



United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS

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January 31, 2025

ORDER

WESTERN WATERSHEDS PROJECT,) UT-0Y20-24-01
)
Appellant) Appeal of a November 13, 2024,
) Final Decision Related to the
v.) Indian Creek Allotment Range
) Improvements, Monticello Field
BUREAU OF LAND MANAGEMENT,) Office
)
Respondent.)

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JONATHAN B. RATNER, and SAGE) UT-0Y20-24-02
STEPPE WILD,)
) Appeal of a November 13, 2024,
Appellants) Final Decision Related to the
) Indian Creek Allotment Range
v.) Improvements, Monticello Field
) Office
BUREAU OF LAND MANAGEMENT,)
)
Respondent.)

Stay Petitions Granted

I. Overview

On November 13, 2024, the Bureau of Land Management (BLM) issued a Notice of Final Decision (Final Decision) to The Nature Conservancy (TNC), authorizing the construction of range improvements within the Indian Creek Allotment. BLM received two separate appeals and stay petitions from: (1) Western

Watersheds Project (WWP); and (2) Jonathan B. Ratner and Sage Steppe Wild (collectively SSW). BLM opposes both stay petitions. Based on a preliminary review of the record and pleadings, and for the reasons stated below, Appellants have met the criteria for a stay. Therefore, the petitions for a stay of the Final Decision are hereby granted.

II. Background

TNC holds a grazing permit for the Indian Creek Allotment (Allotment), a 272,458-acre allotment located entirely within the boundaries of Bears Ears National Monument (BENM or Monument).¹ When originally established in 2016,² the Monument encompassed approximately 1.35 million acres.³ In 2017, a Presidential Proclamation reduced the size of the Monument by approximately 1.1 million acres,⁴ and in 2021, the Monument was restored to its original boundaries.⁵ Grazing is an authorized use within the Monument. And the 2021 Presidential Proclamation specifically provides that: “The Secretaries shall manage livestock grazing as authorized under existing permits or leases, and subject to appropriate terms and conditions in accordance with existing laws and regulations, consistent with the care and management of the objects identified above and in Proclamation 9558.”⁶

To facilitate livestock management, TNC has proposed the construction of thirteen earthen reservoirs and five rangeland fences in the Allotment.⁷ TNC developed these projects in conjunction with BLM’s Monticello Field Office.⁸ In 2018, BLM posted the proposal on its website and mailed letters to members of the interested public.⁹ In 2020, BLM reached out to 32 Tribal Nations and 15 consulting parties to identify potential impacts associated with the proposed range projects.¹⁰ In

¹ BLM, Indian Creek Allotment – Range Improvements, Environmental Assessment DOI-BLM-UT-Y020-2018-0054-EA at 2-3 (Nov. 2024) (EA).

² Proclamation 10285 of October 8, 2021, Bears Ears National Monument, 86 Fed. Reg. 57321 (Oct. 8, 2021) (2021 Proclamation).

³ *Id.* at 57322.

⁴ *Id.*

⁵ *Id.* at 57321; *see also* EA at 3.

⁶ 2021 Proclamation at 57332.

⁷ EA at 2.

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.* at 5.

2022, BLM informed the Bears Ears Commission of the project and followed up with presentations and copies of relevant documents for review.¹¹

BLM also prepared an environmental assessment (EA) to analyze the impacts associated with two alternatives: (1) Alternative A—No Action; and (2) Alternative B—Proposed Action.¹² Although BLM considered four other alternatives, those alternatives were excluded from detailed analysis.¹³ According to the “purpose and need” statement in the EA, the proposed action is a response to TNC’s “request to construct and maintain additional watering points and fences on BLM-administered lands to improve the distribution and control of livestock throughout the Indian Creek Allotment.”¹⁴

As discussed in the EA, the project area is situated within the lower Indian Creek watershed near Highway 211.¹⁵ Thirteen reservoirs and five new fences would be constructed within the Creek, Park, Middle, Lavender, Davis, Drill, and North Cottonwood Pastures.¹⁶ These seven pastures account for 56,012 acres within the 272,458-acre Allotment.¹⁷ Presently, these pastures contain ten existing water improvements and fourteen fences.¹⁸

