ORDER

RAYMOND PAGE, ) CA-N070-09-01
Appellant ) Appeal from the Field Manager’s Final
v. ) Decision dated August 31, 2009,
) involving the Calcutta Allotment,
BUREAU OF LAND MANAGEMENT, ) Surprise Field Office, California
Respondent )

WESTERN WATERSHEDS PROJECT, ) CA-N070-10-01
Appellant ) Appeal from the Field Manager’s Final
v. ) Decision dated August 31, 2009,
BUREAU OF LAND MANAGEMENT, ) involving the Calcutta Allotment,
Respondent ) Surprise Field Office, California

Motion to Dismiss Denied;
Petition for a Stay Granted;
Appeals Consolidated

I. Introduction

Raymond Page and Western Watersheds Project (WWP) have separately appealed an August 31, 2009, decision (Final Decision) issued by the Surprise Field Office, Bureau of Land Management (BLM). The Final Decision renews, with certain changes, the grazing permit of Hapgood Ranch for the Calcutta Allotment.
Included with WWP's appeal is the Declaration of Michael J. Conner (Conner Declaration) and a petition for a stay of the Final Decision. BLM filed a response in opposition to the petition and a motion to dismiss WWP's appeal for lack of standing. WWP filed a reply, including the Supplemental Declaration of Michael J. Conner (Supplemental Declaration). For the reasons set forth below, the motion to dismiss is denied, the petition for a stay is granted, and the appeals are consolidated.

II. Background

As a result of a wildfire in July 1979, the Allotment was created and separated by fencing into two pastures. The southeasterly pasture, where the fire occurred, was partially seeded (Seeded Pasture). It contains 1,390 acres of crested wheatgrass seeding (Jeep Fire Seeding) and 4,255 acres of unseeded land, including a 189-acre fenced gathering field. The northwesterly pasture contains 4,615 acres of unburned native vegetation (Native Pasture).

In April of 1981, a Technical Review Team examined the Allotment and estimated the carrying capacity at 778 AUMs, attributing AUMs of 348 to the Jeep Fire Seeding, 200 to the unseeded native portion of the Seeded Pasture, and 230 to the Native Pasture. The team also made recommendations for livestock grazing which were implemented by a final grazing decision issued in January 1982 (1982 Decision).

In the 1982 Decision, the grazing preference for the Allotment was specified to be 620 animal unit months (AUMs), with 496 being active and 124 being suspended. However, the decision also stated: “As a result of the [Jeep Fire Seeding], grazing use above active qualifications may be allowed on an annual basis as it is determined additional forage is available. This use will be authorized on a temporary non-renewable basis [TNR] and does not constitute an increase in active qualifications . . .”1

Initially, the Allotment was grazed in combination with the Little Sheldon Grazing Unit on United States Fish and Wildlife Service lands bordering the eastern

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1 The 1982 Decision also set a maximum season of use: April 16 through October 31.
boundary of the Allotment. In 1993, this unit was closed to livestock grazing. From then until 1997, a rest rotation system was used, with either the Seeded Pasture or the Native Pasture being (mostly) rested every year.

In 1997 the rotation system was changed so that grazing occurred first in the Seeded Pasture for 7 to 8 weeks, then in the Native Pasture for 8 to 9 weeks, and finally back to the Seeded Pasture for 7 to 12 weeks. In each subsequent year, grazing has taken place in a similar fashion, with actual use, including TNR use, ranging from 645 to 1,092 AUMs and averaging 894 AUMs from 1997 through 2008.

The record suggests that BLM, in its annual authorizations of TNR use, did not subject those authorizations to prior analysis under NEPA. BLM has indicated that any future proposals for TNR will be analyzed under NEPA prior to granting or denying them.

In 2009, BLM interdisciplinary (ID) team completed an Allotment Evaluation (AE) addressing whether the Allotment was meeting the applicable rangeland health standards (Standards). That year BLM also issued an Environmental Assessment (EA) incorporating the data and findings of the AE and evaluating the environmental effects of renewing the grazing permit for the Allotment.

In the AE, the ID team found that the Upland Soils Standard was being met and that both the Riparian/Wetland and Biodiversity Standards were not being met. Livestock grazing was considered a causal factor for failing to meet the Riparian/Wetland Standard but not the Biodiversity Standard.

