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UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

OREGON NATURAL DESERT ASSOCIATION

OR-010-04-02

Appellant

**SUPPLEMENTAL STATEMENT
OF REASONS IN SUPPORT OF
APPEAL AND PETITION FOR
STAY**

v.

BUREAU OF LAND MANAGEMENT,

Respondent.

INTRODUCTION

Pursuant to 43 C.F.R. Part 4, Appellant hereby files this supplemental statement of reasons in support of its appeal and petition for stay of EA OR-010-2004-07 (“Buckaroo Pass Fence Extension and Water Development Project”). To achieve success on the merits of its appeal, Appellant must demonstrate, by a preponderance of the evidence, that the BLM’s Buckaroo Pass Fence Extension and Water Development project decision is unreasonable or does not substantially comply with the federal grazing regulations. See Eason v. BLM, 127 IBLA 259, 262 (1993). A BLM decision is arbitrary, capricious, or inequitable where it is not supported by any rational basis. Wayne D. Klump v. BLM, 124 IBLA 176, 182 (1992). In balancing the likelihood of a movant’s success against the potential consequences of a stay on

the other parties, “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.” Wyoming Outdoor Council, Inc., 153 IBLA 379, 388 (2000) (quoting Sierra Club, 108 IBLA 381, 384–85 (1989)). Although the BLM repeatedly argues that Appellant’s claims represent “mere disagreements” with the agency’s policies, the types of NEPA violations alleged in this appeal clearly support a stay of the proposed action pending a “more deliberative investigation.”

ARGUMENT

The BLM dismisses ONDA’s assertion that the agency has defined the purpose and need for this project in unreasonably narrow terms as a “mere[] . . . disagreement.” BLM Resp. at 1. The BLM indicates that increased herding does not meet the CEQ definition of a “reasonable alternative” because “it was not practical or feasible from a technical or economic standpoint.” Id. Yet, this conclusion does not appear in the EA and there is no information in the EA or in any of the BLM’s subsequent correspondences with ONDA to support these conclusory statements. Because the BLM cannot point to any place in the record to support this conclusion, the decision not to consider increased herding (or reduced grazing or resting both pastures) is arbitrary, capricious and not in accordance with the law.

In fact, this Office recently determined, in an appeal concerning a final multiple use decision following a BLM rangeland health regulations assessment, that an appellant’s “contention that BLM violated NEPA by failing to consider a reasonable range of alternatives raises a substantial, difficult, and serious question that is a fair ground for litigation and thus for more deliberative investigation.” Western Watersheds Project v. BLM, Nos. NV-010-2004-01 &

NV-010-2004-02, slip op. at 7 (Office of Hearings and Appeals, Sept. 14, 2004).¹ In that case, as in this one, the appellants argued that the BLM should have considered alternatives that would provide for adequate periods of rest or a substantial decrease in authorized livestock use, and that would rely on herding rather than fences to control livestock distribution. *Id.* The Administrative Law Judge agreed, “especially given the obviousness of the alternative of substantially reducing authorized grazing to help solve the problems caused by overgrazing. BLM has not adequately explained, either in the EA or in its response to Appellant’s petition, why it did not consider this alternative.” *Id.* Moreover, the ALJ emphasized that “[t]he fact that reductions in livestock numbers alone may not adequately address the problems does not mean that reductions cannot contribute to the remedy for the problems caused by livestock overuse.” *Id.* In that appeal, the ALJ concluded that the appellant had indeed “raised serious questions as to whether BLM should have considered such an alternative in order to make an informed decision.” *Id.* at 7–8.

The BLM also argues in this case that ONDA has not provided “data or other information” to show that current levels of grazing in the project area or on the allotment are unsustainable. BLM Resp. at 3. However, the BLM itself acknowledges in the EA that “[n]atural barriers and herders have been used in this area to try to keep cattle out of the rested pasture, but this has proven ineffective.” EA at 1 (emphasis added). As ONDA noted in its opening Statement of Reasons, the underlying problem the BLM is seeking to address with this proposal is continuing degradation from current grazing practices and failures to meet natural resource standards on the Beaty Butte Allotment. Now six years after the Beaty Butte AMP was adopted, the management scheme adopted in that plan has “proved ineffective” and the BLM acknowledges the need to make grazing management changes in order to protect the natural

¹ A copy of the slip opinion is attached to this memorandum for the convenience of the Office of Hearings and Appeals and the parties.

