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To: Greta Anderson
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From: Harvey C. Sweitzer
Administrative Law Judge

Subject: Western Watersheds Project, AZ-LL-AZG01000-12-01

22 page(s) to follow excluding this cover.

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United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS

Departmental Hearings Division
405 South Main Street, Suite 400
Salt Lake City, Utah 84111

December 5, 2011

ORDER

WESTERN WATERSHEDS PROJECT, Appellant

v.

BUreau OF LAND MANAGEMENT, Respondent

AZ-LI-AZG01000-12-01

Motion to Dismiss as Untimely Denied
Motion to Dismiss for Lack of Standing Denied
Petition for Stay Granted

I. Introduction

Western Watersheds Project (WWP) has appealed from and petitioned for a stay of a Decision Record (Decision) issued on March 25, 2011, by the Safford Field Office, Bureau of Land Management (BLM), Safford, Arizona. The Decision authorized development of the Goat Camp Well located on the Twin C Allotment. Although the Decision issued in March, BLM did not mail a copy to WWP at that time because it did not consider WWP an “interested public.” WWP reportedly received a copy of the Decision later in September 2011 as part of a response to a Freedom of Information Act (FOIA) request. WWP submitted its Notice of Appeal and Petition for Stay (Appeal and Stay Petition) by mail on October 19, 2011.

BLM responded to the Stay Petition on October 31, 2011 (BLM Response), and submitted the declarations of BLM employees, Paul L. Summers and Amy L. Humphrey. Along with its Response, BLM also filed two motions: (1) a Motion to
Dismiss the Appeal as untimely, and (2) a Motion to Dismiss for lack of standing. On November 10, 2011, WWP filed a response to BLM’s motions (WWP Response), which included additional exhibits as well as the declaration of Paul D. Ruprecht. Seven days later, on November 17, 2011, BLM filed a reply in support of the motions to dismiss (BLM Reply). WWP submitted its final reply brief on November 29, 2011 (WWP Reply).

Based upon a preliminary review of the record, pleadings, exhibits, and declarations, and for the reasons set forth below, BLM’s motions to dismiss are denied and the petition for a stay of the Decision is granted.

II. Background

The Twin C Allotment (Allotment) is an irregularly-shaped allotment located in Graham County, Arizona, approximately 15 miles northeast of Safford. It encompasses approximately 10,987 total acres and includes portions of the Gila Box Riparian National Conservation Area (RNCA). The Gila River flows along its northwestern boundary and an existing well next to the river presently serves as a significant source of water for the Allotment.

The Allotment has been subdivided into several pastures and livestock management occurs in accordance with a rotation grazing system. The current authorization allows the permittee to graze 160 head of cattle for a total of 1,920 animal unit months (AUMs). Existing range improvements include 22 miles of pipe, including 8 miles of pipe from the Gila River well to the Goat Camp well storage area. In addition, there are 6 storage tanks and 10 water troughs.

The well project approved by the Decision will connect to the existing tanks and pipeline, providing water to the Goat Camp, River, and Cinder Pit pastures. These three pastures account for a majority of the allocated AUMs (approximately 70-75%). Drilling has already begun at the well site, which lies about three miles east of the Gila River and about 1,000 feet above the river’s floodplain. When completed, BLM’s environmental assessment (EA) anticipates that the water from the new well will either eliminate or augment the Gila River as a source of water for livestock.
Prior to issuing the Decision, BLM prepared an EA which considered two alternatives: the proposed action and the no action alternatives. BLM also completed a National Environmental Policy Act (NEPA) Supplement for Biological Assessment and Endangered Species Act (ESA) Compliance. In that document, BLM concluded that the well would have no effect on the razorback sucker or bald eagle, two listed species found in the area. In addition, BLM prepared a Cultural Resource Compliance Document Record.

On March 25, 2011, BLM issued the Decision along with a finding of no significant impact (FONSI). The Decision selected the proposed alternative and identified five mitigation measures/stipulations. These included: (1) a requirement to properly dispose of discarded or leftover materials, (2) a statement that BLM will be the registered owner of the well and that no new road construction will occur, (3) a prohibition against stocking with non-native fish, (4) a requirement to maintain troughs so that they will be accessible to wildlife and provide a means for escape, and (5) a right to modify the operation of the well for resource protection if it becomes evident that there is a direct impact to the Gila River.