To make substantial progress toward meeting the Standards, the ID team recommended certain changes in grazing management which BLM incorporated into a proposed action for renewing, with modifications, the grazing permit for the Allotment. Those changes included altering the pastures' seasons of use somewhat, with the precise dates varying every other year; constructing a pit reservoir in the northwest part of the Native Pasture to better distribute cattle; and for each of two springs, building an exclosure fence and trough. Another proposed change was to increase the authorized active use from 496 to 778 AUMs, although 778 AUMs is less than the average actual use, including TNR use, of 894 AUMs from 1997 onward. After analyzing this proposed action and alternatives thereto in the EA, BLM issued
a Finding of No Significant Impact (FONSI) regarding the proposed action and adopted it in the Final Decision.

The following tables show the grazing management authorized by the Final Decision and the management preceding issuance of the Final Decision.

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III. Motion to Dismiss Denied

The basis for BLM’s motion to dismiss WWP’s appeal is the argument that WWP has failed to make a sufficient showing of standing.
For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *E.g.*, *Jenkins v. McKeithen*, 395 U.S. 411, 421-422 (1969).

*Natural Resources Defense Council, Inc. v. OSM*, 89 IBLA 1, 8, 92 I.D. 389, 424 n.3 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

Under 43 C.F.R. § 4.470(a), any person whose interest is "adversely affected" by a final BLM grazing decision may appeal the decision to an administrative law judge. A similar provision governing appeals to the Interior Board of Land Appeals ("Board") exists at 43 C.F.R. § 4.410. The Board has found that its interpretations of § 4.410 provide useful guidance for interpreting § 4.470(a). *See The Center for Tribal Water Advocacy v. BLM*, 173 IBLA 165, 171 (2007).

With regard to § 4.410, the Board has stated that in order for a party to have standing to appeal from a BLM decision, it must have a legally cognizable interest that is adversely impacted by that decision. *Legal and Safety Employer Research Inc. et al.*, 154 IBLA 167, 172 (2001). For an organization to have standing to appeal, one or more of its members must have a legally cognizable interest that was or is likely to be adversely affected by the decision. *Id.* at 172-73.

To be adversely affected, the interest allegedly affected by the decision under review must be a legally cognizable interest and the allegation of adverse effect must be colorable, identifying specific facts which give rise to a conclusion regarding the adverse effect. *National Wildlife Federation v. BLM*, [129 IBLA 124, 127 [(1994)]; *Powder River Basin Resource Council*, 124 IBLA 83, 89 (1992). The interest need not be an economic or property interest; however, a deep concern for a problem will not suffice. *Robert M. Sayre*, 131 IBLA 337 (1994). We have recognized that the use of the land involved or ownership of adjacent property may constitute a sufficient interest. *Southern Utah Wilderness Alliance*, 127 IBLA 325, 327 (1993); *The Wilderness Society*, 110 IBLA 67, 70 (1989). Nonetheless, the threat of injury and its effect on a party appellant must be more than hypothetical. *Missouri Coalition for the*


In its appeal WWP states:

Individual board members, staff, and/or members of WWP use the public lands of northwest Nevada for recreation, scientific pursuits, hiking, photography and/or spiritual fulfillment. This allotment is of particular interest to our staff and members because the members and staff regularly visit and recreate on the public lands in the BLM Surprise Resource Area and intend to continue to do so. For example, WWP member Michael Conner has visited the allotment to hike, photograph, and enjoy and experience the wildlife, plants, cultural resources, and geological values. (Conner Declaration attached) Our staff members intend to revisit the allotment on an ongoing basis in the future. [Id]

... The implementation of [the Final] Decision will ... result in the loss of the ability of WWP and its staff and members to experience the land in question without ongoing degradation of important public resources and values. ... Increased cattle stocking rates on the allotment will lead to continued, pervasive degradation of the public lands, destruction of habitat for sensitive and rare species, the continued degradation of riparian areas, and lead to the potential extirpation of rare and sensitive species within the Allotments.

In the Conner Declaration, Michael Conner identifies himself as a WWP member. He indicates that he visited the Allotment twice before issuance of the Final Decision. Paragraphs 4, 5, and 6 of his declaration read as follows:
4. During my visits to [the Allotment], I hiked, picnicked, photographed plants and wildlife, and used these lands for recreation, cultural enrichment, aesthetic enjoyment, and wildlife viewing. I have also monitored existing and proposed land uses for the area including visiting sage grouse and pygmy rabbit habitat. I am aware that other members of [WWP] also use and value these lands for recreation, aesthetic enjoyment, and scientific study.

