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April 28, 2014

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From: Harvey C. Sweitzer
Administrative Law Judge

Subject: *Hammond Ranches, Inc. v. BLM*; OR-020-14-01

10 page(s) to follow excluding this cover.

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April 28, 2014

ORDER

HAMMOND RANCHES, INC.,)	OR-020-14-01
)	
Appellant)	Appeal from Field Manager's Final
v.)	Decision dated February 14, 2014,
)	involving the Mud Creek,
BUREAU OF LAND MANAGEMENT,)	Hammond, Hardie Summer, and
)	Hammond FFR Allotments, Burns
Respondent)	District, Oregon
<hr/> OREGON CATTLEMEN'S ASSOC. and)	
OREGON FARM BUREAU FED'N,)	
)	
Amicus Curiae)	

Stay Petition Denied

I. Summary

Hammond Ranches, Inc. ("HRI"), has appealed and petitioned for a stay of a February 14, 2014 final decision issued by the District Manager, Burns Grazing District, Bureau of Land Management ("BLM"). The Oregon Cattlemen's Association and Oregon Farm Bureau Federation (collectively referred to as "OCA") have filed an amicus curiae brief in support of a stay. BLM's decision denies HRI's application for renewal of its grazing permit for the Mud Creek, Hardie Summer, Hammond, and Hammond FFR Allotments ("Allotments"), declares that HRI's grazing preference will no longer be effective,¹ and finds that HRI will no longer

¹ An examination of the entire text of the decision shows that the verbiage that HRI's "grazing preference . . . will no longer be effective" equates to, and has no meaning separate from, the language that HRI "will no longer hold a . . . priority position against others for the purpose of receiving a grazing permit for these allotments." Consequently, that verbiage is not addressed further.

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hold first priority position against others for the purpose of receiving a grazing permit for the Allotments. The Decision is based on the finding that HRI does not have a satisfactory record of performance. For the reasons set forth below, the stay petition is denied.

II. Background

HRI holds the grazing preference for the Allotments. HRI's grazing permit, which was approved on February 13, 2004 and expired on February 28, 2014, authorized the following grazing use:

Allotment	Livestock # & Kind	Grazing Period	% Public Land	Active Animal Unit Months ("AUMs")
Mud Creek	390 cattle	05/16 – 06/30	100	590
Hammond	68 cattle	04/01 – 10/30	99	471
Hardie Summer	408 cattle	07/01 – 09/30	33	407
Hammond FFR	32 cattle	04/01 – 04/30	100	32

In the last 45 years during which HRI has grazed the public lands, BLM has not issued a single decision to HRI or any of its affiliates of non-compliance with the terms of its permit or the grazing regulations. In the most recent BLM assessments of conformance with the rangeland health standards, BLM generally found that HRI's grazing management practices and levels of use conformed to the standards.

HRI is a corporation and family ranch operated by Dwight and Susan Hammond and their adult son, Steven Hammond, and his wife. HRI provides the sole source of income and support for the family.

Dwight is the president and Steven is the vice-president. They both live on the ranch. The expired permit was issued in the name of HRI "c/o Dwight Hammond" and signed by Steven Hammond. He also signed the 2003 application for the expired permit and actual use reports during the permit term.

In a Superseding Indictment dated May 16, 2012 and filed in Federal court, Dwight and Steven (the "Hammonds") were criminally charged in numerous counts with starting several fires that damaged public lands in violation of 18 U.S.C. § 844(f)(1) or § 844(h)(1). The former imposes criminal penalties on a person who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property" owned

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by the United States. A violation of 18 U.S.C. § 844(h)(1) requires at least \$1,000 in damage.