BLM did not mail a copy of the Decision to WWP at the time of issuance. According to WWP, it received a copy of the Decision later on September 19, 2011, in response to a FOIA request. Its Appeal and Stay Petition was mailed on October 19, 2011, and received by BLM on October 21, 2011. The Appeal alleges that the BLM’s Decision violated NEPA, 42 U.S.C. §§ 4321-70f, the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-85, and BLM’s grazing regulations, 43 C.F.R. part 4100.

III. Motion to Dismiss as Untimely Denied

BLM has moved to dismiss WWP’s Appeal as untimely because it was filed seven months after the Decision issued in March 2011. WWP responded that it did not receive a copy of the Decision contemporaneously with its issuance, but timely filed its Appeal within 30 days of receiving a copy that BLM later provided as part of a FOIA document request. In its reply brief, BLM modified its stance somewhat based upon the additional exhibits provided by WWP, arguing: “Under the circumstances, uncertainty exists with respect to whether the appeal was timely.” BLM Reply at 4.
In order to resolve this motion, two issues must be addressed: (1) whether WWP qualified as a member of the "interested public" that should have been notified by BLM of the Decision when it issued, and (2) whether BLM has established as a matter of law that WWP's subsequent filing 30 days after reportedly receiving a copy of the Decision as part of a FOIA request rendered the appeal untimely.

The pertinent portions of the grazing regulations governing notice and appeal provide that:

Proposed decisions shall be served on an any affected applicant, permittee or lessee, and any agent and lien holder of record, who is affected by the proposed actions, terms or conditions, or modifications relating to applications, permits and agreements (including range improvement permits) or leases, by certified mail or personal delivery. **Copies of proposed decisions shall also be sent to the interested public.**

43 C.F.R. § 4160.1(a) (emphasis added).1 Thereafter,

Any applicant, permittee, lessee or other interested public may protest the proposed decision under § 4160.1 of this title in person or in writing to the authorized officer within 15 days after receipt of such decision.

Id. at § 4160.2 (emphasis added). If no protest is filed, the proposed decision becomes the final decision without further notice. Id. at § 4160.3(a). On the other hand, if BLM receives a timely protest, the proposed decision will be reconsidered and a final decision issued. Id. at § 4160.3(b). Any appeal must be filed within "30

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1 Although BLM's grazing regulations set forth at 43 C.F.R. part 4100 et seq. were amended in 2006, see 71 Fed. Reg. 39402 (July 12, 2006), implementation of those amendments was subsequently enjoined by court order. 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 (October 3, 2011). Therefore, citation to the grazing regulations will be to the 2005 Code of Federal Regulations, unless otherwise specified.
days following receipt of the final decision, or 30 days after the date the proposed
decision becomes final. . . .” *Id.* at § 4160.3(c); see also 43 C.F.R. §§ 4.470(a), 4160.4.

As defined in the grazing regulations, the term “interested public” means
an individual, group or organization that has submitted a written
request to the authorized officer to be provided an opportunity to be
involved in the decision-making process for the management of
livestock grazing on specific grazing allotments or has submitted
written comments to the authorized officer regarding the management
of livestock grazing on a specific allotment.

43 C.F.R. § 4100.0-5. Thus, interested public status can be achieved (1) through a
written request, or (2) by making written comments about grazing management on
an allotment.

BLM maintains that it had no obligation to treat WWP as an interested public
entitled to receive notice of the Decision because WWP failed to make any allotment-
specific request or provide any allotment-specific comments. WWP has responded
by providing several exhibits documenting its contacts and interactions with BLM.
Among those exhibits, WWP has included a July 30, 2009, letter from BLM
addressed to WWP containing a compact disc with the Standard and Guidelines
(S&G) evaluations for 20 different allotments, including the Twin C Allotment, with
a salutation of “Dear Interested Publics.” Ex. I to WWP Response. A chronological
summary of the pertinent written contacts between WWP and BLM is set forth
below.

