



**United States Department of the Interior**

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January 13, 2022

**ORDER**

WILDLANDS DEFENSE,	)	ID-BD-2000-2022-003
	)	
Appellant	)	Appeal of Field Manager's Grazing
	)	Permit Renewal Final Decision,
v.	)	dated October 21, 2021, for
	)	Dickshooter Cattle Co., DBA
BUREAU OF LAND MANAGEMENT,	)	Simplot Livestock Co., involving
	)	the Big Springs Creek Allotment,
Respondent	)	Bruneau Field Office, Boise, Idaho
_____	)	
	)	
DICKSHOOTER CATTLE CO., dba	)	
SIMPLOT LIVESTOCK CO.,	)	
	)	
Intervenor	)	

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WESTERN WATERSHEDS PROJECT	)	ID-BD-2000-2022-004
and WILDERNESS WATCH,	)	
	)	Appeal of Field Manager’s Grazing
Appellant	)	Permit Renewal Final Decision,
	)	dated October 21, 2021, for
v.	)	Dickshooter Cattle Co. DBA
	)	Simplot Livestock Co., involving
BUREAU OF LAND MANAGEMENT,	)	the Big Springs Creek Allotment,
	)	Bruneau Field Office, Boise, Idaho
Respondent	)	
_____	)	
	)	
DICKSHOOTER CATTLE CO., dba	)	
SIMPLOT LIVESTOCK CO.,	)	
	)	
Intervenor	)	

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**Motion to Intervene Granted;**  
**Petitions for Stay Granted**

**I. Motion to Intervene Granted**

J. R. Simplot Company dba Dickshooter Cattle Co. (DCC) has filed a motion to intervene in ID-BD-2000-2022-004. DCC is a grazier with grazing privileges that are governed by the appealed grazing decision. Because DCC could have independently appealed the decision and because it may be adversely affected by the decision on appeal, DCC’s request to intervene in ID-BD-2000-2022-004 is granted. *Las Vegas Valley Action Comm.*, 156 IBLA 110, 112 (2001); *Nev. Div. of Wildlife v. BLM & Tuleadad Grazing Assoc.*, 138 IBLA 382, 390-391 (1997).<sup>1</sup>

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<sup>1</sup> In the Order dated January 10, 2022, DCC was treated as an intervenor in ID-BD-2000-2022-004 prior to the issuance of an order formally granting DCC intervenor status. That Order is hereby clarified to advise that DCC has been considered an intervenor in ID-BD-2000-2022-004 by this tribunal since the January 10, 2022, Order was disseminated. DCC is advised that its opposition to the petition for stay in ID-BD-2000-2022-004 was fully considered for purposes of this ruling.

## II. Summary

Wildlands Defense, Western Watersheds Project, and Wilderness Watch (hereinafter collectively “WWW”) have appealed from and petitioned for a stay of an October 21, 2021, final decision (FD) issued by the Bruneau Field Office, Bureau of Land Management (BLM). The FD revises and renews for ten years the livestock grazing permit for DCC in the Big Springs Creek Allotment’s DCC Use Area (DCCUA). For the reasons set forth below, WWW’s petitions for stay are granted.

## III. General Background

The DCCUA is located in Owyhee County approximately 60 miles southwest of Mountain Home, Idaho. The DCCUA includes 60,174 acres of public land, 4,543 acres of state land, and 4,419 acres of private land totaling 69,136 acres. The entire DCCUA is Sage Grouse Priority Habitat Management Area (PHMA). *See* May 2021 Environmental Assessment DOI-BLM-ID-B020-2021-009-EA (EA). EA at Appendix A Figure 7.

Grazing management in the DCCUA is currently authorized by the grazing permit that would be superseded by the FD (hereinafter prior permit) if the petitions for stay were not granted. The prior permit specifies type of livestock, animal unit months (AUMs), and seasons of use. Under the prior permit, DCC may utilize 10,621 AUMs between April 4 and September 15 each year subject to various terms and conditions as well as BLM’s discretion to modify the permit to meet the applicable laws and regulations. Average actual use in the DCCUA between 1995 and 2018 was 3,779 AUMs.

The FD adopts the DCC’s proposed grazing alternative from the EA with substantial modifications including an adaptive management plan intended to address rangeland health issues in the DCCUA. The FD authorizes the annual utilization of 10,800 AUMs in the DCCUA. The FD’s 179 AUM increase over the prior permit results from a land transfer deal between BLM and DCC as well as the creation of the Sage Hen allotment which is located within the bounds of the DCCUA. FD at 10. The FD also authorizes the immediate construction of four range improvement projects (RIPs) as well as the potential construction of another three RIPs if rangeland health monitoring indicates a need for their construction. FD at 17.

Using data from 2004 through 2012 as well as monitoring data collected through 2019, BLM determined that the DCCUA was failing to meet Idaho Rangeland Health Standards (IRHS) 7 – water quality and 8 – special status species.

