



United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS

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June 11, 2010

ORDER

VALLEY SUN, LLC and WESTERN)	ID-330-2009-03
WATERSHEDS PROJECT,)	
Appellants)	Appeal from Field Managers Final
v.)	Decision dated May 18, 2009,
)	involving the Spud Creek, Thompson
)	Creek, and Bradshaw Basin
BUREAU OF LAND MANAGEMENT,)	Allotments, Challis Field Office, Idaho
Respondent)	
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VALLEY SUN, LLC and WESTERN)	ID-330-2010-01
WATERSHEDS PROJECT,)	
Appellants)	Appeal from Field Managers Final
v.)	Decision dated March 26, 2010,
)	involving the Spud Creek, Thompson
)	Creek, and Bradshaw Basin
BUREAU OF LAND MANAGEMENT,)	Allotments, Challis Field Office, Idaho
Respondent)	

Petition for Stay Granted

Summary of Ruling

In Docket No. ID-330-2010-01, Appellants Valley Sun, LLC ("Valley Sun"), and Western Watersheds Project ("WWP") have appealed from and petitioned for a stay of a March 26, 2010 Decision ("Final Decision") issued by the Challis Field Manager, Bureau of Land Management ("BLM"). That decision canceled Valley Sun's grazing permit for the Spud Creek, Bradshaw Basin, and Thompson Creek Allotments (the "Allotments") based on three rationales: (1) that Valley Sun lost control of its base property; (2) that Valley Sun failed to maintain range improvements; and (3) that Valley Sun representatives knowingly or willfully made false statements in grazing applications.

This appeal is consolidated with Valley Sun's and WWP's (for convenience sometimes also referred to collectively as "Valley Sun") appeal of BLM's grazing decision rendered the previous year, on May 18, 2009 (the "2009 Final Decision") which denied the Appellants' application to place the Allotments in conservation non-use for that grazing season.

For the reasons given below, the Appellants' petition for a stay of the 2010 Final Decision is granted.

Background

- Valley Sun Acquisition and WWP Management of Property

In 2000, Valley Sun, an Idaho limited liability company, acquired the subject base property, 432 acres located near Clayton, Custer County, Idaho, along the East Fork of the Salmon River, just above its confluence with the main Salmon River. The property is now known as the Greenfire Preserve. Attached to the base property were grazing permits for three allotments: the Spud Creek, Bradshaw Basin, and Thompson Creek Allotments. In 2001, BLM approved Valley Sun's application to acquire those permits upon transfer from the previous owner. The transfer included an assignment of range improvements, under which Valley Sun assumed the responsibility to maintain certain range improvements in cooperation with BLM, that was in effect with the previous owner.

On September 27, 2000, Valley Sun and Idaho Water Project ("IWP"), an Idaho non-profit corporation, executed a Management Agreement ("2000 Agreement") under which IWP agreed to manage the Greenfire Preserve for the owner, Valley Sun. Jon Marvel, IWP's Executive Director, signed the agreement on behalf of IWP, which is now known as WWP. The 2000 Agreement, ¶3, listed some of WWP's management duties as follows:

" . . . fish production and farming the Property, maintaining in good standing any and all permits and licenses applicable to the Property from any source whatsoever, including, but not limited to, water rights, coordination with state or federal agencies, coordination with educational and research projects and institutions allowing the Property to recover from damage caused by past over-grazing and

cattle production and maintaining all improvements, equipment and personal property on the Property . . .”

In consideration of its management services, the 2000 Agreement, ¶4, entitled IWP “to use the Property in furtherance of IWP purposes.” Pursuant to ¶2, the 2000 Management Agreement was renewed automatically each year until 2007.

WWP became the owner of Valley Sun in 2001. The Greenfire Preserve has served as WWP’s headquarters since then. WWP uses the property for regular meetings, retreats, and public functions. In 2007, WWP transferred its interest in Valley Sun to Gordon Younger. On January 5, 2007, WWP and Valley Sun executed an Amended and Restated Management Agreement (“2007 Agreement”) to continue the terms of the 2000 Agreement with certain modifications. The 2007 Agreement added clauses to ¶3 specifying that Valley Sun, through Mr. Younger or successor managers, will manage the property’s business operations, including maintenance of its facilities and payment of all real property costs and expenses, while WWP will conduct its management activities “on behalf of Valley Sun.” (2007 Agreement, ¶3(b)). As seen below, BLM corresponded regularly both with Mr. Marvel, as the designated representative of WWP and Valley Sun, and Mr. Younger, as the manager of Valley Sun, with respect to Valley Sun’s grazing permit.