On April 17, 2007, Erik Ryberg, WWP’s Arizona attorney, sent a letter to the
Safford Field Office requesting to be placed on the mailing list for six separate
projects. Ex. A to WWP Appeal. He also requested that BLM add his name to the
list “to receive mailings about future decisions involving livestock grazing, water
tanks, water pipelines, water guzzlers, and water wells.” *Id.*

About five months later, in a letter dated September 5, 2007, Greta Anderson,
the Arizona Director of WWP, requested that BLM add her to the mailing list for “all
grazing management activities for the Safford Field Office and Gila Box Riparian
National Conservation Area, including, but not limited to, range improvement projects, lease renewals, standards and guidelines assessments, field visits, and overall resource management planning, etc.” Ex. B to WWP Appeal. In that letter she explained that she had looked at the NEPA project log online, but found it hard to determine which projects had been completed thus far because the log did not include dates. As a result, that made it difficult for her to form a more specific request. Id.

On October 9, 2007, Richard White, a rangeland management specialist with BLM emailed Greta Anderson:

I have received requests to be interested publics from Western Watersheds and their staff attorney Erik Ryberg. We would like to consider you as the point of contact for WWP and alleviate multiple mailings. The BLM will inform WWP of all requested actions, and that information could be distributed internally. Please reply with your thoughts on this matter.

Ex. H to WWP Response.

On March 16, 2009, Ms. Anderson sent an email to several BLM employees about a recent field visit which included the following request:

In the meantime, I'd like to remind you all that I'd appreciate hearing about any and all fieldwork being conducted by range personnel and/or other biologists working on the district where that work interfaces with grazing pressure, range improvement projects, and the S&G assessments. I realize after talking with you all that my interested party status may be construed too narrowly, and what I really want is to hear about everything happening on the ground where there is an interface with grazing use...

Also since you mentioned that you are evaluating hundreds of range improvement projects out there for reconstruction/decommissioning with the stimulus money, I’m guessing there are environmental documents being prepared to address these decisions. Could you
please be sure that I'm on the mailing list for all of them? Thanks so much.

Ex. C to WWP Appeal.

Thereafter, on July 30, 2009, Amy Humphrey, a range management specialist with the Safford Field Office, sent WWP a "Dear Interested Publics" letter by certified mail forwarding the S&G evaluations on compact disc for 20 different allotments, including the Twin C Allotment. Ex. I to WWP Response. The letter asked that written comments, if any, be forwarded to the Safford Field Office by Monday, August 17, 2009. Id. at 2. WWP provided comments in a letter dated August 17, 2009. Ex. D to WWP Appeal. In bold print, the letter indicates that it contains comments on the S&G evaluations for all 20 allotments, including the Twin C Allotment. In the body of that letter, WWP's Greta Anderson wrote:

Given the number of allotments and the breadth of the acreage involved, we do not believe that the short comment period is sufficient to be conducive to meaningful public participation. Nevertheless, below are the comments of Western Watersheds Project, on behalf of our staff and members, who are concerned with the grazing management of these public lands. Our comments are relevant to all of the allotments listed above except where otherwise specified.

Id. at 1. Her comments to BLM identified concerns related to range improvements for all of the 20 listed allotments:

The BLM must provide a timely and complete EA/EIS for any proposed range developments on federal lands. For example, the effects of additional troughs and pipelines on the allotments must be thoroughly analyzed. See Blackrock S&G at 17, Spenazuma at 17. This is true for all range proposals on all of the allotments, and must be considered before a proposed decision is issued.

Id. at 2. On page 5, the letter cites specifically to the S&G evaluation for the Twin C Allotment when discussing the definition of category "T" allotments. Id. at 5. Finally, in the closing paragraph, Ms. Anderson writes: "Please keep us informed as the planning process for these permit renewals proceeds and please send us the complete EAs with any notices of proposed decisions." Id. at 6.
Although WWP did not specifically identify the Twin C Allotment by name when initially requesting notification, see Exhibits A-C, subsequent correspondence between WWP and the Safford Field Office indicates that WWP had every reason to believe that they had been given interested public status with respect to the Twin C Allotment as of July 2009. See Ex. I to WWP Response. By responding to Ms. Humphrey’s July 2009 letter with written comments applicable to all 20 of the listed allotments, including specific reference to the Twin C Allotment, WWP solidified its status as an interested public. See Ex. D to Appeal. That letter qualified under the second part of the definition which requires an organization to “submit written comments to the authorized officer regarding the management of livestock grazing on a specific allotment.” See 43 C.F.R. § 4100.0-5. Nothing requires that the comments be extensive, just that they be specific to the allotment. Having satisfied the prerequisite for interested public status, WWP should have been sent a copy of the Decision under 43 C.F.R. § 4160.1(a).

