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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS

Valley Sun, LLC and Western Watersheds Project, Appellants	)	ID-330-2009-03 & ID-330-2010-01 (Consolidated cases)
v.	)	**REPLY IN SUPPORT OF PETITION FOR STAY**
Bureau of Land Management, Respondent	)	

INTRODUCTION

BLM's Response to Petition for Stay offers little more than a restatement of the inaccurate facts and unsupported legal assertions presented in the Final Decision. It ignores many arguments presented by Appellants Valley Sun LLC and Western Watersheds Project ("Valley Sun"), and fails to present any compelling showing of harm that it would suffer under a stay. Because the Final Decision is unsupported by the pretextual reasons offered by BLM and otherwise arbitrary and capricious, and the interests of the public and the relative harms to the parties favor staying the permit cancellation, a stay should be granted.

REPLY STATEMENT OF FACTS

BLM's fact section is a nearly verbatim copy of the facts set forth in the Final Decision, which Valley Sun's Appeal explained was full of omissions, and even untruths. BLM restates several of these untruths, still omits key facts, and fails to respond to facts presented by Valley Sun.

For example, BLM implies Valley Sun did not respond to its May 2009 letter requesting a maintenance schedule for range improvements, Resp. at 3–4; and later flatly states that "[n]either Valley Sun LLC nor WWP has responded." *Id*. at 7. This is demonstrably false. As explained in the Appeal (and attached as Exhibit A), Valley Sun promptly responded, explaining that many water sources have gone dry and requesting clarification and a field trip.

BLM again makes much of its charge that Mr. Marvel and Mr. Younger made false statements, and that they "elected to pay a collateral forfeiture rather than contest the citation." Resp. at 5. BLM stubbornly refuses to recognize that Marvel, Younger and Appellants have always vigorously contested these allegations, and continue to do so in this appeal. Appeal at 24. BLM's *ipse dixit* approach to these hotly contested issues lends no weight to its argument.

Tellingly, BLM provides no rejoinder to several points of evidence presented by Valley Sun. One key example is BLM's lack of any response to Valley Sun's evidence that the relevant water developments are dry or otherwise incapable of being brought to a functioning state through maintenance (or in fact functioning properly). Appeal at 22–23 (quoting BLM statements admitting water developments are dry); *see also* Ertz Decl. (documenting conditions).

REPLY ARGUMENT

I. LIKELIHOOD OF IRREPARABLE HARM.

Valley Sun explained that the decision will cause irreparable harm to Valley Sun (both financial and with respect to restoration goals) and to the environment.

With respect to financial harm, BLM asserts a novel theory that "private land only has a value as base property for federal grazing permits if the owner intends to sell the private land and grazing preference attached to the base property prior to retiring grazing permits and/or the cancellation of said permits." Resp. at 9. This theory has no basis and BLM cites none. In fact, a grazing preference can be transferred for value either with or without the sale of the base property. *See* 43 C.F.R. § 4110.2-3. In any event, Valley Sun—like any other base property owner—is obviously free to offer the base property for sale at any time; and, by BLM's own admission, the accompanying BLM permit constitutes part of the value of the property.

With respect to harm to restoration goals and to the environment, BLM asserts that Valley Sun "has not initiated any activity with the BLM to implement restoration action on the allotments." Resp. at 10. This statement is bizarre, since BLM admits virtually in the same breath that Valley Sun has been applying for non-use on an annual basis, and that resting the allotments from livestock has been achieving substantial restoration in recent years. *Id*.