- Descriptions of Allotments

The Spud Creek Allotment consists of 8856 acres immediately west and adjacent to the Greenfire Preserve. The Spud Creek Allotment is in the watersheds of both the East Fork and main Salmon River. Spud Creek, a perennial stream, flows northward through the Allotment into the Salmon River. There is a 330-acre private inholding along Spud Creek in the north central part of the Allotment. Elevations range from 5400 feet along the Salmon River, to about 8600 feet on the forested ridges to the south and west, where the Spud Creek Allotment is bordered by the Challis National Forest.

The Bradshaw Basin Allotment consists of 7493 acres in the Salmon River watershed, about 5 miles northeast of the Greenfire Preserve. The Thompson Creek Allotment is located about 10 miles northwest of the Greenfire Preserve, just north of the Salmon River. The Thompson Creek Allotment is comprised of 5595 acres of

BLM land and over 16,000 acres of Forest Service land. It is managed in conjunction with the Forest Service.

In 2008, a BLM interdisciplinary team conducted rangeland health assessments and evaluations (“RHAs”) on these three Allotments to determine whether the Allotments were meeting the applicable Idaho standards and guidelines for rangeland health. Using data from 2003 for the Thompson Creek and Spud Creek Allotments and from 2006 for the Bradshaw Basin Allotment, BLM determined that the Allotments were meeting all applicable standards for rangeland health. Streams on the Allotments were found to be in proper functioning condition (“PFC”).

The three Allotments are located in the Challis Resource Area. Grazing and other activities on the Allotments are governed by the Challis Area Resource Management Plan (“RMP”) issued by BLM in 1999. The Challis RMP provides that non-use AUMs are to be used for watershed protection, wildlife habitat, and improvement of ecological condition to meet allotment objectives. Non-use AUMs may be authorized for temporary non-renewable (“TNR”) grazing use once BLM has determined that allotment objectives have been met. The RMP also provides that livestock are not to be allowed in a pasture until range improvements are functional and properly maintained.

- Grazing Authorizations and Applications

In 2002, BLM renewed Valley Sun’s grazing permit for a 10-year term, expiring on February 28, 2012. The authorized active use in animal unit months (AUMs) is set forth in the following table:

Allotment	Head of Cattle	Season of Use	AUMs
Bradshaw Basin	117	05/16 - 06/22	146
Spud Creek	180	05/10 - 06/30	178
Thompson Creek	67	07/01 - 09/30	51

The permit contains terms requiring the maintenance of structural livestock management facilities “as necessary to effectively manage livestock grazing.” Since there are streams in the Spud Creek and Thompson Creek Allotments that provide habitat for endangered salmon, the permit includes additional terms and conditions intended to protect that resource, such as forage utilization limits and riparian use restrictions. The permit also incorporated terms and conditions from the 1981 Spud Creek Allotment Management Plan (“AMP”).

However, Valley Sun has applied for and taken non-use each year since it acquired the grazing permits for all three Allotments. Thus, there has been no authorized livestock grazing on either the Spud Creek or Thompson Creek Allotments since 2001. There has been some limited grazing use on the Bradshaw Basin Allotment during that period, by two co-permittees authorized to use that Allotment. There has also been some use by trespassing cattle on the Spud Creek Allotment in recent years. During a large portion of the past decade, from 1999 through 2007, the central Idaho area experienced a severe drought and many other permittees took non-use as well.

Each year from 2001 through 2004, WWP applied for conservation non-use, for the purposes of resource protection. BLM, by the Field Manager at that time, Renee Snyder, approved those applications.

In July, 2005, Mr. Marvel of WWP, on behalf of Valley Sun, applied for non-use on all its Allotments “to eliminate any livestock impacts on wildlife and fisheries habitat including listed fish species.” (Grazing Application dated July 13, 2005). BLM’s new Field Manager, David Rosenkrance, responded in a letter warning Valley Sun that it was required to return grazing applications before the start of the grazing season, or be liable to pay grazing fees even if authorized AUMs were not used.