Even though BLM did not send a copy of the Decision to WWP when it issued, BLM argues that WWP received constructive notice because the Decision, FONSI, and EA were posted on BLM’s web site. See BLM Response at 2, 4. Notably, however, BLM submitted no legal authority in support of this position.

According to WWP’s Appeal, it received a copy of the Decision on September 19, 2011. See Appeal at 1. BLM offers no contrary evidence suggesting that this statement is inaccurate or that receipt occurred on a different date. Thus, WWP’s mailing of its Appeal on October 19, 2011, and receipt by BLM on October 21, 2011, constitutes a timely transmission within the 30-day appeal period. See 43 C.F.R. § 4.422(a). BLM’s motion to dismiss the Appeal as untimely is hereby denied.

2 In a footnote to its Response, BLM noted in a cursory manner that the certificate of service attached to WWP’s Appeal and Stay Petition did not list the permittee. BLM Response at 6 n.1. Pursuant to 43 C.F.R. §§ 4.470(a), 4.471(b), 4.422(c) an appellant must serve a copy of the appeal and stay petition on any other “person named in the decision” from which the appeal is taken. However, the Decision provided as part of the administrative record does not identify or contain the name, or address, of the permittee. See AR at Tab 6; see also 43 C.F.R. § 4.421 (defining “person named in the decision”). In any event, BLM did not assert the lack of service as a basis for dismissing this Appeal nor did BLM serve a copy of its Response on the permittee. See 43 C.F.R. 4.472(a); BLM Response at 11; BLM Reply at 5.
IV. Motion to Dismiss for Lack of Standing Denied

Establishing that WWP qualifies for interested public status in relation to the Twin C Allotment does not give the organization an automatic right to appeal. To maintain an appeal, a party must still show standing. Cf. Donald K. Majors, 123 IBLA 142, 146 (1992) (interpreting the phrase “affected interest” contained in a prior version of 43 C.F.R. § 4100.0-5); see also Oregon Natural Resources Council v. BLM, 129 IBLA 269, 273-74 (1994) (also interpreting a prior version of the regulation).

Standing to appeal is governed by 43 C.F.R. § 4.470(a), which provides that any “person whose interest is adversely affected by a final BLM grazing decision may appeal the decision to an administrative law judge. . . .” To be adversely affected, an appellant must demonstrate injury or harm to a “legally cognizable interest.” Fred E. Payne, 159 IBLA 69, 73 (2003). For an organization to have standing, “one or more of its members must have a legally cognizable interest that was or is likely to be adversely affected by the decision.” Board of Commissioners of Pitkin County, 173 IBLA 173, 178 (2007).

Standing may be shown either by: (1) evidence demonstrating use of the land in question, Wyoming Outdoor Council, 153 IBLA 379, 382-84 (2000), or (2) evidence “setting forth interests in resources or in other land or its resources affected by a decision and showing how that decision has caused or is substantially likely to cause injury to those interests.” The Coalition of Concerned Nat’l Park Retirees, 165 IBLA 79, 83-84 (2005); see also Theodore Roosevelt Conservation Partnership, 178 IBLA 201, 206 (2009) (quoting Coalition of Nat’l Park Retirees, 165 IBLA at 83-84). As the Appellant, WWP bears the burden of demonstrating that the requisite elements of standing have been satisfied. Pitkin County, 173 IBLA at 178.

3 A similar provision found at 43 C.F.R. § 4.410 governs appeals to the Interior Board of Land Appeal (IBLA or Board) and requires that an appellant be “adversely affected.” Cases discussing that provision provide useful guidance for interpreting 43 C.F.R. § 4.470(a). See The Center for Tribal Water Advocacy v. BLM, 173 IBLA 165, 171 (2007).
In support of its Appeal and claim of standing, WWP submitted the declaration of Paul D. Ruprecht. See Exhibit J to WWP Response. Mr. Ruprecht is a third-year law student at Lewis and Clark Law School in Portland, Oregon and has been a member of WWP since 2009. Decl. of Ruprecht at ¶ 6. In his declaration, he described prior visits to the State of Arizona generally, including work performed in June 2007 as a firefighter for BLM and the Forest Service in the area of the Empire Ranch, the Sierra Vista District, the Buenos Aires National Wildlife Refuge, and the Madera Canyon. Id. at ¶ 9. Mr. Ruprecht detailed his specific interest in the Twin C Allotment and Gila River as follows:

