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September 17, 2014

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Administrative Law Judge

Subject: *Julian Tomera Ranches, Inc., et al.*, NV0-6-14-03.

18 page(s) to follow excluding this cover.

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United States Department of the Interior

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September 17, 2014

ORDER

JULIAN TOMERA RANCHES, INC.,)	NV-06-14-03
BATTLE MOUNTAIN DIVISION,)	
CHIARA RANCH, DANIEL E. and)	Appeal from Field Managers Final
EDDYANN U. FILIPPINI, and HENRY)	Decision dated August 22, 2014,
FILIPPINI, JR.,)	involving the Argenta Allotment,
)	Mount Lewis Field Office, Nevada
Appellants)	
)	
v.)	
)	
BUREAU OF LAND MANAGEMENT,)	
)	
Respondent)	

Stay Petition Denied;

Motion for Leave to File Reply Denied

I. Summary

The permittees of the Argenta Allotment ("Allotment"), Julian Tomera Ranches, Inc., Battle Mountain Division; Chiara Ranch, Daniel E. & Eddyann U. Filippini; and Henry Filippini, Jr. ("Permittees"), have appealed from and petitioned for a stay of an August 22, 2014 decision issued by the Mount Lewis Field Office ("MLFO"), Battle Mountain District ("BMD"), Bureau of Land Management ("BLM"). The appealed decision, which was placed in immediate full force and effect, temporarily closes nine upper elevation use areas within the Allotment to livestock use because of livestock over utilization during extreme drought conditions. It requires removal of livestock from those areas and reduces the Permittees' authorized use in proportion to the acreage closed.

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BLM filed a response in opposition to the stay petition and the Permittees filed a reply to BLM's response. BLM has filed a motion for leave to file a reply to the Permittees' reply. For the reasons set forth below, the stay petition is denied and consequently BLM's motion for leave to file a reply is also denied.

II. Stay Petition Denied

A. Background

The Allotment contains about 331,520 acres of which approximately 141,689 acres are public lands. Preliminary priority habitat for the Greater Sage-Grouse, which contains all of the important seasonal habitat that sage-grouse require for breeding, brood-rearing, and overwintering, is found in 74% of the Allotment and 81 % of the public lands within the nine use areas closed to grazing by the August 22, 2014 decision.

Within the public lands there are 42 miles of perennial stream, 329 miles of intermittent/ephemeral stream, and 43 springs. Proper Functioning Condition assessments conducted in the Allotment from 2003 to 2013 reveal that only 8% of Lentic and 21 % of Lotic sites on BLM lands in the allotment are at Proper Functioning Condition.

As shown by U.S. Drought Monitor Maps, the Allotment has suffered from severe drought since 2012. From June 2013 to the present, the U.S. Drought Monitor has characterized 100% of the Allotment as falling within the extreme drought category, which is worse than both moderate and severe drought.

As the drought developed, BLM prepared the BMD Drought Management Environmental Assessment ("Drought EA"), BMD Drought Detection and Monitoring Plan, and BMD Drought Management Plan. They were issued in June 2012. BLM contemplated therein that if certain drought triggers were met or exceeded, then drought response actions would be taken. The forage drought triggers are: (1) 25 % utilization of key species in Salt Desert Shrub communities, (2) 30% utilization of key species in Sagebrush Grassland, Pinyon-Juniper Woodland, and Mountain Shrub communities, and 4-inch stubble height of key riparian species.

BLM explained its use and selection of the drought triggers:

Drought afflicted rangelands are unable to support pre-drought stocking levels. Overutilization during drought can negatively impact

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plant health and impair the ability (in the future) to meet, or make significant progress towards fulfillment of, the standards and guidelines of rangeland health. Permitted livestock grazing levels should be conservative so that grazing plans and grazing use levels can be sustained during periods of drought.

