sage-grouse nesting/early brood-rearing habitat outside the 3-mile radius from March 15 to July 15, maintenance of 15 to 30 percent sagebrush cover with heights of 11 to 32 inches and 6 inches or more of grasses and forbs.

With respect to Anderson's appeal, the key provisions of the Final Decision pertaining to the new Arapahoe Creek Common Allotment are (1) a term setting Anderson's active use at 1,757 AUMs, which is half of his permitted use, and (2) the provision establishing the stubble height pasture rotation indicators. These are the only parts of that decision which Anderson is challenging and seeking to stay.

His permit for the period of March 1, 2008, through March 28, 2015, which pertained prior to issuance of the Final Decisions, lists his active use as 3,515 AUMs. However, the permit also states: "Grazing use in the [GMCA] shall be in accordance with the [1999 Decision]." Pursuant to that decision, his active use was set by annual operating plans at 2,203 AUMs and 2,018 AUMs in 2008 and 2009, respectively. His actual AUM usage was 1,939 in 2008 and 1,996 in 2009.

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III. WWP's Petition for a Partial Stay Granted

To prevail on its stay petition, WWP must show, in accordance with 43 C.F.R. § 4.471(c)(2), sufficient justification based on the relative harm to the parties if the stay is granted or denied, the likelihood of WWP's 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. The party seeking the stay 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).

To achieve success on the merits, WWP must meet its 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 CFR 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).

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 explained below, WWP's petition for a partial stay must be granted because WWP has met all of the criteria for granting a stay. A stay of only the fence construction provisions of the Final Decisions, rather than a complete stay, is appropriate because, during the relatively short time it will take to resolve the

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appeals, the grazing permittees can herd their livestock, as they have done for decades, to minimize livestock usage of the two riparian areas to be fenced.

A. Likelihood of Success on the Merits

WWP argues that BLM violated the National Environmental Policy Act of 1969 (NEPA) in various ways. NEPA is primarily a procedural statute 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).

Informed decisionmaking is fostered by informed public participation in the NEPA process. "One of NEPA's goals is to facilitate 'widespread discussion and consideration of the environmental risks and remedies associated with the pending project,' thereby augmenting an informed decisionmaking process." *LaFlamme v. FERC*, 852 F.2d 389, 398 (9th Cir. 1988)(quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980)(per curiam)). Thus, "[s]ection 102(2)(C) of NEPA and its implementing regulations generally require BLM to encourage and facilitate public involvement in the NEPA process." *Lynn Canal Conservation, Inc.*, 169 IBLA 1, 4 (2006) (citing 40 C.F.R. §§ 1500.1(b), 1501.4(b), 1500.2, 1506.6)

WWP contends that BLM failed in the 2008 EA to take a "hard look" at the environmental impacts of the actions taken in the Final Decisions and thus failed to comply with section 102(2) of NEPA, 42 U.S.C. 4332(2).

In preparing an EA to assess whether an EIS is required under NEPA, an agency must take a "hard look" at the proposal being addressed and identify relevant areas of environmental concern so that it can make an informed determination as to whether the environmental impact is insignificant or impacts will be reduced to insignificance by mitigation measures. Southern Utah Wilderness Alliance, 159 IBLA 220, 235 (2003), citing Colorado Environmental Commission,

142 IBLA 49, 52 (1997); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174 (1987).

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In determining whether BLM has taken a hard look at the environmental consequences that would result from a proposed action, [the Interior Board of Land Appeals (Board)] indicated that it will be guided by a rule of reason:

An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, not an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on "incomplete and uncertain information. Blue Ocean Preservation Society v. Watkins, 767 F. Supp. 1518, 1526 (D. Hawaii 1991) * * *." So long as an EA contains a reasonably thorough discussion of * * * significant aspects of the probable environmental consequences, NEPA requirements have been satisfied. Sierra Club v. United States Department of Transportation, 664 F. Supp. 1324, 1338 (N.D. Ca. 1987), quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974); 40 CFR 1508.9; Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973); Missouri Coalition for the Environment, 124 IBLA 211, 219-20 (1992).

Bales Ranch, Inc., 151 IBLA 353, 358 (2000), quoting Don't Ruin Our Park v. Stone, 802 F. Supp. 1239, 1247- 48 (M.D. Pa. 1992).