10. I traveled to the Gila River in December of 2009 for the purposes of camping, hiking, and exploring public lands, and to bird-watch, photograph wildlife, and better understand and appreciate southwestern desert and riparian ecosystems. I spent approximately eight days on the BLM lands of the Safford Field Office, the majority of which I spent in or adjacent to the Gila Box Riparian National Conservation Area.

11. During this time, I backpacked along a stretch of the Gila River from Owl Creek Campground to Riverview Campground. I was impressed by the obvious import of the river’s riparian area in the context of the surrounding landscape. During my trip, I enjoyed seeing coatis, javelina, deer, bighorn sheep, coyotes, and tracks from mountain lions, and I identified over 50 species of resident and migratory birds. I am aware that remote, protected corridors such as the Gila Box RNCA serve as crucial stopovers for migratory birds and provide important habitat for countless local species of fish and wildlife as well.

12. I also spent several days in the upland areas west of Bonita Creek, between Bonita Creek and the Gila River, and east of the Gila River off of the Black Hills Byway, where I was able to survey parts of the Twin C Allotment. These uplands are already pockmarked with livestock improvements. I examined and photographed dozens of wells, water tanks, earthen dams, stock ponds, mineral supplement troughs, feeding areas, and other developments. Many of these sacrifice areas
were bladed, littered with decommissioned plastic piping and other trash, and completely denuded of any vegetation. Besides being aesthetically displeasing, these disturbed areas provided fertile ground for invasive weeds.

13. Water tanks and troughs associated with wells and pipelines also present hazards for native animals, especially birds and small mammals that can easily become trapped in them and drown. I have frequently encountered dead birds and rodents in water troughs in other areas. Most of the troughs I saw in the vicinity of the Twin C Allotment had no escape ladders. Artificial stock ponds unnaturally concentrate javelina, deer, pronghorn, and bighorn sheep and make them overly vulnerable to hunters and predators. In fact, I passed several hunting parties that were glassing stock ponds from the Black Hills Byway. Thus, in addition to its visual impacts, I am reasonably concerned that the proposed Twin C/Goat Camp well will endanger native wildlife and plants by manipulating water resources in a naturally dry environment.

14. Upon my return to Idaho, I provided Greta Anderson, WWP’s Arizona Director, with photographs, geospatial locations, and detailed notes of my trip to the Gila River region. I consider this information a donation to WWP and was not paid for my observations. In my correspondence with her, I indicated my intention to return to the Gila River and my desire to take a canoe trip on the river in the future.

15. I intend to return to the Gila River and the area of the Twin C Allotment within the next year, perhaps as early as December 2011 but no later than September 2012. I am looking forward to becoming more familiar with this specific region and the recreational opportunities it provides.

16. The BLM’s decision to approve the Twin C/Goat Camp well harms my interests through its potential to adversely affect riparian habitat and sensitive species, including rare desert fishes, as well as result in fragmentation of important upland areas, the integrity of which are
important to me. In addition, the well would detract from the visual resources of this stunning area and could divert water from plants and wildlife to livestock.

17. It is also important to me that BLM evaluates and fully discloses the impacts of its actions to convert more relatively undisturbed areas into grazing developments before it undertakes them, and provides interested parties the opportunity to comment on its proposals before they are approved.

Decl. of Ruprecht at ¶ 10-17.

In all likelihood, Mr. Ruprecht’s backpacking trip along the Gila River between the Owl Creek and Riverview campgrounds caused him to travel along the Twin C Allotment’s northwestern boundary which closely follows the course of the river. See Administrative Record (AR) at Tab 3 (allotment map). While use of the land can confer standing, BLM has correctly noted that Mr. Ruprecht’s use did not occur within proximity of the well site which lies nearly three miles from the river.