The . . . drought response triggers associated with forage are intended to ensuring proper utilization levels of upland and riparian key species In instances where key species referenced in the ESD are absent, key species would be identified using site-specific and/or past monitoring data). Appropriate utilization levels provide adequate residual matter for the maintenance of plant health especially during a drought. The triggers have been organized into three categories; utilization and stubble height triggers by vegetation community, livestock distribution, and plant production/drought stress.

. . . Utilization triggers were developed using the utilization guidelines proved by Holechek et al. (1988). The guidelines provide a range of use associated with rangeland condition. For the purpose of grazing management during times of drought, the BLM has chosen to limit utilization of key species to the lower utilization level. The lower utilization levels are consistent with those suggested for ranges in poor condition. These were chosen due to the reduced vigor and production of range forage plants resulting from drought. . . . Stubble height triggers were developed to ensure adequate residual matter remains to maintain riparian plant communities. Generally, stubble heights of 4 to 6 inches provide effective stream bank protection, prevent sedimentation, and maintain or improve plant communities (USDI 1999-2001).

Drought EA at 5.

BLM monitoring for 2012-13 indicated that drought conditions had resulted in reduced forage and water availability for livestock and wildlife. In both years drought response triggers, including the 4-inch riparian stubble height limit, were exceeded and the Permittees voluntarily agreed to early removal of livestock due to drought and heavy utilization.

In February 2014, monitoring showed that most riparian monitoring locations had exceeded the 4-inch stubble height drought trigger and exhibited signs of

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excessive grazing impacts. Very little residual forage growth was observed throughout the Allotment. Consequently, BLM staff recommended that much of the upper elevation use areas be rested from grazing in 2014 to protect drought-impacted resources and allow for recovery of those resources.

The Permittees agreed to take voluntary nonuse in those areas and to only apply to graze areas that contained residual forage from the previous year. After favorably timed precipitation in the spring of 2014 resulted in near normal grass production, particularly for annuals in certain areas, the Permittees requested permission for immediate turn out of livestock, despite the fact that BLM had approved their applications for voluntary nonuse and that this moisture was not enough to pull the area out of the extreme drought category as indicated by the U.S. Drought Monitor maps for May and June.

Indeed, after conducting monitoring on June 3 and 4, shortly after livestock turnout, BLM concluded in the Argenta Monitoring Summary June 3-4, 2014:

The minimal rain received does not alleviate the prolonged drought or the associated impacts. . . . The amount of precipitation received to date is much less than 75% which according to the Society for Range Management, is considered drought. Monitoring information . . . indicates that riparian and upland vegetation is showing signs of drought stress. The majority of riparian vegetation has reduced growth and vigor and the majority of upland vegetation is prematurely senescing.

....

Riparian Monitoring Conclusion

Monitoring information collected at the riparian areas showed the majority of riparian species close to the four inch stubble height trigger. . . . All sites visited, showed disturbance such as hummocking, bank shearing, head cuts, incised channels, trampling and/or recent grazing. Utilization observed at Mill Creek and The Park resulting in stubble heights below four inches. Woody riparian vegetation species (e.g., willow and rose) were sparse and with little sign of young age classes or new establishment.

To accommodate the Permittees and allow for use of forage that was made available as a result of spring moisture, while still ensuring adequate protection of

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the range during continued drought conditions, BLM agreed to allow grazing use only if the Permittees committed to promptly remove livestock if upland or riparian utilization limits (the drought triggers from the Drought EA) were met or exceeded. The Permittees signed an agreement in May 2014 ("2014 Agreement") committing to remove livestock within 7 days from any use area where monitoring showed that the uplands utilization or riparian stubble height triggers were met or exceeded.

The agreed utilization limits for primary key species are 30% at upland sites and 4-inch stubble height at riparian sites. For woody riparian species the agreed limit is 30% at the end of the growing season. The 2014 Agreement also sets forth the monitoring methods to be used and contemplates that the Permittees and BLM would coordinate in ensuring that the monitoring sites are adequate. Monitoring sites were selected for each of the 20 use areas established for drought monitoring purposes. This included establishing new sites for use areas where no site previously existed and relocating sites in other use areas.