Mr. Marvel timely filed Valley Sun’s grazing application for 2006, giving the reason for requested non-use that “livestock in process of acquisition & will not be available.” (Grazing Application dated April 28, 2006). BLM did not respond to that application. The following year, Gordon Younger of Valley Sun filed the application for non-use, stating: “Valley Sun is in the process of acquiring livestock, so wishes to designate non-use for conservation purposes during 2007 season.” (Grazing Application dated May 14, 2007). In an accompanying letter, Mr. Younger informed

BLM that Valley Sun, by written agreement, had delegated day-to-day management authority over the allotment permits to WWP and designated Mr. Marvel as the contact person. BLM again did not formally respond to this application.

In Valley Sun's grazing application dated May 2, 2008, Mr. Younger once again applied for non-use, stating: "Valley Sun is not yet prepared to release any livestock on any of the 3 allotments for 2008; accordingly we request designation as non-use for conservation purposes for 2008." In a letter to Mr. Younger dated May 20, 2008, BLM approved non-use on the grounds of not being prepared to release livestock. However, the Field Manager stated that BLM disagrees that the Allotments require rest for the purpose of conservation, and indicated BLM would likely not approve non-use on the Allotments for any reason not dictated by resource conditions after the 2008 grazing season. BLM's letter concluded by warning Mr. Younger that Valley Sun's failure to make substantial grazing use in 2009 as required by 43 C.F.R. § 4140.1(a)(2) may jeopardize its permit.

– 2009 Final Decisions

In October 2008, a local rancher, Richard Baker, applied to BLM to graze 30 head of cattle on the Spud Creek Allotment on a temporary, non-renewable basis ("TNR") during the 2009 grazing season. BLM then wrote Valley Sun to inquire whether it intended to graze the allotment in 2009. That initiated an exchange of correspondence between BLM and Valley Sun in December 2008 and January 2009 in which BLM requested proof of Valley Sun's ownership of enough cattle to substantially use the Spud Creek Allotment, and Valley Sun questioned BLM's right to assign grazing use on its permit to a third-party applicant. Valley Sun also complained that BLM had not addressed cattle trespass on the Spud Creek Allotment and had not consulted with Valley Sun or WWP in conducting the RHA's on the three Allotments.

BLM moved ahead with consideration of Mr. Baker's grazing application over the objections of Valley Sun and WWP. On April 1, 2009, BLM issued an Environmental Assessment ("EA") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq* ("NEPA"), approving the proposed action to authorize Mr. Baker's TNR use on the Spud Creek Allotment. In conjunction with the EA, BLM issued two proposed grazing decisions, one to Valley Sun denying temporary non-use for the 2009 grazing season and one to Mr. Baker approving his use on the

Spud Creek Allotment for the 2009 season. On April 15, 2009, Mr. Younger filed Valley Sun's application requesting non-use for conservation purposes for the 2009 grazing season.

On May 18, 2009, BLM issued two Final Decisions. The first, under appeal here in Docket No. ID-330-2009-03, denied Valley Sun's application for non-use, both on temporary and conservation bases.¹ BLM's Final Decision denied conservation non-use primarily on the basis that its information showed that the rangeland on the Allotments was in good condition and suitable for grazing, in both upland and riparian areas. The Final Decision also pointed out that Valley Sun had used up its three temporary non-use seasons for annual fluctuations in livestock numbers allowed by 43 C.F.R. § 4130.2(g)(2). Therefore, the Final Decision stated that the 2009 grazing season would be the first season of unapproved non-use under Valley Sun's grazing permit for its three Allotments.

The appeal of the 2009 Final Decision was assigned to the undersigned Administrative Law Judge, who convened a telephone conference with the parties on September 15, 2009. The issue arose whether the appeal was moot, since it directly addressed grazing only for the 2009 season, which was already over. In a ruling issued on November 13, 2009, I found that the appeal was not moot since the Final Decision could be counted as one year's failure to make substantial grazing use pursuant to 43 C.F.R. § 4170.1-2, which provides that a grazing permit can be cancelled after two consecutive years of failure to make substantial use. In any event, the parties agreed to wait until BLM took action on Valley Sun's grazing permit for the 2010 season, and to consolidate an expected appeal of that decision with that of the 2009 Final Decision. In the meantime, the parties agreed upon a schedule for discovery in anticipation of future hearing proceedings.