Although use of the land may be “the most direct way to show a connection between a legally cognizable interest and injury to that interest,” standing can also be established by demonstrating interests in resources and “how the decision has caused or is substantially likely to cause injury to those interests.” Coalition of Nat’l Park Retirees, 165 IBLA at 83-84. In this regard, Mr. Ruprecht’s declaration sets forth facts sufficient to establish his interest in both visual resources and river resources affected by the Decision.

As acknowledged in BLM’s Reply:

Mr. Ruprecht’s declaration establishes that he has an interest in the Gila River, its recreational opportunities, riparian habitat, and associated wildlife and plants. The declaration accurately tracks Appellant’s statement of standing contained in the notice of appeal and the statement of reasons that express concerns regarding the potential adverse effects on the Gila River.
BLM Reply at 2. BLM argues, however, that river resources will not be affected by the Decision because no hydrological connection exists between the relevant groundwater and the Gila River. *Id.* In support of this contention, BLM supplied the declaration of Paul L. Summers, a ground water specialist and Senior Hydrologist with BLM. Decl. of Summers at ¶¶ 1-2 & at p. 4.

As explained in his declaration, Mr. Summers conducted an evaluation of the potential impacts to the Gila River from pumping at the new well site “as a supporting document for BLM in the appeal by Western Watersheds Project.” *Id.* at ¶ 4. In order to render an opinion, Mr. Summers consulted two geologic maps prepared by the U.S. Geological Survey that cover the drill sites. The maps provided information about rock type and structural geology in the area. *Id.* at ¶ 5. Using those maps he was able to “make interpretations on ground water flow directions and the likelihood of a well producing water if drilled into various geologic formations.” *Id.* He concluded:

10. In summary, the proposed well being drilled for the Twin C range allotment located about 3 miles east of the Gila River will not have an impact on flow in the Gila River for several reasons:

a. The planned pumping rate of the well (20 gallons per minute) won’t create a cone of depression that will extend out 3 miles to intercept flow in the river.

b. Due to geologic conditions, it is likely that the well will be completed above the level of the river in the volcanic rocks, in which case there would not be a hydraulic connection to the river.

c. The intermittent pumping schedule will allow the aquifer to recover, limiting the growth of the cone of depression in the aquifer, which means the cone of depression will not extend out to the river.

d. Short pumping durations and low pumping rates do not produce a far reaching cone of depression.
e. Even if the well is completed at or near the level of the river, the pumping rate is not sufficient to impact the river, because the cone of depression will not extend to the river.

Decl. of Summers at ¶ 10.

As noted by WWP, Mr. Summers analysis occurred after WWP filed its appeal and directly contradicts statements contained in the EA upon which the Decision relies. In various portions of the EA, BLM admits that it did not know whether the proposed well would adversely affect flow in the Gila River:

... Interactions between surface and ground water within the Twin C Allotment are unknown at this time. The relationship and interactions between ground water and surface water can be important if the Gila River is connected to the ground-water system. If the ground water and surface water are connected to each other then pumping ground water via the proposed well can adversely affect flow in the Gila River.

... Wetlands/Riparian Zones may be negatively affected if groundwater pumping affects baseline flow within the Gila River. It is unknown at this time how much water the well will produce and how much will be removed.

EA at 5; see also EA at 7 ("The relationship, if any, between groundwater and surface flows is unknown."). In addition, the EA noted that:

Within the project vicinity Sonora sucker, desert sucker, and longfin dace may be affected by the proposed action. Ground water beneath BLM lands is a valuable resource that requires prudent management and at this time we do not know if surface and ground water are connected nor do we know if ground water discharge is sustaining base flows in the Gila River within the Twin C Allotment. Over-pumping of ground-water may diminish surface flows and dry up important aquatic and riparian habitats. In Arizona, most of the rivers have been negatively impacted by a forty year history of over-pumping ground water. On the San Pedro River, ground water
pumping reduces the river's flow by two thirds and only two of the 13 native fish remain.

EA at 7.

In essence, BLM has contradicted itself. It asks that the declaration of Mr. Summers be adopted and the analysis in the EA be discounted or ignored with absolutely no explanation as to why Mr. Summer's conclusions were not considered as part of the EA or why the analysis in the EA is faulty. At best, BLM's documentation reveals considerable uncertainty about the harms to the Gila River that may ensue from pumping at the new well site. These internal inconsistencies cannot be resolved without a more complete development of the record. Citing to BLM's own conflicting evidence, WWP has met its burden of showing that the Decision has a substantial likelihood of causing injury to the interests of its member in the Gila River and its associated resources.