BLM also determined that grazing management practices are a significant factor in the DCCUA's failure to meet standard 8 for special status plants. FD at 2, 5.

In order to address BLM's finding regarding the DCCUA's failure to meet Standard 8 of the IRHS and DCC's application to renew grazing privileges in the DCCUA, BLM prepared the EA. In the EA, BLM analyzed four alternatives in detail: Alternative A – current grazing management; Alternative B – no grazing; Alternative C – blended alternative; and Alternative D – DCC's proposal.

Under Alternative C, the blended alternative, BLM would authorize the annual utilization of 3,903 AUMs and incorporate a comprehensive adaptive management plan delineated in Appendix C of the EA. EA at 9-10. Under Alternative D, DCC's proposal, BLM would authorize the annual use of 10,800 AUMs and incorporate the comprehensive adaptive management plan delineated in Appendix C of the EA. EA at 9, 13.

In the FD, BLM selected Alternative D, without carrying forward Appendix C's full adaptive management plan from the EA. FD at 10. Instead BLM chose to utilize a substitute adaptive management plan discussed further below.

#### **IV. Discussion**

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

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

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

As more fully discussed below, a preliminary review of the record indicates that WWW have met each of the regulatory criteria. Accordingly, WWW are entitled to the entry of an order granting their stay petitions.

#### A. Likelihood of Success on the Merits

WWW have noted several eyebrow-raising features of the EA and FD including: (1) BLM's apparent willingness to sacrifice at least one occurrence of BLM sensitive species Bach's calicoflower that may have migrated to a reservoir constructed in the 1950s. EA at 31, 55; (2) That the FD may be inconsistent with the 1983 Bruneau Management Framework Plan's (MFP) directive to "provide [for] or enhance rare and endangered plants where they exist throughout the planning unit." MFP at unnumbered page 62; (3) That BLM's plan to develop a post-FD monitoring plan with the DCC evades site specific NEPA analysis. FD at 14; and (4) That BLM utilizes riparian conditions to assess cultural resource impacts but did not to respond to Wildlands Defense's protest point asking BLM to explain the rationale behind this choice. FD at 49.<sup>2</sup>

However, the most concerning aspect of the FD is that it abandons some of the most crucial components of the comprehensive, carefully-thought-out adaptive management plan delineated at Appendix C of the EA. FD at 10. Instead, the FD adopts an adaptive management plan through which grazing use will be reduced by at least one week—using one-week increments—if minimum stubble height and browse thresholds are not met at the end of each growing season. While BLM offers little explanation as to why reductions in grazing use as short as one-week are expected to bring the DCCUA into conformance with IRHS, that is not the most problematic aspect of BLM's new adaptive management regime. What is more problematic is that under the FD: "Following the year that thresholds are met, the full use period will be reinstated." FD at 14. This regime differs greatly from the adaptive management plan evaluated for all of the action alternatives in the EA. EA at 9. Under the adaptive management plan analyzed in the EA, BLM has discretion to keep grazing mitigation measures in place if it determines that they are necessary to maintain applicable stubble heights and browse thresholds. See EA at Appendix C at C-6 "Decision Tree."

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<sup>2</sup> To some extent, BLM explained the riparian area and cultural resource nexus in the EA; however, because BLM did not address Wildlands Defense's protest point, Appellants and I cannot be certain that BLM's reasoning was given the scrutiny that such an unusual resource connection demands.

Under the scheme adopted in the FD, successive reductions in grazing use (potentially as short as one-week) may be necessary to meet stubble height requirements and browse thresholds. Nevertheless, once those requirements are met, grazing use returns to its full prior level. Moreover, the FD's adaptive management plan will be implemented based on a monitoring agreement and program BLM, the DCC, and, potentially, other appropriate entities develop at some point in the future. Neither I nor the interested public know exactly what that monitoring program consists of based on the EA or FD. This is a significant change from what was analyzed in the EA because the entirety of Appendix C and all of its design features applied to the action alternatives and were analyzed in the EA as management features common to all alternatives. EA at 9.

Because the EA and FD do not contain sufficient analysis or explanation describing why and how BLM expects the FD's modified adaptive management program to succeed, I and the interested public are left to wonder whether this adaptive management plan will result in continuous oscillation between grazing management that meets the minimum stubble height requirements and browse thresholds and grazing management that causes failure of the DCCUA to meet those standards.

While BLM may believe this regimen is somehow subsumed within the EA's analysis, I cannot find a cogent explanation in the EA or FD supporting the adoption of this modified adaptive management plan. This is particularly the case because in the EA, Alternative D was explicitly evaluated based on the assumption that it would be implemented utilizing the EA's Appendix C adaptive management plan. EA at 9.