- 2010 Final Decision

Before issuance of BLM's 2010 decision, the parties engaged in several other significant contacts. In May and June, 2009, WWP complained several times to BLM, alleging that up to 40 head of cattle were trespassing on the Spud Creek Allotment.

¹ The second decision approved Mr. Baker's application for TNR use on the Spud Creek Allotment, but the Appellants later withdrew their appeal of that decision when BLM indicated that it was not going to implement it.

On June 15, 2009, BLM responded that it had confirmed only 3 head in trespass, and 8 more near the Forest Service boundary. BLM also confirmed its position that the range on the Allotments was in good condition and suitable for resumed grazing.

On May 27, 2009, in response to an email from WWP, BLM wrote Valley Sun to request that it provide, within 30 days, a maintenance schedule for range improvements on the Allotments. BLM warned that failure to maintain the range improvements may cause BLM to take action against Valley Sun's permit. Counsel for Valley Sun and WWP responded in a letter dated June 25, 2009, to the effect that numerous water developments were beyond repair because of complete dilapidation or lack of water at the locations and that any rebuilding would require NEPA compliance. The Appellants requested a joint field visit with BLM to establish a common understanding concerning current conditions of the improvements and what maintenance may be necessary or appropriate. BLM did not respond to this letter.

During this period as well, the U.S. Attorney's Office investigated allegations and issued citations to Mr. Marvel and Mr. Younger alleging they had knowingly made false statements on grazing applications to BLM. In February 2010, Mr. Marvel and Mr. Younger resolved these charges by agreeing to a collateral forfeiture in the amount of \$250. However, according to Appellants' statement of facts, those two individuals have always disputed any allegations of false statements, and expressly denied the allegations or any admission of guilt in the notice of payment of the forfeiture.

On January 29, 2010, BLM issued its proposed decision to cancel Valley Sun's grazing permit. Valley Sun and WWP filed a combined protest of the proposed decision. BLM issued its Final Decision on March 26, 2010, adopting the action in the proposed decision. The Final Decision canceled Valley Sun's permit for three reasons. First, pursuant to 43 C.F.R. § 4110.2-1(d), BLM asserted that Valley Sun had lost control of the base property by assigning management responsibilities for the property to WWP. Second, BLM alleged that Valley Sun had failed to maintain range improvements as required by 43 C.F.R. §§ 4120.3-1 and 4140.1(a)(5). Third, the Final Decision alleged that Valley Sun had knowingly or willfully made false statements on grazing applications in violation of 43 C.F.R. § 4140.1(b)(8).

Valley Sun filed its Appeal, Statement of Reasons, and Petition for Stay on April 29, 2010, in which it argues that none of BLM's rationales for cancellation of its permit are valid. BLM filed a response in opposition to the petition for a stay on May 12, 2010. Pursuant to leave granted, Appellants filed a reply on May 28, 2010.

Discussion

To prevail on a petition for a stay of a grazing decision, a petitioner must show, in accordance with 43 C.F.R. § 4.471(c), sufficient justification based on the relative harm to the parties if the stay is granted or denied, the likelihood of petitioner'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. As the party seeking the stay, the petitioner bears the burden of demonstrating that a stay is warranted under each of the regulatory criteria. *See* 43 C.F.R. § 4.471(d); *Oregon Natural Resources Council*, 148 IBLA 186, 188 (1993).

To ultimately achieve success on the merits, an appellant must meet the burden of demonstrating, by a preponderance of the evidence, that a BLM final grazing decision is unreasonable or does not substantially comply with the provisions of the grazing regulations found at 43 C.F.R. 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).

However, the Interior Board of Land Appeals has also formulated a balancing approach in considering a petition for a stay of a BLM grazing decision.