When ruling on a motion to dismiss based upon standing, WWP's material allegations must be accepted as true and the Appeal must be construed in favor of the appellant. *Natural Resources Defense Council v. Office of Surface Mining Reclamation and Enforcement*, 89 IBLA 1, 8 n.3, 92 I.D. 389, 424 n.3 (1985), dismissed as moot, Civ. No. 86-F-2535 (D. Colo. June 30, 1988). Applying this standard to the record as it presently exists, WWP has demonstrated that it meets the minimum prerequisites for standing. Consequently, BLM's motion to dismiss the Appeal for lack of standing is denied.

V. Petition for Stay Granted

To prevail on a stay petition, an appellant must show sufficient justification based on the following factors:

1. The relative harm to the parties if the stay is granted or denied;
2. The likelihood of the appellant'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 granting of the stay.

43 C.F.R. § 4.471(c). The party seeking a 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);
Oregon Natural Resources Council, 148 IBLA 186, 188 (1999). Based upon a preliminary review of the record and pleadings, and as more fully discussed below, WWP has satisfied each of these requirements.

A. Likelihood of Success

To achieve success on the merits, an appellant must demonstrate, by a preponderance of the evidence, that the Final Decision is unreasonable or does not substantially comply with the provisions of the Federal grazing regulations found at 43 C.F.R. part 4100. See 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). As explained by the Interior Board of Land Appeals (IBLA or Board):

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 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).


Public participation is an important component of both FLPMA and NEPA. Under FLPMA, public participation has been mandated in many aspects of land management. See 43 U.S.C. §§ 1712(f), 1739(e), 1740. As noted in the preamble to the 1995 grazing regulation amendments,

Allowing more Americans to have a say in the management of their public lands is an important element of improving management of the public rangelands. The American rangelands can be – and are – used
for far more than grazing. Hiking, birding, camping, fishing, hunting, mountain biking and mineral development activities are among the activities that are compatible with sound grazing practices. Section 102(a)(8) of FLPMA makes clear that the Secretary is to manage the public lands in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air, atmospheric, water resource, and archeological values.

The Department believes that the public interest will be best served if a wide range of interests are represented when decisions are being made. Thus, increased public participation is essential to achieving lasting improvements in the management of our public lands.

60 Fed. Reg. 9894, 9895 (Feb. 22, 1995). In that regard, the grazing regulations establish public participation and consultation requirements for members of the interested public. 43 C.F.R. § 4100.0-5 (defining interested public). However, despite repeated requests for information, and even after providing written comments specific to the Twin C Allotment, BLM still failed to include WWP in the decision-making process for this allotment. Specifically, BLM violated its own regulations when it failed to mail WWP a copy of the Decision before it became subject to implementation. See 43 C.F.R. § 4160.1(a).

As a procedural statute, NEPA is designed to “insure a fully informed and well-considered decision.” Center for Native Ecosystems, 170 IBLA 331, 344 (2006) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978)). Informed decision-making is fostered by public participation in the NEPA process. As such, NEPA and the implementing regulations “generally require BLM to encourage and facilitate public involvement in the NEPA process.” Lynn Canal Conservation, Inc., 169 IBLA 1, 4 (2006). Indeed, “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b); see also 40 C.F.R. §§ 1500.2(d), 1501.4(b), 1506.6; 43 C.F.R. § 46.305.

The adequacy of the public process is generally examined on a case-by-case basis. Lynn Canal, 169 IBLA at 5. In its Appeal, WWP has raised serious doubts and
questions about whether BLM provided any genuine opportunity for public involvement in the NEPA process. According to the Appeal, WWP did not receive notice of scoping, which apparently occurred between January 12, 2009, and February 27, 2009, and was not consulted regarding the EA. See Appeal at 3; Exhibit E to WWP Appeal; see also EA at 12 (listing consultations with permittee, field office employees, and the Natural Resources Conservation Service).

Public participation requirements are not mere formalities. By not offering WWP an opportunity to provide input during the NEPA process, BLM deprived WWP of the chance to offer other alternatives or point out potential shortcomings in BLM’s analysis. By not sending WWP a copy of the Decision when it was proposed, BLM prevented WWP from commenting on the project before drilling began.