The Board must ensure that the agency's conclusion in an EA and FONSI with respect to a lack of significant impacts is justified. The Board will approve a proposed action based on a FONSI "if the record establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been

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identified, and the final determination that no significant impacts will occur is reasonable in light of the environmental analysis." Southern Utah Wilderness Alliance, 122 IBLA 334, 338 (1992) (citations omitted). The record must demonstrate that BLM has "made a convincing case that no significant impact will result therefrom, or that such impact will be reduced to insignificance by the adoption of appropriate mitigation measures." Robert W. Hall, 149 IBLA 130, 138 (1999), citing Nez Perce Tribal Executive Committee, 120 IBLA 34, 37-38 (1991). An appellant challenging a FONSI must demonstrate an error of law or fact or that the EA failed to consider a substantial environmental problem of material significance. The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal. Rocky Mountain Trails Association, 156 IBLA at 71, citing Larry Thompson, 151 IBLA 208, 217 (1999).

Colorado Mountain Club et al., 161 IBLA 371, 381-82 (2004).

WWP has raised serious questions about the adequacy of the 2008 EA's analysis of the impacts on sage-grouse under these standards, thus establishing a substantial likelihood of success on the merits. This conclusion follows from the importance of the sage-grouse, the significance of the GMCA to the sage-grouse, and various facts casting serious doubt on the adequacy of BLM's assessment of the effects of the Final Decisions on the sage-grouse.

BLM has acknowledged that the sage-grouse is "arguabl[y] . . . the species of greatest concern in the Lander Field Office at the present time because of repeated efforts to have it federally listed." 2008 EA at 3-43. Since this acknowledgment was made, the Forest Service published a finding that listing of the sage-grouse is warranted but that other priorities prevent listing at this time. 75 Fed. Reg. 13910-01.

That same publication notes that the importance of the GMCA region to sage-grouse, stating that the southwest Wyoming Basin is one of two strongholds of contiguous sagebrush habitat containing the highest densities of males in the range of the species. *Id.* at 13962. Indeed, Wyoming is home to more than half of the remaining sage-grouse in the country and the GMCA has the second highest lek density in the State.

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The Forest Service also observed that declines in sage-grouse population are attributable in large part to the loss of sagebrush habitat quality and quantity. 75 Fed. Reg. at 13921-22. Factors identified as contributing to this loss by fragmentation and degradation include *grazing*; infrastructure such as roads, powerlines, and *fences*; direct conversion; urbanization; wildfire; incursion of invasive plants; and energy development. *Id.* at 13924, 13929.

The effects of fencing on sage-grouse include direct mortality through collisions, creation of predator (raptor) and corvid perch sites, the potential creation of predator corridors along fences (particularly if a road is maintained next to the fence), incursion of exotic species along the fencing corridor, and habitat fragmentation.

... Sage-grouse frequently fly low and fast across sagebrush flats, and fences can create a collision hazard. [Reports of large numbers of collisions] include [a] recent study in Wyoming confirmed 146 sage-grouse fence strike mortalities over a 31-month period along a 7.6-km (4.6-mi) stretch of 3-wire BLM range fence.

Not all fences present the same mortality risk to sage-grouse. Mortality risk appears to be dependent on a combination of factors including design of fencing, landscape topography, and spatial relationship with seasonal habitats.

Id. at 13929.

In the 2008 EA, BLM likewise acknowledged the impacts on sage-grouse of livestock grazing and fencing. BLM observed:

Livestock grazing has impacted sage-grouse in the allotment by the removal of herbaceous plants (grasses and forbs) that occur around the base of sagebrush plants. The removal of these plants permits predators to prey upon sage-grouse eggs by reducing the hiding cover around the nest. Livestock grazing practices have also impacted sage-grouse by reducing habitat quality in riparian habitats used for brood rearing.

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....

The greater sage-grouse can be negatively impacted throughout various stages of its life cycle by livestock grazing and associated range improvements. Placement of fences or water development facilities that provide perches for raptors within sight of a lek can lead to excessive predation of breeding sage-grouse. Fences may also cause hazards to grouse flying to and from the lek. Concentrations of livestock during herding and near water developments can disrupt strutting (if too close to a lek) during the breeding season and cause direct trampling of nests during the nesting period. Reduction of residual stubble height by livestock grazing below six inches may contribute to increased nest predation by reducing concealment of the eggs and young (Gregg et al., 1994). Overgrazing of riparian areas may diminish the quality of brood-rearing habitat. Connelly et al. (2000) found that sage-grouse preferred areas with high plant species richness, moisture, and taller grasses and forbs during the brood-rearing portion of their life cycle. Water developments, although providing water where none existed before, tend to attract sage-grouse predators, increase potential for accidental drowning, and have been associated with the spread of the West Nile virus (WNV), which is almost always fatal in sage-grouse. Any additional range improvements constructed under Alternative One would be subject to site-specific NEPA analysis and evaluated as to their potential impact on sage-grouse habitat. Whenever possible, future water developments would be located away from leks and suitable nesting habitat. With the improved livestock distribution from herding and additional water developments, residual stubble heights should be easier to manage, and improved riparian habitat should provide better brood-rearing habitat.