In balancing the likelihood of [a petitioner's] success [on the merits] against the potential consequences of a stay on the other parties it has been held that "it will ordinarily be enough that the [petitioner] 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 discussed below, I find that WWP has met its burden to demonstrate that a stay of the 2010 Final Decision is warranted, pending the ultimate decision on the merits of the appeal.

- Relative Harm to the Parties

Valley Sun alleges that it would be harmed if a stay is not granted due to financial loss in the value of the base property, and environmental harm to the Allotments if Valley Sun's permit is cancelled and the Allotments are opened to grazing by other ranchers. BLM claims it would be harmed by a stay since it could not collect annual grazing fees, and it would lose the flexibility to allow neighboring ranchers to make grazing use of the Allotments. For the reasons given below, the balance of these harms favors granting a stay.

Although the amount and timing of the harm is unclear, the parties agree that a federal land grazing permit does have financial value, and enhances the value of the base property to which it is attached. Valley Sun submitted evidence in the form of an appraisal, and a citation to literature concerning the value of a grazing permit. Thus, Valley Sun would suffer some economic injury if its permit is cancelled.

The chief issue raised in the appeal of the 2009 Final Decision concerns whether or not the condition of the range on the Allotments is now suitable to re-open them for grazing. The Appellants contend that cancelling its permit and resumed grazing will cause irreparable environmental harm, due particularly to the steepness of the land and the likelihood of increased erosion and sedimentation that would adversely affect the habitat for endangered salmon. Valley Sun has supported this argument with an affidavit by a sedimentation geologist, Don Clarke. While the Appellants' likelihood of succeeding on this issue is addressed below, such harm would be potentially quite serious or irreparable if Appellants are ultimately determined to be correct.

BLM's claimed harms from granting a stay, on the other hand, are highly speculative, unsupported, and insubstantial. Even if the Allotments were opened to use of their full preferences, the total annual grazing fees BLM could collect, for Valley Sun's full authorization of 375 AUMs, would be a bit over \$500. As pointed

out by Appellants, this amount would be far offset by the increased costs of management on those Allotments, including monitoring, maintenance or reconstructing range improvements, and NEPA compliance. BLM's claim of loss of management flexibility is also dubious since there is no indication in the record of any other rancher seeking to graze the Allotments in the foreseeable future. Any resumed grazing use would first require the rehabilitation of range improvements. In addition, this reason raises the question of why such flexibility is needed when those other allotments are supposed to be managed within their own terms and conditions in accord with the regulations to maintain or make significant progress towards meeting the standards for rangeland health.

BLM has approved or allowed non-use of Valley Sun's grazing permit since 2001. There is no apparent harm shown from continuing such non-use during the pendency of this proceeding, while there is potential harm in allowing the Final Decision to go into immediate effect. The balance of relative harms favors granting a stay of the Final Decision.

- Likelihood of Irreparable Harm

As discussed above, if Appellants are correct in their contentions, the harm from cancellation of the Valley Sun grazing permit could be irreparable – both financially and environmentally. While it remains to be seen if or to what extent Appellants' positions are vindicated through the hearing process, any reasonable chance of incurring such irreparable harm militates in favor of maintaining the status quo and granting a stay of the Final Decision. In considering whether to enjoin action that may cause environmental harm, the Supreme Court has stated:

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. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Production Co. v. Village of Gambel, 480 U.S. 531, 545 (1987). Appellants have shown that environmental harm of an irreparable nature is sufficiently likely to justify staying the Final Decision.

- Likelihood of Success on the Merits

The “likelihood of success” standard for granting a stay does not require that the Administrative Law Judge handicap at this stage the ultimate outcome of the appeal after hearing. That would not be possible where the actual evidence, subject to cross-examination, corroboration, rebuttal, and analysis, has yet to be offered. This point is recognized in the Board’s adoption of the principle cited above that the likelihood of a petitioner’s success on the merits is judged by whether the party 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, supra*, 153 IBLA 379, 388 (2000). The Appellants here have met that standard with respect to the four issues or rationales identified by BLM as the bases for denying conservation non-use and cancelling Valley Sun’s grazing permit.