A "rule of reason" approach applies to both the range of alternatives and the extent to which each alternative must be addressed. *In re Stratton Hog Timber Sale*, 160 IBLA 329, 337 (2004). In order to satisfy the rule of reason, an environmental assessment must meet "NEPA's twin goals of fostering informed decision-making and informed public participation." *Missouri Coalition For the Environment Heartwood*, 172 IBLA 226, 240 (2007). The circumstances here leave me and the interested public—including Appellants—left to speculate as to whether the FD is a fully informed decision that has been subject to NEPA scrutiny. Accordingly, WWW have demonstrated a sufficient likelihood of prevailing on their NEPA violation arguments to warrant entry of a stay.

## B. Likelihood of Immediate and Irreparable Harm

If a stay were granted, grazing would continue at the level of use authorized by the prior permit. *See* 43 C.F.R. § 4160.3(d) (2005).<sup>3</sup> The number of AUMs authorized by the prior permit and the FD are similar. Thus, granting a stay would have little effect in terms of authorized use. However, the difference between authorized use and actual use on the DCCUA is significant. The FD clearly demonstrates an intent to increase actual grazing use in the DCCUA by authorizing the construction of five RIPs and the possible construction of an additional 3 RIPs and implementation of the above-described adaptive management plan.

This course of action raises concern because, at average actual use levels of 3,779 AUMs, the DCCUA is failing to meet Standard 8 of the ISRH and BLM identified grazing use as a significant causal factor of that failure. Given the imprecise, untested, and unanalyzed nature of BLM's adaptive management plan in the FD, as well as its—yet to be developed—monitoring plan with similar procedural flaws, the possibility of increased actual grazing use in the DCCUA creates a risk of immediate harm to resources in the DCCUA from which it may never recover; this risk is particularly acute with regard to at least one occurrence of Bach's calicoflower which BLM speculates may not survive grazing under the FD. EA at 31. Heightened attention to such risks is additionally appropriate because the entire DCCUA is sage-grouse PHMA which in some locations suffers a direct negative impact by DCCUA's failure to meet ISRH Standard 8. *Id.* at 28-32.

Moreover, because this harm stems from a likely NEPA violation (i.e., failure to adequately analyze the FD's adaptive management plan as well as the yet to be developed monitoring plan) "the harm at stake [from failure to comply with NEPA] is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment." *Sierra Club v. Marsh*, 872 F.2d 497, 500-01 (1st Cir. 1989) (vacating a district court's denial of a motion for injunctive relief).

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<sup>3</sup> BLM's 2006 amendments to the grazing regulations, 71 Fed. Reg. 39402 (July 12, 2006), were enjoined in their entirety by court order. *See Western Watersheds Project v. Kraayenbrink, et al.*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd in relevant part*, 632 F.3d 472 (9th Cir. 2011), *cert. denied*, 565 U.S. 928 (2011). Thus, citations to the grazing regulations will be to the 2005 Code of Federal Regulations, unless otherwise indicated.

Finally, in *Amoco Production Company v. Village of Gambell*, 480 U.S. 531, 545 (1987), the Supreme Court has held that: “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” *Id.* Accordingly, WWW have sufficiently demonstrated a likelihood of immediate and irreparable harm to warrant entry of stay.

**C. The Relative Harm to the Parties if the Stay is Granted or Denied**

DCC avers that entry of a stay will have adverse economic impacts on the cattle company as well as the economy of Owyhee County. This position is supported to some extent by analysis in the EA. DCC also argues that a stay would impede its ability to facilitate improved ecological conditions in the DCCUA. While I do not take DCC’s assertions lightly, BLM’s economic analysis in the EA concludes that DCC could continue operation under the prior permit. EA at 47. Additionally, I do not intend to let this appeal linger on my docket. I recognize the need for economic certainty among members of the ranching community. Accordingly, I intend to determine whether the FD is sound or whether it must be set aside swiftly. Thus, the relative harm to DCC should be minimal.

Conversely, if the FD and EA suffer from the NEPA shortcomings WWW have thus far been able to demonstrate, impacts to the environment could be irreparable. Such harmful impacts would not only affect WWW’s ability to use and enjoy the public lands in the DCCUA, but they could also render the DCCUA unavailable to DCC for long-term resource utilization or, at minimum, greatly reduce the availability of resources in the DCCUA that DCC is granted permission to utilize. Accordingly, I find that the balance of harms weights in favor of granting WWW’s petitions to stay the FD.

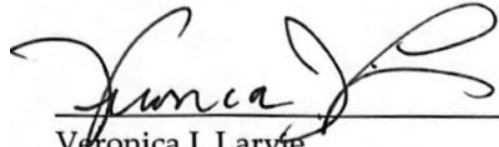
**D. Whether the Public Interest Favors Granting the Stay**

The public interest also favors granting a stay. When a serious controversy exists, the public has an interest in preserving the status quo until the merits can be fully considered. *See Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980). 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.



**V. 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 have been fully considered for purposes of this ruling and do not change my conclusion. Based upon the foregoing, WWW's stay petitions are granted.



Veronica I. Larvie  
Administrative Law Judge

See page 10 for distribution.

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.

Distributed

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