5. I plan to return to the Calcutta Allotment in spring 2010.

6. [The Final Decision] will harm the interests of myself and other WWP members by impacting sensitive species including the pygmy rabbit and sage grouse and by further degrading upland and riparian habitats. My enjoyment of my visits to the area will be injured if the decision is implemented.

His Supplemental Declaration and the appeal elaborate upon why cattle grazing in general, and grazing under the Final Decision in particular, would be harmful to sensitive species so as to diminish his enjoyment of the Allotment when using it. Paragraphs 8 and 9 of the Supplemental Declaration state:

8. ... For the reasons stated in the appeal, any grazing at all threatens sage grouse, pygmy rabbits, bighorn sheep, and their habitats, a significant source of my enjoyment of the Calcutta Allotment.

9. Granting the stay requested by WWP will mean that fewer cattle are authorized on the allotment. Fewer cattle would mean that it would be less likely that sage grouse eggs would be stepped on or eaten by cattle, that a sage grouse hen would abandon her nest due to cattle proximity or that a nest would be trampled, or that a sage grouse would be deprived of cover - increasing the likelihood of predation - because cattle trampled or ate the taller grasses in which sage grouse hide, and that less degradation of their habitat would occur....

Mr. Conner similarly details how pygmy rabbits would be injured. He then explains that the viability of these species and his enjoyment of the Allotment's scenery would be better if the new range improvements authorized by the Final Decision were not built. Supplemental Declaration at ¶¶ 9-10.
Accepting all of these allegations as true for purposes of evaluating the motion to dismiss, they show that Mr. Conners, a WWP member, has a legally cognizable interest through his use of the Allotment that is likely to be adversely affected by the Final Decision. Consequently, WWP has established its standing sufficiently to defeat the motion to dismiss and therefore the motion to dismiss is hereby denied.

IV. Petition for a Stay Granted

To prevail on its 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 (1993).

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, the petition for a stay must be granted because WWP has met its burden of showing that each of regulatory criteria have been satisfied.

A. Likelihood of Success on the Merits

WWP has shown a likelihood of success on the merits of its claim that BLM failed to adequately consider the environmental impacts on sage grouse in violation of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq. Among other things, NEPA requires that an environmental impact statement (EIS) be prepared for any proposed "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2)(C) (1994).

To determine whether a proposed action will have a significant impact on the human environment, an agency first analyzes the environmental impacts in an EA. 40 C.F.R. §§ 1501.3, 1501.4(c).

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). [Footnote deleted.]


Concerning BLM's responsibilities under NEPA, the Interior Board of Land Appeals (Board) has said that

[a] Federal agency must take a "hard look" at the environmental consequences of its proposed actions. ***
In reviewing whether BLM has taken a "hard look," the Board examines whether the record establishes that BLM [**26] made a careful review of environmental issues, identified relevant areas of environmental concern, and whether its final determination was reasonable.


When BLM has complied with the procedural requirements of section 102(2)(C) of NEPA, by actually taking a hard look at all of the likely environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this [office] or a court (in the event of judicial review) . . .

In order to overcome BLM's decision to proceed with [the proposed action], [WWP] must carry [its] burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to consider or to adequately consider a substantial environmental
question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA.


In the EA, BLM states that “direct trampling of nests and nest abandonment due to cattle can be a threat to sage-grouse. . . . Direct impacts from cattle grazing would be much less in odd years than in even since almost all nesting by ground nesting birds is over before 1 August.” EA at 31. However, as WWP points out, the apparent assumption underlying this statement - that much less grazing would occur before August 1 in an odd year - is not correct. Before August 1, authorized use in an even year is approximately 460 AUMs, whereas it is about 475 AUMs in an odd year.

Further, BLM’s analysis of the adverse effects of the pit reservoir upon sage grouse also appears inadequate. With regard to those effects, BLM mentions only the loss of vegetation from greater cattle use in the area. Nothing is said about the direct impacts of such greater grazing use and BLM does not provide any information as to the distribution of nesting and brooding grounds.

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2 203 AUMs (4/16 - 5/31) + 239 AUMs (6/01 - 7/24) + 28 AUMs (140 head from 7/25 - 7/31) = 460 AUMs.

3 340 AUMs (4/16 - 7/01) + 135 AUMs (140 head from 7/02 - 7/31) = 475 AUMs.