TNC grazes 1,004 cows in the Allotment from October 1 through June 15 for a total of 8,518 active animal unit months (AUMs).¹⁹ Livestock are rotated among various pastures within the Allotment, then trailed to an adjacent U.S. Forest Service allotment in the spring, and returned to the Allotment in the fall.²⁰ According to the 2008 Monticello Field Office’s Resource Management Plan (2008 MFO RMP), which was in effect when the Final Decision issued, the Allotment has been placed in the “improve” category.²¹

¹¹ *Id.* at 5.

¹² *Id.* at 6-9.

¹³ *Id.* at 9-10.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 6, 11.

¹⁹ *Id.* at 11, 15.

²⁰ *Id.* at 10.

²¹ *Id.* at 3.

On July 1, 2024, BLM issued its Proposed Decision along with a Finding of No Significant Impact (FONSI).²² After considering the protests and information received through consultations and communications with the public, Tribal Nations, the Bears Ears Commission, U.S. Fish and Wildlife Service, and the National Historic Preservation Act (NHPA) process, BLM issued its Final Decision on November 13, 2024.²³ The Final Decision authorized the construction of thirteen reservoirs and five fences as described in the EA's proposed action alternative.²⁴ The Final Decision explained that the construction of these projects would improve livestock distribution in the Allotment consistent with the protection of Monument objects as described in Presidential Proclamation 10285.²⁵

WWP and SSW appealed and petitioned for a stay of the Final Decision. After those appeals were filed, BLM issued a new Record of Decision and Approved Resource Management Plan for the BENM (BENM RMP).²⁶ The Department of the Interior's Principal Deputy Assistant Secretary for Lands and Minerals Management signed the BLM Record of Decision on January 13, 2025, and made the Approved BENM RMP effective immediately.²⁷

III. Standard of Review

To prevail on a stay petition, an appellant must show sufficient justification based on the following standards set forth in 43 C.F.R. § 4.471(c):

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;

²² BLM, Proposed Decision, Indian Creek Allotment Range Improvements (July 1, 2024); BLM, Finding of No Significant Impact, Indian Creek Allotment Range Improvements (July 1, 2024) (FONSI).

²³ BLM, Notice of Final Decision at 2 (Nov. 13, 2024) (Final Decision).

²⁴ *Id.*

²⁵ *Id.* at 3.

²⁶ BLM, Records of Decision and Approved Resource Management Plan for Bears Ears National Monument and Approval of the Amendment to the Manti-La Sal National Forest Land and Resource Management Plan in Utah, 90 Fed. Reg. 4778 (Jan. 16, 2025).

²⁷ 90 Fed. Reg. at 4778; *see also* BLM, Bears Ears National Monument, San Juan County, Utah, Record of Decision, Approved Resource Management Plan at 24 (Jan. 2025) (BENM RMP).

3. The likelihood of immediate and irreparable harm if the stay is not granted; and
4. Whether the public interest favors granting the stay.

The appellant bears the burden of demonstrating that a stay is warranted under each of the regulatory standards.²⁸ Although it is not necessary to prove each standard with certainty, the appellant must show that it likely meets each of the four standards.²⁹ Failure to satisfy any one of the four standards will result in denial of the stay petition.³⁰

IV. Discussion

Based on a preliminary review of the record and pleadings filed in this proceeding, and for the reasons discussed herein, Appellants have sufficiently established each of the four regulatory standards and demonstrated that a stay of the Final Decision is warranted.

A. Likelihood of Immediate and Irreparable Harm

For purposes of a stay, Appellants must establish that the harms associated with the Final Decision will likely be immediate and irreparable.³¹ To meet this burden, the harms must be “likely” and not just theoretical.³² As discussed below, this two-part standard has been met for purposes of granting a stay.