....

Sage-grouse tend to fly near the ground, and collisions with fence wire (especially electric fence wires) serve as added causes of mortality. In areas of sage-grouse breeding and nesting, fence posts provide perching raptors a vantage point from which to observe and pick off

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sage-grouse on the ground. As sage-grouse activity is extensive throughout the GMCA, the location of fences in avoiding sage-grouse will only partially mitigate this impact. Lastly, fences tend to concentrate livestock in certain areas. This impact, coupled with any increase in livestock numbers, increases the likelihood of trampling or disturbing the nests of sensitive bird species such as the . . . greater sage-grouse.

2008 EA at 3-43, 4-32, 4-56.

The study confirming 146 sage-grouse fence strike mortalities referenced by the Forest Service is the basis for an estimate by Jonathan Ratner, a biologist and WWP's Wyoming Director, that a minimum of 269 sage grouse per year will be killed by collisions with the new fencing authorized by the Final Decisions. That study is dated October 26, 2009, and was conducted about 15 miles west of the GMCA. The estimate is offered in support of WWP's contention that the impacts of the Final Decisions will be significant and were not adequately assessed by BLM.

BLM takes issue with the accuracy of the estimate, arguing, among other things, that BLM will be marking the fences to make them more visible and that the same study shows that marking fences reduced collisions by 61%. While the FONSI does state that the fences will be marked, fence marking is not evaluated in the 2008 EA, required in the Final Decisions, nor even mentioned in either the 2008 EA or Final Decisions.

BLM challenges the accuracy of Mr. Ratner's mortality estimate on the additional ground that the new fences, unlike the fencing within the study area, does not lie within two miles of two large sage-grouse leks of over 100 males each nor bisect sage-grouse winter habitat. Mr. Ratner counters that within 2.4 miles of the proposed Granite Creek-Rocks Pasture Fence are 8 leks with 565 males and that 6 of those leks with 273 males are less than 2 miles from the fence. Further, that fence, like the study fencing, lies in late brood-rearing riparian habitat. Portions of the fence also lie within nest/early brood-rearing habitat and skirt or possibly intersect winter habitat. See 2008 EA at Maps 2-15, 2-18. In sum, BLM's challenge is not convincing.

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Another factor of at least equal importance is BLM's failure to provide any mortality calculations or estimates of its own. This highlights the paucity of data upon which BLM's NEPA analysis of the impacts to sage-grouse is based.

Data deficiencies include the lack of specificity as to the location of 6 miles of fencing referred to as the Crooks Creek Riparian Pasture Fence. As previously noted, a version of this fence was analyzed as part of Alternative 4 in the 2008 EA but it was described as being only 4 miles long. A large scale map in the 2008 EA of the Alternative 4 range improvements for the entire 522,000-acre area shows the general location of the 4-mile fence, but neither the 2008 EA nor the pertinent Final Decision provides a map of any scale of the 6-mile version of the fence. Without the specific location, it is difficult to assess the fence's likely effects on the sage grouse or whether BLM adequately considered those effects.

Also troubling is the fact that the FONSI is based upon a detailed analysis of four alternatives, all of which included sage-grouse guidelines to mitigate the impacts to sage-grouse, yet the Final Decisions, without explanation, omit two of those guidelines. The omitted guidelines required, in all suitable sage-grouse nesting/early brood-rearing habitat within a 3-mile radius of the perimeter of an identified lek or in identified sage-grouse nesting/early brood-rearing habitat outside the 3-mile radius from March 15 to July 15, maintenance of the following: (1) 15 to 30 percent sagebrush cover with heights of 11 to 32 inches, and (2) 6 inches or more of grasses and forbs.

Appendix 16 of the 2008 EA describes the behavior and habitat needs of the sage-grouse upon which the omitted guidelines are based:

Sage grouse are dependent upon sagebrush (*Artemisia* spp.), primarily big sagebrush (*A. tridentata*) and do not occur throughout the year in areas where an abundance of this shrub is absent. Breeding activities generally occur from early March to early May in Wyoming. . .