The arson counts and jury verdicts of June 12, 2012, are summarized below:

Count	Fire		Code Involved	Defendant	Verdict
	Year	Area			
2	2001	Hardie-Hammond	18 USC 844(f)(1)	Dwight Steven	Guilty Guilty
3	2006	Lower Bridge Creek	18 USC 844(f)(1)	Dwight Steven	Not Guilty Not Guilty
4	2006	Lower Bridge Creek	18 USC 844(h)(1)	Dwight Steven	Not Guilty Not Guilty
5	2006	Krumbo Butte	18 USC 844(f)(1)	Steven	Guilty
6	2006	Krumbo Butte	18 USC 844(h)(1)	Steven	Not Guilty
7	2006	Bridge Creek Road (Granddad Fire)	18 USC 844(f)(1)	Dwight Steven	Not Guilty No verdict*
8	2006	Bridge Creek Road (Granddad Fire)	18 USC 844(h)(1)	Dwight Steven	Not Guilty No verdict*

* These counts against Steven as well as Counts 1 and 9 against both defendants were dismissed on motion of United States.

In the final decision BLM relied on the Hammonds' convictions as well as trial evidence of other fires in concluding that HRI did not have a satisfactory record of performance. That evidence includes multiple instances of the Hammonds setting fires to eliminate juniper for the purpose of increasing forage for their cattle. Those fires damaged vegetation on public land or, in one instance, vegetation on private property of a neighboring ranch. The evidence, in summary, is:

- that during the 2001 Hardie-Hammond Fire, Hammonds burned public land, endangered the lives of Dwight's own 13-year-old grandson (who was sworn to secrecy as to the Hammonds' fire-starting activities) and hunters who the Hammonds knew were in the area, and violated 43 C.F.R. § 4140.1;²

² BLM did not discover the Hammonds culpability relating to the 2001 Hardie-Hammonds Fire until many years later when Dwight's grandson divulged their acts of fire starting.

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- that on or between August 23, 2005 and August 30, 2005, Steven started a fire which burned private property owned by William Otley of Diamond Ranches, Inc.;
- that on August 4, 2006, Steven phoned BLM employee Karla Bird to inform her that BLM's scheduled prescribed burn of public land leased to HRI was not soon enough to suit him;
- that on August 17, 2006, Steven told BLM Range Management Specialist Joe Glascock that the Hammonds had been setting fires in the area for years and that he shouldn't be surprised if more fires appeared after the next lightning storm in the area;
- that on August 22, 2006, during 2006 Krumbo Butte Fire, Steven lit fires which burned public land, endangered the lives of fire fighters, and violated 43 C.F.R. § 4140.1;
- that on August 22, 2006, the Hammonds lit fires in the Lower Bridge Creek area which burned public land, endangered the lives of fire fighters, and violated 43 C.F.R. § 4140.1;
- that on August 23, 2006, during the Granddad Fire, the Hammonds lit fires near the Bridge Creek Road which burned public land, endangered the lives of firefighters who they knew were in the area, and violated 43 C.F.R. § 4140.1; and
- that on August 24, 2006, Steven threatened to blame Mr. Glascock for lighting suspicious fires if he was not willing to work with the Hammonds to make the fire investigations against them go away.

In a letter dated April 5, 2013, BLM discussed these convictions and informed HRI:

In light of the criminal convictions under 18 U.S.C. § 844(f)(1) and Hammond actions described in the evidence presented in the criminal proceedings, the BLM may determine the grazing permit cannot be renewed due to an unsatisfactory record of performance. Accordingly, BLM advises that Hammond Ranches, Inc. should be considering alternative arrangements for its livestock if the permit is not renewed.

In another letter dated September 18, 2013, BLM again discussed the convictions and advised HRI in a similar manner.

III. Discussion

To prevail on a stay petition, the petitioner must show, in accordance with 43

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C.F.R. § 4.471(c), sufficient justification based on four criteria:

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

The petitioner bears the burden of demonstrating that a stay is warranted under each of the regulatory criteria. *See* 43 C.F.R. § 4.471(d); *W. Wesley Wallace*, 156 IBLA 277, 278 (2002); *Oregon Natural Resources Council*, 148 IBLA 186, 188 (1999). Based upon a preliminary review of the record and pleadings, and as more fully explained below, the petition for a stay must be denied because HRI has not established a sufficient likelihood of success on the merits.