With respect to the immediate nature of the harm, the EA acknowledges that on-the-ground impacts will occur immediately upon commencement of construction activities.³³ According to the EA, thirteen earthen reservoirs will be constructed using mechanized equipment such as bulldozers to create an earth filled

²⁸ See 43 C.F.R. § 4.471(d); *W. Wesley Wallace*, 156 IBLA 277, 278 (2002).

²⁹ *Pueblo of San Felipe*, 187 IBLA 342, 345 (2016); see also *Tenn. Gas Pipeline Co., L.L.C.*, 189 IBLA 108, 112 (2016).

³⁰ See *Jerri Tillett*, 188 IBLA 384, 385 (2016); *Western Oil Exploration Co.*, 189 IBLA 48, 49 (2016).

³¹ 43 C.F.R. § 4.471(c)(3).

³² *Heather Bromm*, 193 IBLA 152, 157 (2018).

³³ EA at 6-8; see *WWP*, Notice of Appeal and Petition to Stay at 16 (*WWP Appeal*) (arguing that the “bulldozing of 13 reservoirs and 5 fences will cause immediate physical changes on the ground and significantly increase resource damage to areas that were not heavily impacted by livestock use”).

embankment and spillway within ephemeral drainages to capture rainfall and snowmelt.³⁴ Each reservoir will likely disturb 0.5 acres during construction.³⁵ In addition, fence construction will require clearing trees and brush with a chainsaw along the entire length of the fence line.³⁶ The EA estimates that construction disturbances will extend up to five feet on either side of the fence line, impacting about 1.63 acres.³⁷ The initial construction will also require cross-country motorized vehicle travel, totaling about 7.2 miles, to access and construct the reservoirs and fences, which would result in trampling and crushing of vegetation.³⁸

Contrary to BLM's assertions, the impacts associated with the construction of these range projects are not merely temporary or speculative.³⁹ Unlike other water development projects, such as wells or pipelines which can be capped if the appellants ultimately prevail on the merits, the damage likely to occur during construction of the earthen reservoirs cannot be reversed. As SSW explained in its Petition for a Stay, if a stay is not granted, "the bulldozing will begin immediately" and even if Appellants ultimately prevail, "the permanent degradation of our public lands will have already occurred."⁴⁰ The changes to the landscape, soils, and vegetation associated with the construction of reservoirs and the use of heavy equipment is the type of long-standing, irreparable harm that supports the imposition of a stay pending a resolution of these appeals.

In addition to construction impacts, the EA details the long-term impacts that will likely occur in the immediate vicinity of the reservoirs and fences due to

³⁴ EA at 6.

³⁵ *Id.*

³⁶ *Id.* at 7.

³⁷ *Id.* at 8.

³⁸ *Id.* at 19.

³⁹ BLM, Bureau of Land Management's Opposition to Petition for Stay (Western Watersheds Project) at 7 (Dec. 26, 2024) (BLM Opposition to WWP); BLM, Bureau of Land Management's Opposition to Petition for Stay (Ratner and Sage Steppe Wild) at 8 (Jan. 10, 2025) (BLM Opposition to SSW).

⁴⁰ SSW, Notice of Appeal, Statement of Reasons, and Petition for Stay at 64 (SSW Appeal); *see also id.* at 40 (arguing that "[a]nyone who has spent time in the arid west will know that a single pass of a bulldozer remains a scar on the land ¾'s of a century later").

concentrated livestock use and trailing along fences.⁴¹ While BLM and Appellants disagree about the size of this area, no one disputes that “native grasses and shrubs would be severely trampled and thoroughly consumed around the immediate area of the water points.”⁴² The installation of new reservoirs would also disperse livestock and redistribute grazing use. Under normal conditions, the EA estimates that livestock grazing occurs within a one-mile radius around each water source (2,010 acres).⁴³ Consequently, once the thirteen reservoirs are installed, large areas will experience permanently increased grazing impacts.

Appellants argue that granting a stay would prevent both the “immediate physical changes on the ground” as well as the “resource damage to areas that were previously not heavily impacted by livestock use.”⁴⁴ When viewed together, the immediate and irreparable impacts associated with construction activities, concentrated use, and livestock redistribution support the imposition of a stay.