The agreement was implemented through a June 6, 2014 decision placed into immediate full force and effect. The decision temporarily modified the Permittees' permits for the 2014 grazing season by adding additional terms and conditions contained in the agreement, including removal of livestock within seven days from areas where BLM monitoring demonstrates utilization limits have been met or reached. The Permittees have the option of moving the livestock to other portions of the Allotment if the utilization limits have not been met or exceeded there. Also, the Permittees took voluntary nonuse of 5,273 animal unit months ("AUMs") for 2014, which is approximately 29% of their total authorized active AUMs of 18,125.

BLM conducted monitoring on 31 sites on July 9-11, 2014, and issued an Argenta Monitoring Summary on July 18, 2014 ("July Summary"). Utilization limits were exceeded for nine of the use areas totaling about 92,000 acres: Mill Creek, North Fork, Indian Creek, Trout Creek, Sansinena, Slaven, Maysville North, Maysville South, and Corral Canyon. More specifically, the limit for riparian stubble height was exceeded in eight use areas and for upland utilization in two areas. Livestock were observed congregating on riparian areas and infrequently throughout the uplands. Drought conditions were observed throughout the Allotment and that rangeland conditions exhibited varying degrees of degradation. The July Summary recommended removal of livestock from those nine use areas.

Page 2 of the July Summary further discusses the degraded state of riparian areas:

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Surface water discharge was seasonally low. Several of the perennial streams were dry or nearly dry, suggesting hydrologic drought. Severe streambank trampling was observed at some of the riparian sites and impacts are compounded by livestock concentrating on the remaining water resources and corresponding riparian areas. Livestock have not grazed some of the use areas. As a result, utilization was minimal to absent at these sites.

Native riparian grasses sedges (*Carex spp.*) and rush (*Juncas spp.*) were observed at most designated monitoring areas (DMAs), their relative abundance was too low for accurate statistical estimates of stubble height, nor to maintain channel stability. Therefore, it was often necessary to measure early seral and shallow rooted species such as red top (*Agrostis stolonifera*) and Kentucky bluegrass (*Poa pratensis*) (see Argenta Allotment monitoring plant species list). This shift towards poor stabilizing, early seral plants are common in highly disturbed riparian systems and were observed through-out the allotment. Aside from two use areas, livestock have focused on the herbaceous plants. Further focus on herbaceous plants may be especially pronounced, as the overwhelming majority of upland plants have already senesced. During the heat of the summer, when the overwhelming majority of livestock tend to congregate at the riparian areas, the additional trampling is expected to have further adverse impacts on the riparian areas.

Consequently, BLM notified the Permittees on July 23, 2014 that the utilization limits had been exceeded in those nine areas and that livestock should be removed therefrom and placed in other parts of the Allotment by July 30, 2014. The Permittees' counsel responded, claiming that (1) BLM lacks authority to require removal of livestock from areas where drought triggers have been met; (2) that BLM's monitoring protocols and monitoring locations were not proper; and (3) that there are less onerous alternatives to removing livestock. The Permittees gave no initial indication to BLM that they intended to comply with the directive to relocate their cattle but at some point began relocating them. During an August 1, 2014 meeting, BLM explained that livestock needed to be removed from the identified use areas and that proposals for electric fencing or other actions would require time to process and were unlikely to be viable options for the 2014 grazing season.¹

¹ Meanwhile, a U.S. Drought Monitor Map dated August 5, 2014 showed that the Allotment was still suffering from extreme drought.