Sites chosen for display are openings with an abundance of sagebrush within 300-650 feet for escape cover. . . . Sites used generally are close to or in large expanses of sagebrush and have good visibility (for predator detection) and acoustical qualities (so sounds of breeding displays will carry). After breeding in March-April (later for hens

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unsuccessful in their first nest attempt), hens disperse from lek sites and choose nest sites from 650-980 feet to over 5 miles from lek of mating. Recent studies have shown that about 70-80 percent of all hens nest within 5 miles of lek of mating. Nest sites are in taller (> 20 inches), more dense (> 25 percent canopy cover) than average sagebrush areas that have an abundance of forbs (>5-8 percent) and grasses (>20 percent). Residual cover of grasses and forbs is important for nesting hens as few herbaceous plants are growing in mid to late April when hens initiate nesting activities.

Nests are typically placed at the base of a live sagebrush bush. . . .
Nests occurring under other shrubs or grasses are rarely successful in hatching clutches due to increased predation. . . .

Incubation occurs for 27-28 days with sage grouse hens . . . not being determined nesters. Thus, nest abandonment is common if the hen is disturbed during nesting. Extent of re-nesting if the initial clutch is depredated or abandoned varies with population and, probably, with moisture/vegetative conditions. If re-nesting occurs, most hens will re-nest within .6 miles of the original nest site. . . .

Hatching of eggs can start by May 5-10 but most eggs hatch in June with a peak between June 6 and June 23. Clutches hatching after July 1 are usually the result of re-nesting attempts by hens unsuccessful in their initial attempt. Few clutches hatch in July.

Given these behaviors and needs, BLM should have offered some explanation for omitting the two guidelines from the Final Decisions. Its failure to do so, along with the other factors discussed above, casts serious doubt upon whether it took a hard look at the impacts of the Final Decisions. Consequently, WWP has established a substantial likelihood that it will succeed on the merits of its argument that BLM violated NEPA.

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B. Likelihood of Immediate and Irreparable Harm and Balance of Harms

WWP has also shown a likelihood of immediate and irreparable harm if a partial stay is not granted and that the balance of harms favors granting that stay.

[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 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 (1st Cir. 1989) (quoting *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952 (1st 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, BLM's likely NEPA violation entails a potentially irreparable risk to the environment, and the sage grouse in particular, that must be considered in assessing the likelihood of irreparable harm and the relative harm to the parties. This risk,

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when added to the already quantified likelihood of hundreds of sage grouse deaths annually from collisions with the new fences, amounts to a likelihood of immediate and irreparable harm to a species on the verge of being listed under the ESA.

In balancing the relative harms of granting or denying a partial stay, the harm from collisions is not the only harm of denying a stay to consider. Fence construction provides perches for sage-grouse predators, leads to soil and vegetation damage from trailing near the fences, and can lead to cheatgrass invasion which increases the risk of harmful wildfires. Additionally, the fences are likely to cause deaths of big game and disrupt their migration patterns. They also would lessen the value of GMCA for open space and for historic trails, as the Granite Creek - Rocks Pasture Fence would cross the Seminoe Cutoff in pristine locations.

If a partial stay is granted, some harm may come to the unfenced riparian areas from inadequate herding and this harm, in turn, may have some adverse effect on sage grouse and other wildlife. However, BLM has not identified the extent of that harm over the short-term period necessary to resolve the appeals. In sum, the relative harm to the parties and likelihood of immediate and irreparable harm favor granting a partial stay.

C. Public Interest

Finally, the public interest favors granting a partial stay. Before BLM makes an irretrievable commitment of resources, expending thousands of dollars on fencing, the issue of whether BLM complied with NEPA should be fairly litigated and deliberately investigated to insure that the purposes of NEPA are served.

D. Conclusion

Based upon the foregoing, **WWP's petition for a partial stay is granted in that the provisions of the Final Decisions authorizing fence construction are hereby stayed.**

IV. Anderson's Petition for a Partial Stay Denied

In his petition for a stay, Anderson seeks to stay only two provisions of the Final Decision pertaining to the new Arapahoe Creek Common Allotment: (1) a term

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setting Anderson's active use at 1,757 AUMs, which is half of his permitted use, and (2) the provision establishing the stubble height pasture rotation indicators. His petition must be rejected because he has failed to show that the balance of harms favors granting a stay.