B. Balance of Harm

The balance of harm also weighs in favor of granting a stay. As noted by Appellants, the proposed range projects have been under consideration for over six years,⁴⁵ and BLM has not identified any time-sensitive circumstances or other factors that would weigh in favor of immediate implementation of the Final Decision.⁴⁶ Instead, the primary harm to BLM (and TNC) from the imposition of a stay would be the resulting delay in construction of the reservoirs and fencing while this Tribunal considers the merits of the appeals.⁴⁷

⁴¹ EA at 17-19; *see also id.* at 24 (describing the Area of Potential Effects for cultural resources as a 30-meter corridor for fence segments and the area around the water improvements impacted by congregating livestock, which totals 101 acres).

⁴² *Id.* at 18.

⁴³ *Id.* at 11; *see also* WWP Appeal at 8 (asserting that livestock impacts “could radiate out from water sources for up to 1-2 miles or more, removing vegetation and biological soil crusts, increasing bare ground, soil, and water erosion and facilitating expansion of exotic invasive weeds”); *see also* WWP, Reply to Bureau of Land Management Opposition to Petition to Stay at 9 (Jan. 29, 2025) (WWP Reply).

⁴⁴ WWP Appeal at 16; *see also* WWP Appeal at 2, 8, 12-14; SSW Appeal at 23-28, 49-55.

⁴⁵ WWP Appeal at 16.

⁴⁶ *Id.*; *see also* BLM, Opposition to WWP at 19-20.

⁴⁷ SSW Appeal at 65.

Unlike other grazing appeals where the range projects are part of an integrated grazing scheme and permit renewal process, these projects have not been developed in connection with a review or analysis of grazing use within the Allotment. In fact, the EA contains only a cursory discussion of current grazing use⁴⁸ and barely any rangeland health data specific to the pastures or locations where the new reservoirs and fences will be constructed.⁴⁹ The most comprehensive site-specific data provided in the EA relates to the presence of biological soil crusts within (and adjacent to) the 0.5-acre footprint likely to be disturbed during construction of each reservoir.⁵⁰ After reviewing conditions at each location, the EA found that biological soil crusts were present at eight of the thirteen reservoir sites.⁵¹ It concluded that biological soil crusts would be “damaged or destroyed” in the construction area and that impacts would extend out 300 feet (6.5 acres) from each reservoir.⁵²

Even though BLM claims that the benefits associated with improved livestock distribution will outweigh any harms, the overall lack of pasture-specific data and analysis precludes such a finding. By contrast, Appellants have identified immediate and irreparable harm that will likely ensue if the projects are constructed before the merits of the appeals are fully considered. For these reasons, the balance of harm tips in favor of granting the stay.

C. Likelihood of Success

To achieve success on the merits, Appellants must establish “that the [appealed] decision fails to substantially comply with the Department’s grazing regulations or that, by a preponderance of the evidence, the decision is unreasonable

⁴⁸ EA at 10-11, 15, 31.

⁴⁹ EA at 15 (explaining that the “permit may be modified in the future in response to standards and guidelines for healthy rangelands and rangeland monitoring data”); *id.* at 16-17 (describing utilization as light to moderate and noting that “[l]ong-term vegetation monitoring studies have been established across the Allotment including in the vicinity of the Proposed Actions on the Indian Creek Pastures” and that the “monitoring data shows the summary of key plant species as having an overall stable trend in the frequency of occurrence in plant communities in 2016, yet were down in 2019 primarily from a severe drought in 2018”).

⁵⁰ *See id.* at 27-29.

⁵¹ *Id.* at 29.