To achieve success on the merits,

an appellant bears the burden to establish that the decision fails to substantially comply with the Department's grazing regulations or that, by a preponderance of the evidence, the decision is unreasonable and thus lacks a rational basis. *See* 43 C.F.R. § 4.480(b); *Foianini v. BLM*, 171 IBLA [244,] 250-51 [(2007)]; *Mercer v. BLM*, 159 IBLA 17, 29 (2003); *Yardley v. BLM*, 123 IBLA 80, 90 (1992).

Hanley Ranch Partnership et al v. BLM, 183 IBLA 184, 198 (2013).

In considering a stay petition, the following principle, gleaned from the federal courts' treatment of motions for a preliminary injunction, is applicable:

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.

³ HRI and OCA offer arguments as to why BLM's decision should not be effective before HRI is able to challenge it at hearing that, if accepted, would nullify § 4.471(c) and its criteria for determining whether a decision should be allowed to go into effect or not. Therefore, those arguments are rejected summarily.

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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)).

The regulation governing renewal of grazing permits states in pertinent part:

(b) Applicants for the renewal or issuance of new permits and leases and any affiliates must be determined by the authorized officer to have a satisfactory record of performance.

(1) *Renewal of permit or lease.* (i) The applicant for renewal of a grazing permit or lease, and any affiliate, shall be deemed to have a satisfactory record of performance if the authorized officer determines the applicant and affiliates to be in substantial compliance with the terms and conditions of the existing Federal grazing permit or lease for which renewal is sought, and with the rules and regulations applicable to the permit or lease.

(ii) The authorized officer may take into consideration circumstances beyond the control of the applicant or affiliate in determining whether the applicant and affiliates are in substantial compliance with permit or lease terms and conditions and applicable rules and regulations.

....

(c) In determining whether affiliation exists, the authorized officer shall consider all appropriate factors, including but not limited to, common ownership, common management identity of interests among family members, and contractual relationships.

43 C.F.R. § 4110.1 (2005).⁴ Likewise, the right of a holder of an expiring grazing permit to first priority for a new permit is conditioned upon compliance with the

⁴ Citations herein to the Department's grazing regulations in 43 C.F.R. Part 4100 are to the regulations in effect as of Oct. 1, 2005, given the injunction of a subsequent extensive revision of the regulations imposed by the Federal District Court in *WWP v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd in relevant part, vacated in part, and remanded*, 632 F.3d 472 (9th Cir. 2011). See 60 Fed. Reg. 9894, 9927 (Feb. 22, 1995).

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rules and regulations. 43 C.F.R. § 4130.2(e)(2).

BLM found that HRI was not in substantial compliance with the regulations based upon the conduct of its affiliates, the Hammonds.

Affiliate means an entity or person that controls, is controlled by, or is under common control with, an applicant, permittee or lessee. The term "control" means having any relationship which gives an entity or person authority directly or indirectly to determine the manner in which an applicant, permittee or lessee conducts grazing operations.

43 C.F.R. § 4100.0-5. In determining whether affiliation exists, the authorized officer shall consider all appropriate factors, including, but not limited to, common ownership, common management, identity of interests among family members, and contractual relationships. 43 C.F.R. § 4110.1(c).

The Hammonds are clearly affiliates of HRI and HRI has not disputed this. Thus, the Hammonds conduct is relevant in determining whether HRI has substantially complied with the regulations and has a satisfactory record of performance.

The Hammonds' conduct includes acts for which they were found guilty of violating the prohibition at 18 U.S.C. § 844(f)(1) against damaging United States' property by fire. Those guilty verdicts are conclusive as to the facts necessary to establish a violation of the prohibition at 43 C.F.R. § 4140.1(b)(3) against "burning, . . . destroying, or removing vegetation without authorization."⁵ There is also substantial evidence of other instances of the Hammonds setting fires which resulted in violations of 43 C.F.R. § 4140.1(b)(3).