Significantly, after receiving WWP’s Appeal, which questioned whether the EA had taken a sufficiently “hard look” at the impacts of this new well on the Gila River, Appeal at 4-5, BLM’s hydrologist prepared an impacts evaluation. See Decl. of Summers. In deciding whether an agency has taken a “hard look” at the environmental consequences of its actions, judges are guided by the “rule of reason.” Hualapai and Fort Mojave Indian Tribes, 180 IBLA 158, 168 (2010). As noted above, Mr. Summer’s evaluation contradicts the analysis contained in the EA, and BLM provided no explanation as to why it failed to perform this evaluation earlier. These inconsistencies and omissions cast serious doubt on the question of whether BLM took the requisite “hard look” at ground and surface water resources when preparing the EA.

Had WWP been afforded adequate public participation earlier in the decision-making and NEPA processes, there is a greater likelihood that a thorough hydrological evaluation would have occurred prior to project approval. That analysis could then have been studied, considered, and critiqued by all interested parties before BLM issued its Decision and before drilling began. By excluding WWP from that process, BLM may not have made a fully informed decision, nor adequately identified and examined the environmental issues in accordance with the statute’s “hard look” requirement.
These issues pose serious questions, presenting fair grounds for litigation and more deliberative investigation. As such, WWP has demonstrated a sufficient likelihood of success on the merits.

B. Relative Harm and Likelihood of Immediate and Irreparable Harm

In the NEPA context, courts recognize the potential harm that flows from a violation of the statute:

... [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].


In addition to the procedural harms associated with BLM’s failure to comply with the public participation requirements of FLPMA and NEPA, there are still unresolved doubts about the impacts of this project on the Gila River and its associated resources. Although BLM argues that the river is already being affected by the existing well and pump, it is far from certain that this new well will replace the existing pump. Instead, the EA states that: “The purpose of the project is to provide a new source of water. This new source of water will either eliminate or augment the current water source, which is the Gila River.” EA at 3. If this new well merely “augments” current pumping, there could be a net increase in the volume of water removed. These environmental impacts, and the potential harm associated therewith, weigh in favor of granting a stay.
BLM argues, in response, that the permittee could suffer economic harm if the Decision is stayed. According to the declaration provided by Amy Humphrey, the permittee received a $100,000 grant from the Arizona Department of Agriculture under the Livestock and Crop Conservation Grant Program to drill the well. Decl. of Humphrey at ¶ 6.

To date they have received $25,000 to begin drilling of the well. The well is currently 140 feet and progress is being made daily. Cueto Drilling, who has the contract to drill Goat Camp Well, employs three men. They are at the well site on a daily basis.

Id. Although BLM argues that the grant may need to be repaid and that the employment of those drilling the well could be jeopardized, it did not submit any evidence to substantiate those concerns or to show that those harms could result as a consequence of granting a stay pending a final determination. Without greater certainty about these potential economic impacts, the balance of harms weighs in favor of granting the stay.4

Moreover, because drilling is presently ongoing, the impacts associated with the project, including the harms associated with the failure to allow public participation before proceeding, are already occurring. Unless this Decision is stayed pending resolution of this Appeal, immediate and irreparable harm will continue in the form of increased financial costs, ongoing disturbance to the area surrounding the well, and even damage to water resources should the well begin pumping. Consequently, both the balance of harms and the likelihood of immediate and irreparable harm warrant granting of a stay.

4 This conclusion is reached with full awareness that the permittee is not a party to the Appeal. Like WWP, the permittee was not named in the Decision at issue, see AR at Tab 6, and it remains unclear, what, if any, notice the permittee has received related to this litigation. Nevertheless, this Office is bound by strict time constraints when ruling on petitions for stay, see 43 C.F.R. § 4.472, and cannot engage in speculation about what arguments the permittee may or may not assert.
C. Public Interest

The public interest also favors granting a stay. Before making an irretrievable commitment of resources, the adequacy of BLM's decision-making process should be fairly litigated and deliberately investigated to ensure compliance with the applicable statutes and regulations.

D. Conclusion

For the foregoing reasons, the petition for a stay of the Decision 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 22 for distribution.
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