⁵² *Id.*

and thus lacks a rational basis.”⁵³ A likelihood of success on the merits does not require that the probability of success be free from doubt but may be shown by presenting a reasonable basis for challenging the legal or factual soundness of the agency’s decision.⁵⁴ This standard will ordinarily be satisfied if the petitioner raises questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and more deliberative investigation.⁵⁵

Appellants allege that BLM’s EA violates the National Environmental Policy Act (NEPA),⁵⁶ because it failed to take a “hard look,” or otherwise adequately consider, the impacts associated with the Final Decision. As a procedural statute, NEPA does not mandate a certain result, but instead promotes “fully informed and well-considered decision[s].”⁵⁷ An EA must “fulfill the primary mission of NEPA” by ensuring that “BLM is fully informed of the environmental consequences.”⁵⁸ Consequently, BLM has an obligation to take a “hard look” at the potential environmental consequences of the proposed action.⁵⁹

NEPA’s “hard look” standard requires BLM to conduct “a thorough environmental analysis” and prepare a document demonstrating “thoughtful and probing reflection of the possible impacts associated with the proposed project.”⁶⁰ “Conclusory statements regarding impacts without adequate discussion do not meet the required ‘hard look’ under NEPA.”⁶¹

⁵³ *Hanley Ranch P’ship et al. v. BLM*, 183 IBLA 184, 198 (2013); see also 43 C.F.R. § 4.480(b).

⁵⁴ *Pueblo of San Felipe*, 187 IBLA at 346.

⁵⁵ *Wy. Outdoor Council Inc.*, 153 IBLA 379, 388 (2000) (quoting *Sierra Club*, 108 IBLA 381, 384-85 (1989)); see also *Tenn. Gas Pipeline Co.*, 189 IBLA at 115.

⁵⁶ 42 U.S.C. §§ 4321-70h.

⁵⁷ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978); see also *Or. Nat. Res. Council*, 116 IBLA 355, 361 n.6 (1990) (explaining that NEPA requires “whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action”).

⁵⁸ *Colo. Env’tl. Coal.*, 149 IBLA 154, 157 (1999).

⁵⁹ *Id.* at 156.

⁶⁰ *Klamath-Siskiyou Wildlands Ctr.*, 190 IBLA 295, 310 (2017) (quoting *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005) and *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006)).

⁶¹ *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 72 F.4th 1166, 1178 (10th Cir. 2023).

Appellants assert that BLM failed to take a hard look at the impacts associated with the redistribution of livestock into areas that previously had little to no impacts from livestock grazing⁶² and improperly focused on the smaller, more limited project footprints.⁶³ Although BLM considered and discussed the literature, which it characterized as reaching “varying conclusions regarding the effects of water points on cattle distribution,”⁶⁴ BLM did not provide pasture-specific analysis of the rangeland health conditions or the likely impacts on rangeland health associated with the redistribution of livestock after construction of the thirteen reservoirs and five fences.

SSW’s Director, Jonathan Ratner,⁶⁵ argues that rangeland health within the Allotment is “severely degraded”⁶⁶ He points to a 2019 trend report and data he collected last season in the pastures where the reservoirs will be constructed.⁶⁷ He concluded, based on his measurements, that “current conditions are so degraded by BLM’s mismanagement that the pastures have lost 91% of their forage production.”⁶⁸ However, the EA lacks sufficient information to make a comparison. BLM argues that grazing use will remain unchanged, and that the new projects will “better distribute existing permitted livestock across the Allotment,”⁶⁹ but it fails to describe the current management scheme in these pastures and whether the pastures are meeting, or failing to meet, the rangeland health standards. And, if the pastures are not meeting the rangeland health standards, it remains unclear whether livestock grazing, or overgrazing, is a causal factor.

Instead of providing pasture-specific data, the EA relies on general assertions that a more even distribution of livestock equals improved conditions.⁷⁰ It also takes great pains to describe the impacts within the construction footprints and the immediate vicinity as relatively small compared the total acres in the affected

⁶² WWP Appeal at 7-14.

⁶³ SSW, Reply to Opposition to Petition for Stay at 4, 12 (Jan. 15, 2025).

⁶⁴ EA at 12.

⁶⁵ Decl. of Jonathan Ratner at ¶ 4 (Dec. 30, 2024) (Ratner Decl.).

⁶⁶ SSW Appeal at 8.

⁶⁷ *Id.*; see also Ratner Decl. at ¶¶ 20-25.