— Suitability of Allotments for Grazing

Valley Sun’s appeal of the 2009 Final Decision denying its application for conservation non-use was primarily based on a disputed factual issue concerning the rangeland health of the Allotments and their suitability for grazing. BLM denied the application on the basis that its RHAs and inspections showed that range conditions were suitable for resumed grazing, which should be implemented pursuant to the Taylor Grazing Act. WWP opposed that position, contending that the Allotments remained in a deteriorated and vulnerable condition, rendering them still unsuitable for grazing. As mentioned above, WWP provided an affidavit by a geologist that concluded that the nature of the soils and watercourses on the Spud Creek Allotment, combined with the impacts of trespassing cattle, rendered at least that Allotment unsuitable for resumed grazing. WWP also submitted photographs and other evidentiary material in support of its position. The issue to be determined would thus involve finding the facts concerning conditions on the ground, in light of the Taylor Grazing Act and other applicable laws.

While the ultimate facts and their legal interpretation remain to be determined, Appellants have raised questions going to the merits concerning whether the Allotments should be opened to grazing that are sufficiently serious,

substantial, difficult, and doubtful, to warrant more deliberate investigation through litigation.²

– Loss of Control of Base Property

The next issue raised in these appeals, BLM's first rationale in the 2010 Final Decision, concerns BLM's charge that the permittee, Valley Sun, has lost ownership or control of the base property. BLM alleges that, under § 4110.2-1(d), such loss of control has already operated to terminate Valley Sun's grazing permit. Without analyzing the 2000 and 2007 Management Agreements in depth at this point, there appears little reason to doubt Appellants' interpretation that Valley Sun retains control and possession of the base property, with WWP acting as a ranch manager on behalf of Valley Sun. This is supported by the language of the agreements quoted above in these rulings (p. 2-3), as well as by the parties' course of conduct in which Gordon Younger, on behalf of Valley Sun, as well as Jon Marvel, on behalf of WWP and Valley Sun, both took active roles in dealing with BLM. Valley Sun has thus shown a likelihood of success on this issue to the extent that it may not merit much, if any, further deliberative investigation.

– Failure to Maintain Range Improvements

The next issue is raised by BLM's second rationale in the 2010 Final Decision, which charges Valley Sun with failing to maintain range improvements as required by 43 C.F.R. §§ 4120.3-1 and 4140.1(a)(5). In its appeal, Valley Sun alleges that most of the water developments and other range improvements were in disrepair when it acquired the permit, and that they are now largely not capable of maintenance due to their state of deterioration and lack of water supply. Some springs and water developments have apparently run dry as a result of a 1983 earthquake. BLM points out that Valley Sun did not provide a maintenance schedule for the range improvements when requested in 2009. Valley Sun asserts it has not refused to maintain the improvements, but responded with an invitation to BLM to tour the

² In issuing the 2010 Final Decision, BLM apparently acted before Valley Sun filed a grazing application for the 2010 season, perhaps raising again the question of whether the 2009 Final Decision may be moot. Valley Sun did not actually have a chance to apply for conservation non-use in 2010, so BLM did not actually again deny such an application. This issue may be raised and addressed by the parties in a pre-hearing conference.

Allotments to determine what maintenance on which improvements could practicably be accomplished. BLM has not disputed the Appellants' proposition that most of the water developments are not capable of repair, with the one possible exception of the trough at the LMB Spring. The administrative record at this time does not include the range improvement cooperative agreement or any other clear indication of which other range improvements are at issue.

In these circumstances, Valley Sun has shown a sufficient likelihood of success to grant a stay the Final Decision cancelling Valley Sun's permit. Due to changed conditions, the original range improvement cooperative agreement, which is not even in the record, may no longer be operative to at least some extent. BLM does not dispute that at least some of the water developments are incapable of maintenance or repair. In its response to BLM's request for a maintenance schedule Valley Sun did not "refuse" to conduct the maintenance, as prohibited by 43 C.F.R. § 4140.1(a)(5), but requested a meeting and further clarification from BLM. It is thus not clear on this record that Valley Sun violated the applicable regulations.