BLM fails to rebut Valley Sun's showing that authorizing new grazing will cause irreparable harm due the allotments' steepness and unsuitability. In fact BLM additionally admits that if a stay is not granted, it will reconstruct the range projects (which includes both water developments and fencing). Resp. at 6 n.1. This would cause further irreparable harm. The allotments are home to both sage-grouse and endangered fish. Spud Creek AMP at 7–9. As the U.S. Fish and Wildlife Service recently recognized, both fencing and water developments harm sage-grouse through providing perch sites for predators and collision hazards, concentrating livestock in upland areas, providing breeding grounds for mosquitos that can carry West Nile virus, and degrading riparian habitat through removal of water. 75 Fed. Reg. 13910, 13929, 13941 (12 Month Finding) (Mar. 23, 2010). Removing water from streams though water

developments likewise harms listed fish. As this Court recently noted, "[b]efore BLM makes an irretrievable commitment of resources, expending thousands of dollars on fencing" (and in this case, reconstruction of water developments), the issue of whether BLM complied with the law should be "fairly litigated." *WWP, et al. v. BLM*, WY-050-10-02, slip. op. at 22 (May 19, 2010) (*Green Mountain Common*).

II. RELATIVE HARM TO THE PARTIES.

Valley Sun explained that the balance of harms tips strongly towards a stay, because both financial concerns of the permittee and risk of harm to the environment are protected by a stay. BLM asserts it would be harmed by a stay, but its enumerated harms fail to stand up to scrutiny.

It first asserts "it has been harmed by not receiving annual grazing fees." Resp. at 6. As an initial matter, BLM cannot now complain of financial harm of past non-use when it **approved** such non-use until 2009. Further, any claim of future financial harm from lack of receipt of the annual grazing fee fails. Valley Sun's permit authorizes a maximum of 375 AUMs. At the current rate of $1.35 per AUM, the maximum possible annual grazing fee would be $506.25. BLM's implication that this fee would recoup its costs in re-opening the allotment defies logic. BLM ignores the huge costs the agency would have to incur to replace and reconstruct, and drill new wells at the dry water developments, as well as to reconstruct fencing that BLM has admitted is not feasible.[1] Spud Creek AMP at 5 (trespass problems arise because "in general fencing is not feasible"). This is not to mention the cost of conducting the required NEPA analysis on such replacements. 43 C.F.R. § 4120.3-1(f) ("Proposed range improvement projects shall be reviewed in accordance with the requirements of [NEPA]."). And of course grazing the

[1] The Challis RMP requires that: "Livestock would not be allowed in a pasture until range improvements under cooperative agreement or permit are functional and properly maintained." RMP at 40.

allotment would require far more personnel and transportation expenditures for monitoring inspections and similar activities.

Taking a broader view, it is well-known that BLM's grazing program fails to come close to recouping the costs of its administration. A 2005 Government Accountability Office report concluded that federal agencies as a whole generated less than one-sixth of the expenditures required to manage grazing; and that BLM in particular would have to charge $7.64 per AUM to recover its expeditures. Exh. E (summary of report). An agency that shoots itself in the financial foot by failing to collect sufficient fees to pay for its own administration cannot argue it will suffer financial harm from a stay due to loss of the *de minimus* fee.[2]

BLM next argues that having the allotments available for grazing would provide other permittees—whose allotments "could benefit from reduced grazing"—the ability to graze on the allotments without "requir[ing] significant changes in the permittee's operations." Resp. at 6. In other words, instead of requiring permittees who are overgrazing their own allotments to follow standards, BLM would prefer to accommodate them on the Valley Sun allotments. But BLM should not allow permittees to over-graze their allotments in violation of standards, with or without vacant allotments, when of course it has an independent legal duty to require permittees to meet or make progress towards such standards. 43 C.F.R. § 4180 *et seq*.