resources on this allotment. The BLM also admits that “heavy livestock use in some areas,” which affects vegetative diversity and individual plant health, is currently the status quo on this allotment. See BLM Resp. at 5. In fact, the BLM also has proposed a significant project in the East-West Gulches area of the Beaty Butte Allotment (to the north of the project area at issue here), which would involve fencing off degraded riparian areas, closing and rehabilitating a road, and piping water and creating new watering troughs for livestock. See BLM, “Beaty Butte East-West Gulch Projects, EA OR-010-2004-08,” available at www.or.blm.gov/Lakeview/Planning/lkvwfoplans/lkvwea/EAST_Gulch_EA.pdf (last modified July 22, 2004). The purpose of that project is to address actively incising channels and recover healthy functioning conditions in those riparian areas. Clearly, Appellants have raised and cited to serious concerns regarding resource degradation from current grazing management and practices on the Beaty Butte Allotment.

Similarly, the BLM in its Response states that ONDA’s complaint that the EA does not contain enough information to satisfy NEPA’s requirements of public disclosure and informed decision making, “is an issue in which the appellant and the BLM merely disagree.” BLM Resp. at 1. It is telling that the BLM cannot point to anything in the record to indicate the agency has indeed supplied the key lacking information. That information includes a description of the herding that has occurred and how and why it has failed to accomplish the goals of the Beaty Butte AMP, a basic map showing the scope of the proposed project in relation to projects previously considered during the AMP preparation, and basic descriptions of key impacted resources. See ONDA Appeal at 3. The BLM incorrectly describes this as a mere policy disagreement between the parties, as opposed to the violation of NEPA that it is. As was observed in Western Watersheds Project v. BLM, “[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.” Slip op. at 8.

Finally, regarding Appellant’s Petition for Stay, the discussion in Western Watersheds Project v. BLM again is instructive. It is well-established that a 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.” Id. at 9. The ALJ in that case recognized, as has been pointed out by ONDA in this appeal, that extensive new zones of construction disturbance and livestock disturbance could result in irreparable weed invasion and spread, fragmentation of wildlife habitat, irreparable soil erosion, and loss of native vegetation and wildlife. Id. Particularly telling from the Western Watersheds Project decision is the ALJ’s analysis of the relative harms involved in issuing a stay:

Further, the harm of staying [the project] is outweighed by the harm of allowing BLM to proceed with implementation of [the project]. Proceeding with the fencing and vegetative treatment projects involves not only likely tangible harm to Appellant’s interests, but also the harm of the added risk to the environment resulting from the likely lack of adequate NEPA analysis. Those harms are irreparable.

Id. at 10. The potential harms associated with the project at issue in this appeal are analogous in that the BLM’s decision to construct nine miles of new fence, four new fence traps, two pipelines totaling a mile in length, and one new watering trough is not insignificant, ecologically speaking. The BLM argues that because discussion of resource issues such as the spread of weeds, erosion, trampling, compaction, degradation of microbiotic crusts and impacts to wilderness study areas, did not appear under the heading of “Statement of Reasons” in Appellant’s memorandum, ONDA “failed to raise these as actual issues.” BLM Resp. at 5. This argument simply is without merit because ONDA discussed each of these issues at length in its comments, protest and appeal on this project. Under the Department of Interior’s appeals regulations, appellants may either file

a Notice of Appeal along with a Petition for Stay, without a Statement or Reasons, or they may include the Statement of Reasons as part of the initial filing. See 43 C.F.R. §§ 4.21(b)(3); 4.470(a); 4160.4. Finally, the public interest favors granting a stay where untold thousands of dollars are at issue to support a range project that has been approved without the benefit of a “well-informed decision.” See id.

CONCLUSION

In short, Appellant’s likelihood of success on the merits, coupled with the relative harm to the parties, the likelihood of immediate and irreparable harm and the public interest, all counsel toward granting a stay of the proposed Buckaroo Pass Fence Extension and Water Development Project.

DATED this _____ day of September, 2004.

Respectfully submitted,

Peter M. Lacy (“Mac”) (OSB # 01322)
Oregon Natural Desert Association

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served true and accurate copies of Appellant Oregon Natural Desert Association's foregoing SUPPLEMENTAL STATEMENT OF REASONS on the parties herein, via certified mail, return receipt requested, this _____ day of September, 2004, to:

Thomas E. Rasmussen
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Board of Land Appeals
Office of Hearings and Appeals
139 East South Temple, Suite 600
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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

DATED this _____ day of September, 2004.

Respectfully Submitted,

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Oregon Natural Desert Association

Attorney for Appellant