4 BLM statements regarding sage grouse activities can be summarized as follows. Sage grouse sign is found scattered throughout the Allotment, including the north end which appears suitable for strutting. EA at 30; AE at 25. The Allotment contains no known active or historic leks, but three active leks occur within approximately 3.25 miles of the Allotment. EA at 30. One of the leks is about 2.5 miles north of the allotment boundary. AE at 25. The proximity of these important sage-grouse breeding areas as well as the presence of big sagebrush indicates that nesting and brood rearing likely occurs within the Allotment. EA at 30.
Under these circumstances, the question as to whether BLM adequately considered the effects on sage grouse is sufficiently serious to make it a fair ground for litigation and thus for more deliberative investigation. Consequently, WWP has met the criterion of a likelihood of success on the merits.

B. Relative Harm and Likelihood of Immediate and Irreparable Harm

WWP has also made the required showings that there is a likelihood of immediate and irreparable harm if a stay is not granted and that the relative harm favors granting a stay. This conclusion is based, in part, upon the immediate and irreparable nature of the harm attendant to the likely failure of BLM to comply with NEPA.

[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 that must be considered in assessing the likelihood of irreparable harm and the relative harm to the parties.

The risk in this case stems from the apparently inadequate analysis of the likely effects of the grazing management changes on sage grouse. BLM relied on the apparently erroneous assumption that livestock use and, hence, direct impacts to sage grouse will be less in odd years; and BLM likely failed to adequately analyze the direct impacts on sage grouse of increased cattle grazing that will occur around the new pit reservoir. Under the circumstances, there is a likelihood of immediate and irreparable harm to a sensitive species, the sage grouse.

That harm is supportive of a finding that the relative harm favors granting a stay. If a stay is not granted there will also be some harm attendant to the physical acts of constructing the pit reservoir and other range improvements.

The likely harms of actual grazing are less clear. In analyzing the relative harm, it is important to note that a grazing applicant who was granted grazing use in the preceding year may continue at that level of authorized grazing use during the time the decision is stayed. 43 C.F.R. § 4160.3(d)(2005). Therefore, if a stay is

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5 The 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.
granted, Hapgood Ranch's authorized active use would be 496 AUMs, which is 282 AUMs less than under the Final Decision.

While TNR use may be proposed in the future, BLM has indicated that it will begin complying with NEPA before granting or denying any such proposals. Given this fact and the variability of range conditions from year to year, the authorization of future TNR use is speculative.

In sum, if a stay is granted, the level of use is likely to be less and thus more beneficial or less harmful to the environment. On the other hand, a stay is likely to result in a pattern of use that is more harmful to riparian areas because construction of the protective spring exclosures would be stayed. Ultimately, the balance of harms weighs in favor of granting a stay because of the harm of constructing the range improvements and of going forward with grazing around a new pit reservoir when the effects do not appear to have been adequately analyzed.

C. Public Interest

The public interest favors maintaining the status quo until the merits of a serious controversy can be fully considered. See Valdez v. Applegate, 616 F.2d 570, 572-73 (10th Cir. 1980). Additionally, the public has an interest in preventing harm to the public resources caused by grazing management which will be furthered by granting a stay in this case. While the public also has an interest in the economic stability of livestock operations, the likelihood of harm to that interest if a stay is granted has not been adequately shown. Consequently, the public interest favors maintaining the status quo and granting a stay in this case.

D. Conclusion

Based upon the foregoing, WWP's petition for a stay is hereby granted.

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*While the lower use level might be harmful to Hapgood Ranch's grazing operation, the record is devoid of evidence as to the extent of that harm.*
V. Appeals Consolidated

Given that Mr. Page and WWP have appealed the same BLM grazing decision, it is appropriate to consolidate the appeals. Therefore, their appeals are hereby consolidated.

Harvey C. Switzer
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 granting of the stay petition 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 16 for distribution.
Distribution

By Certified Mail:

Raymond Page
P.O. Box 157
Cedarville, California 96104

Michael J. Connor, Ph.D
California Director
Western Watersheds Project
P.O. Box 2364
Reseda, California 91337-2364
(For Appellant)
Fax: 818-345-0425 (call before faxing)

Erica L. B. Niebauer, Esq.
Office of the Regional Solicitor
U.S. Department of the Interior
Pacific Southwest Region
2800 Cottage Way, Room E-1712
Sacramento, California 95825-1890
(Counsel for Respondent)
Fax: 916-978-5694

By First Class Mail:

Field Manager
Surprise Field Office
Bureau of Land Management
P.O. Box 460
Cedarville, California 96104
Fax: 530-279-2171