Further, the argument relies on sheer speculation. BLM fails to name any permittee who needs the allotment, or why such permittee could not use any of the other vacant allotments on the Challis Field Office. No permittee has apparently applied to use the allotment this year. (Last year, BLM informed the public it wished to grant Temporary Non-Renewable grazing to a neighboring rancher—a plan never implemented—but BLM has not so informed the public this

[2] Further, Valley Sun would be more than willing to pay the equivalent of its grazing fee as a bond or to BLM to make up for any supposed hardship.

year.) And finally, the claimed harm is not even to BLM, but rather to the unnamed, hypothetical permittees. BLM fails to explain how this constitutes harm to BLM or to the public lands. BLM concludes that its "daily business is managing grazing permits," and this business would be "enhanced" by having the flexibility to graze the allotments. *Id*. But BLM's "daily business" actually is to manage public lands under its stewardship. In some cases, that may include grazing, and in other cases not. BLM cannot reasonably argue that it would be irreparably "harmed" if it cannot *force* grazing on allotments before the underlying issues are fully resolved on the merits. Following such an argument to its logical conclusion, one could never have a stay in a case such as this, for fear of disrupting BLM's "daily business." Obviously that is not the case.

Finally, BLM fails utterly to demonstrate that time is of the essence. It asserts that Valley Sun somehow "kept" the fact that WWP was the manager of the property from BLM until 2009. Resp. at 7. However, BLM admits in its fact section that "[s]ince 2001, a member of [WWP] has been the authorized representative for Valley Sun LLC" and that in 2007, Gordon Younger informed BLM that "by written agreement, Valley Sun LLC has delegated day-to-day management authority over these allotment permits to Western Watersheds." *Id*. at 2. Thus, by BLM's own admission, it has known of WWP's role for literally years, and cannot now claim that any emergency exists.

III. SUCCESS ON THE MERITS.

BLM fails to provide any cogent response to Valley Sun's legal arguments, instead choosing to ignore the majority of arguments made in the Appeal.

It asserts that IBLA cases discussing appropriate remedies for trespass based upon the severity of the violation are inapposite, Resp. at 8, but fails to respond at all to Valley Sun's

explanation of why the enforcement provisions are analogous. Appeal at 17 (explaining the similarity of the enforcement provisions in 43 C.F.R. § 4170.1-1(b) (for willful trespass) and § 4170.1-1(a) (for other violations)). BLM does not explain why lesser sanctions would be ineffective. Nor does it provide any alternate legal theory for assessing the appropriate severity of the punishment, instead facilely stating that it had "no option" and its response was "logical and reasonable." Resp. at 8. And BLM fails to provide any response to the argument that it failed to consult, cooperate and coordinate.

BLM provides little response to Valley Sun's explanation as to how it has never lost control of the base property. The only response is the assertion, disproved above, that Valley Sun "kept" the Agreements from BLM. Resp. at 7. BLM does not address the actual language of the Agreement showing that WWP acts as a manager of the property **on behalf of** Valley Sun, like any other ranch manager. Appeal at 19–20; Exh. B (2007 Agreement). Thus, the argument that the permit terminated immediately—and that a stay would not restore the permit—has no basis in fact. Resp. at 13.

BLM provides virtually no response to Valley Sun's explanation that dry water developments are not capable of being maintained. It does not rebut Valley Sun's evidence that the relevant water projects are either dry, otherwise nonfunctional (e.g. rusted through), or in fact properly functioning. Appeal at 22–23; *see also* Ertz Decl. (condition of projects).

BLM provides no response to Valley Sun's explanation that the allegedly false statements (which clearly stated livestock would not be available) were absolutely true, and that BLM failed to raise any concerns with the statements for years. BLM simply rehashes the baseless argument that a handful of website quotes indicating WWP's interest in retiring the allotments in the long term precluded Valley Sun from planning to place some cattle on the allotments. Finally, BLM

fails to respond at all to the constitutional claims. BLM's half-hearted response fails to counter Valley Sun's presentation of a "fair ground for litigation and thus for more deliberative investigation." *Wyoming Outdoor Council, et al.*, 153 IBLA 379, 388 (2000).

CONCLUSION

For these reasons, Valley Sun respectfully prays that the Administrative Law Judge stay the challenged Final Decision; and that following a hearing, reverse and set aside the Final Decision.

Dated this 28th day of May, 2010. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I caused a true and correct copy of the foregoing MOTION TO CONSOLIDATE to be served upon the following, by the method indicated:

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DATED this 28th day of May, 2010.

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