While he asserts that setting his active use at 1,757 AUMs constitutes a 50% reduction in his permitted use which "would make ranching unsustainable," "would result in irreparable harm to my livestock operation," and would result in "a 50% cut in income," he does not support these assertions with any evidence of the economics of his operation. Thus, he has failed to meet his burden of presenting objective proof in support of his contention.

Furthermore, it is his active use rather than his permitted use (active plus suspended use) which has been reduced by 50% from that specified on his prior permit and the actual reduction is far less than 50%. This is so because his authorized active use was set at 2,203 AUMs and 2,018 AUMs for the years 2008 and 2009, respectively, pursuant to the provision in his prior permit allowing flexibility to change active use through the annual operating plans. Thus, the reduction in active use from 2008 and 2009 is approximately 20% and 13%, respectively, not 50%.

If a stay were granted, Anderson would only be entitled to graze at the level authorized in the previous year (2009), i.e., 2,018 AUMs. See 43 C.F.R. § 4160.3(d) (2005).² He has not addressed with argument or supporting evidence the harm, if

²The 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, the United States District Court for the District of Idaho has enjoined implementation of those regulatory amendments in all respects. *Western Watersheds Project v. Kraayenbrink, et al.*, 538 F. Supp. 2d 1302 (D. Idaho 2008). In accordance with that injunction, BLM's Assistant Director, Renewable Resources and Planning, issued Instruction Memorandum 2009-109, directing all western BLM field offices (excluding Alaska) not to implement any of the July 12, 2006, amendments to 43 C.F.R. part 4100 *et seq.* 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.

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any, he would suffer by being able to graze only 13% less AUMs if his petition is denied.

As for the harm of granting a stay, BLM has analyzed in detail and explained how a reduction in use is necessary to allow riparian areas to recover from degradation and a stay would delay recovery to the detriment of the wildlife and people who rely on and enjoy those areas. Anderson opines that he should be able to graze his full permitted use of 3,115 AUMs for various reasons, including that grazing less livestock will not improve rangeland health.

He made the same argument in protest of the proposed decisions and BLM responded:

The 50 percent reduction in permitted [sic] use is necessary for three reasons. First, there are large areas of the proposed [Arapahoe Creek Common Allotment] that are too far from reliable water sources to continue to authorize for summer cattle grazing. Second, until such time as the permittees come together and develop and implement a reasonable grazing plan, including installation of additional water sources, the 50 percent reduction will be necessary. Third, a reduction in permitted use is also needed to restore degraded riparian conditions.

Anderson has not offered objective proof to counter BLM's response and analysis. Consequently, he has failed to show that the balance of harms favors granting the partial stay which he seeks and **his stay petition must be, and is hereby, denied.**

V. Deadline for Filing Regarding Supplemental Statement of Reasons


BLM has filed an objection to WWP's supplemental statement of reasons for appeal, arguing that it was not timely filed within the 30-day appeal period and therefore that any new grounds for appeal therein were waived by WWP. *See* 43 C.F.R. § 4.470(c). However, § 4.470(c) states that an appellant may present a waived ground for appeal if permitted to do so by the administrative law judge. In the event that WWP asks for permission, BLM seeks an opportunity to brief the appropriateness of their reasons for doing so.

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WWP has filed a response to BLM's objection, arguing that it should be permitted to present the new grounds for appeal because BLM has not been prejudiced by WWP's untimely filing. This appears to be correct, especially as this office did not rely upon the supplemental statement in ruling upon the stay petitions. Nevertheless, if BLM or Anderson wishes to address the propriety of allowing WWP to present the new grounds for appeal, they may do so in writing, provided that they file the document by **no later than June 1, 2008**.

VI. Notice of Telephonic Conference

Pursuant to Appellants' Request for a Scheduling Conference filed May 5, 2010, a telephonic conference will be held on **Thursday, May 27, 2010, at 2:00 p.m., Mountain Time**, to discuss establishing deadlines for filing any motions for summary judgment and any other matter which may facilitate appropriate resolution of the cases. This office will initiate the conference by telephoning the following party representatives at the numbers indicated: Joshua Anderson at 307-332-8400, Natalie Havlina at 208-342-7024, and John Retrum at 303-231-5353, ext. 27. If a party wishes to designate a different representative or telephone number, or if not possible to take the call at the date and time indicated, please contact this office forthwith.



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 rulings on the stay petitions 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.

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