HRI argues that the 2001 Hardie-Hammonds Fire is not relevant because it

⁵ HRI's arguments that these convictions do not establish non-compliance with the grazing regulations are disingenuous, as the facts necessary to establish a criminal violation of 18 U.S.C. § 844(f)(1) also clearly constitute a violation of 43 C.F.R. § 4140.1(b)(3). Also disingenuous is HRI's contention that BLM relied upon only one instance of misconduct in the final decision - Steven's conviction relating to the 2006 Krumbo Butte Fire - in determining that HRI's record of performance was not satisfactory. BLM clearly relied on numerous instances of fires started by the Hammonds which damaged vegetation on public land as well as comments made by the Hammonds showing their intentions.

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occurred before the term of the permit which BLM has declined to renew. It points to the language of § 4110.1(b)(1)(i) that an applicant's record of performance is satisfactory if the authorized officer determines that the applicant is in "substantial compliance with the rules and regulations *applicable to the permit or lease.*" (Emphasis added.)

HRI's argument is rejected because the regulation need not be interpreted as applying only to conduct which occurred during the current term of the permit, and because this interpretation is not supported by precedent or logical application of the law. In *Edmund and Jessie Walton*, A-31066 (May 27, 1969), a penalty was imposed against a grazer for repeated trespasses spanning nearly 20 years, a span longer than a 10-year grazing permit. In the present case, it is contrary to the spirit and intent of the law to say that BLM may not consider a grazing regulation violation that a permittee committed under its permit because the violation occurred under a previous term of the permit, especially when BLM did not discover the permittee's culpability until during the current term of the permit.

As for the evidence of the Hammonds starting other fires damaging vegetation on public lands, HRI offers little or no evidence in refutation. It does argue that the Hammonds were not convicted for these fires, but the standard of proof in a criminal case is much higher than the simple preponderance of the evidence standard applicable to the case on the merits in this proceeding.

HRI also argues that the generally favorable rangeland health standard determinations show that the rangeland was not damaged. The conclusion does not follow from the premise because such a determination does not mean that vegetation was not burned and thus not damaged or destroyed; it clearly was.

HRI correctly points out that any incidents of noncompliance should be weighed against its record of otherwise good stewardship of the public lands to determine whether it has substantially complied with the grazing regulations and thus achieved a satisfactory record of performance.

"[S]ubstantial compliance" is to be determined by considering both "the number of prior incidents of noncompliance," and "the nature and seriousness of any noncompliances," recognizing that the ultimate aim of a BLM decision regarding renewal is to use the record of performance "to confirm the ability" of a permittee "to be a [good] steward of the public land," and thus "to ensure that permittees . . . are good stewards of the land," thereby "protect[ing] [the land] from

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destruction or unnecessary injury and provid[ing] for orderly use, improvement, and development of resources." 60 Fed. Reg. 9925; see 59 Fed. Reg. 14314, 14330 (Mar. 25, 1994). Further, any act of "noncompliance with the requirements of 43 CFR Part 4100," whether unauthorized grazing use or some other noncompliance, is relevant to a performance review under 43 C.F.R. § 4110.1(b). 60 Fed. Reg. at 9925.

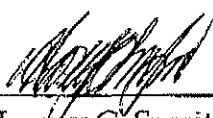
Hanley Ranch Partnership, 183 IBLA at 199.

The Hammonds pattern of starting fires that damage vegetation on public lands and endangers lives is sufficiently serious to warrant permit non-renewal. There is a substantial risk of further vegetative destruction which comprises BLM's ability to orderly manage and improve resources, including utilizing prescribed burns. It is also sufficiently serious to eliminate HRI's right to first priority for a new permit pursuant to 43 C.F.R. § 4130.2(e)(2).

In other words, HRI has failed to show a sufficient likelihood of success on the merits and therefore its stay petition must be denied.

IV. Conclusion

Without belaboring this Order with additional references to contentions of fact and law, I hereby advise that all contentions submitted by the parties have been considered and, except to the extent they have been expressly or impliedly adopted herein, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial. Based upon the foregoing, **HRI's petition for a stay is denied.**



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.

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