⁶⁸ SSW Appeal at 8.

⁶⁹ EA at 14.

⁷⁰ See, e.g., *id.* at 13, 20, 22.

pastures⁷¹ while simultaneously asserting that the beneficial impacts from improved livestock distribution will “be spread across approximately 20,295 acres.”⁷²

But despite claiming beneficial impacts over more than 20,000 acres, the EA only considers the “limited scope of the disturbance (8.13 acres short-term, 3.70 acres long-term)” when analyzing cheatgrass and other invasive plant species.⁷³ As noted by WWP, “[t]hese [invasive] species thrive in areas that have been disturbed, but because the agency opted to analyze an arbitrarily small area of impacts, it failed to consider whether the project could contribute to an increase of these invasive species into areas they have not previously been found.”⁷⁴ And while the EA notes that project impacts would be “spread across eighteen separate locations,” it did not specifically analyze the impacts of trailing between those locations or the impacts of expanded grazing use within a one-mile radius of the new reservoirs.⁷⁵

Similarly, the EA’s discussion of impacts to biological soil crusts assumes that those impacts would be limited to a 300-foot radius around each watering point and along trails created by livestock traveling to the reservoirs.⁷⁶ The EA calculates the area of potential disturbance as “approximately 11 acres (9 acres for a 300-foot radius around each reservoir and an estimate of 0.91 acres of trailing beyond 300 feet from the reservoirs and .3 feet from trailing along proposed fence lines).”⁷⁷ While the EA briefly mentions how a more even distribution of livestock would impact biological soil crusts, it concluded that “because livestock and wildlife historically and currently have had access to the entire pastures, any additional use would not be anticipated to meaningfully disturb soil crusts beyond the concentration area of about 6.5 acres around each watering point.”⁷⁸ Although livestock may theoretically have access to the entire pasture, the purpose of these projects is to improve distribution,⁷⁹ which would presumably move cattle into areas that do not currently receive significant use. However, the EA fails to include biological soil crust data or

⁷¹ *Id.* at 17-20.

⁷² *Id.* at 20.

⁷³ *Id.*

⁷⁴ WWP Appeal at 8.

⁷⁵ *See* EA at 20; *see also* WWP Reply at 7.

⁷⁶ EA at 29-30; *see also* WWP Appeal at 9 (arguing BLM failed to “take a hard look at the true impacts of the project” by limiting its analysis of biological soil crusts to an “arbitrarily small area”).

⁷⁷ *Id.* at 30.

⁷⁸ *Id.*

⁷⁹ *Id.* at 2.

other measurements from this wider area. Instead, the EA concludes that “[t]his permit may be modified in the future in response to standards and guidelines for healthy rangelands, which includes BSC [biological soil crusts] as an indicator, and rangeland monitoring data.”⁸⁰

Given that the only stated purpose in the EA for constructing thirteen reservoirs and five fences is to redistribute livestock, BLM had an obligation to analyze how optimized livestock distribution would impact rangeland health. Without pasture-specific data that extends beyond the limited project footprints, BLM could not perform a meaningful analysis of rangeland health. Accordingly, Appellants have raised serious questions regarding whether BLM took the requisite hard look, and this showing is sufficient to demonstrate a likelihood of success on the merits.

D. Public Interest

When a serious controversy exists, the public has an interest in preserving the status quo until the merits can be fully considered.⁸¹ Given the significant questions surrounding the adequacy of BLM’s analysis, the public interest supports staying the Final Decision so that BLM’s decision-making process can be fairly and deliberatively investigated to ensure compliance with NEPA and other applicable statutes and regulations. A stay will also provide BLM with an opportunity to assess whether subsequent actions, such as the Record of Decision and Approved BENM RMP that became effective on January 13, 2025, affects its analysis of the projects.

V. Conclusion

For these reasons, the petitions for a stay of the Final Decision are hereby GRANTED.

Dawn S. Perry
Administrative Law Judge

⁸⁰ *Id.* at 31.

⁸¹ *See Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980).

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 14 for distribution.

Distributed

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