Even if Valley Sun may have technically not maintained range improvements, cancellation of its permit seems a particularly harsh sanction when Valley Sun has offered to perform appropriate maintenance once its duties are clarified. Under 43 C.F.R. § 4170.1-1(a), BLM has discretion to impose lesser sanctions such as suspension, in addition to cancellation of a permit for violations of the grazing regulations. In determining the proper sanction, BLM should consider any mitigating circumstances. *Eldon Brinkerhoff*, 24 IBLA 324, 336, 83 I.D. 185, 189-90 (1976). The ultimate objective of imposing a sanction is to reform a permittee's grazing practices. *Baltzor Cattle Co. v. BLM*, 141 IBLA 10, 24 (1997); *Wayne D. Klump v. BLM*, 130 IBLA 119, 145 (1994). The Board has refused to impose the most severe penalties (*i.e.*, cancellation) when it has not been shown that a less severe penalty will not be adequate to reform the permittee's practices. *Id.* (citing *Holland Livestock Ranch v. United States*, 588 F. Supp. 943, 949 (D. Nev. 1984); *Alton Morrell & Sons*, 72 I.D. 100, 110 (1965)). "Indeed, cancellation should be invoked, in most cases, only when 'lesser sanctions have proven to be of no effect.'" *Klump*, 130 IBLA at 145 (quoting *Rodney Rolfe*, 25 IBLA at 336, 83 I.D. at 272).

Under these principles, Appellants have shown sufficient likelihood of success on the merits of the validity of the BLM's rationale for cancelling their

permit for failure to maintain range improvements. With regard to this issue, Appellants have raised questions so serious, substantial, difficult, and doubtful, as to be worthy of more deliberative investigation through litigation.

– False Statements in Grazing Applications

The Final Decision alleges WWP violated 43 C.F.R. § 4140.1(b)(8) by “knowingly and willingly making a false statement or representation in . . . grazing applications.” BLM’s rationale here is focused on the two grazing applications, in 2006 and 2007, in which WWP and Valley Sun indicated they were in the process of acquiring livestock, while still requesting non-use for those years. Proof of knowingly and willingly making false statements may be a difficult proposition, since BLM would have to essentially show what was in the minds of Messrs. Younger and Marvel when they made the subject statements. Those individuals have adamantly and consistently denied that their statements were false. BLM contends their intent can be shown by their action, or lack of action in acquiring any livestock to graze the Allotments, as well as by various other statements made by WWP members on its website and in newspaper article quotations. WWP responds that those statements by WWP members outside the grazing application process are irrelevant and not even necessarily contradictory of the statements on the grazing applications. Also, BLM did not raise the issue of alleged false statements until 2010, years after they were made.

The parties have thus outlined a disputed issue of fact, in which Appellants would appear to have some advantage since Mr. Marvel and Mr. Younger will likely testify on their own behalf.³ While in that event their credibility may be at issue, we have yet to hear what they have to say in the crucible of the hearing. The issue of whether Valley Sun knowingly made false statements in grazing applications is clearly disputed by the parties. In these circumstances, Appellants have again, at the least, raised questions going to the merits on whether Valley Sun made false statements, so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and for more deliberative investigation.

³ Of course, depending on trial strategy, it is possible that Messrs. Marvel and Younger will not testify. A related procedural matter to be addressed in a pre-hearing conference is the appropriate order of proof to be followed in this case, pursuant to 43 C.F.R. § 4.476(b).

– Public Interest

BLM asserts the public interest would be served by denying a stay so the Allotments could be opened to use by other ranchers. However, as discussed above (in relation to relative harm), there does not appear to be any realistic or immediate interest in such use by other ranchers, who are supposed to be grazing their own allotment within their respective permits' terms and conditions. In any event, generally, the public interest favors maintaining the status quo until the merits of a serious controversy can be fully considered. *Valdez v. Applegate*, 616 F.2d 570, 572-73 (10th Cir. 1980). This principle applies to the instant case.

Conclusion and Order

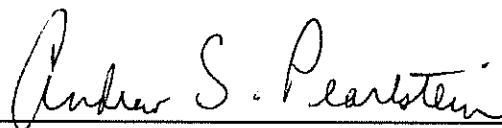
For the reasons given above, Appellants' petition for a stay is granted.

Further Proceedings

My office will contact the parties shortly to schedule a pre-hearing conference call to discuss the schedule and location for the hearing, determining the issues for hearing, discovery, and other pre-hearing and hearing procedures.

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.



Andrew S. Pearlstein
Administrative Law Judge

See page 17 for distribution.