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In its August 22, 2014 decision, BLM similarly noted:

On August 20, 2014, the MLFO received a letter from permittees' counsel proposing numerous temporary electric fencing projects, as well as a season of use change for the Sansinena Use Area, to mitigate grazing effects to riparian areas due to the drought. Before BLM could act on these proposals, BLM would need to conduct a public decision-making process under 43 C.F.R. §§ 4160.1-4160.3, and to comply with NEPA and any other applicable statutory or regulatory requirements. These proposals therefore do not provide a mechanism for implementing immediate or timely protection of the nine use areas.

On August 7 and 8, 2014, BLM conducted removal compliance inspections and found 326 cattle still remaining in eight of the nine use areas. Cattle found were generally located near roads and in other areas that are easy to access. BLM estimated that the remaining cattle could be removed by the permittees, with each only using one group of cowboys to gather each area sequentially, as follows:

Permittee	Days to Remove
Julian Tomera Ranches	6
Filippinis	3

In their mid-August filings the Permittees acknowledged that about 30% of their cattle (approximately 630 head) remain within the nine use areas.

After BLM sought to confirm its jurisdiction to require removal of the livestock, the undersigned issued an August 13, 2014 Order to Show Cause Why BLM Should Not Be Authorized to Issue a New, Emergency Full Force and Effect Decision closing those nine areas to grazing. The Order notes that BLM has proven that those areas are suffering severe drought and that they need immediate protection. BLM eventually moved to partially vacate and remand the June 6, 2014 decision so that it could issue a new decision closing those nine areas to livestock grazing. That motion was granted by Order dated August 18, 2014, noting that the July Summary shows that extreme drought conditions exist justifying closure of those nine use areas pursuant to 43 C.F.R. § 4110.3-3(b).

On August 22, 2014, BLM issued a new decision, placing the decision into immediate full force and effect pursuant to the emergency closure provisions of 43 C.F.R. § 4110.3-3(b) where the public lands require immediate protection due to

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drought. The decision temporarily closes the nine use areas to livestock grazing "to provide immediate protection of resources due to extreme drought conditions."

The following seven use areas will be closed for the duration of the drought, plus one growing season following the cessation of the drought as documented by the U.S. Drought Monitor: Corral Canyon, Indian Creek, Maysville North, Maysville South, Mill Creek, North Fork, and Trout Creek. The other two use areas (Slaven and Sansinena), which have large areas dominated by invasive annual grasses, will be closed for the remainder of the 2014 grazing season (which runs from 3/11/14 to 2/28/15) and thereafter be available for grazing use solely from March 15 to May 15, annually (to allow spring grazing of cheatgrass) for the duration of the drought plus one growing season following the cessation of the drought. The final decision also temporarily reduces the Permittees' authorized use in proportion to the amount of acreage closed to grazing.

BLM reasoned in the Final Decision:

As identified by the U.S. Drought Monitor, severe and extreme drought conditions have persisted since 2012 in the Argenta Allotment, leading to reduced plant growth and vigor. Current drought conditions have been compounded by the previous and current years' lack of appropriate livestock distribution on the Argenta Allotment (i.e., limited upland forage and available water led to increased concentration of livestock in critical riparian areas). This has resulted in the drought triggers identified in the Drought EA being exceeded in many areas of the Argenta Allotment. BLM's monitoring documented over-utilization by livestock during the 2012, 2013 and 2014 grazing seasons, further limiting the area's ability to recover from on-going extreme drought conditions. Resource impacts of primary concern are excessive grazing utilization of the riparian areas in the Argenta Allotment, which have exceeded the stubble height triggers identified in the Drought EA as necessary to protect the riparian areas impacted by drought (previous monitoring reports available upon request). 2014 spring precipitation was favorably timed but limited; in addition voluntary deferment of grazing from 3/1/2014-5/23/2014 (within the growing season) occurred in much of the Argenta Allotment. This led to the June 6, 2014, full force and effect drought decision, allowing the permittees to graze subject to the term and condition that they would remove livestock within seven days of reaching riparian or upland drought triggers in a given use area. The

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most recent monitoring completed July 9-11, 2014, revealed that nine of the twenty use areas in the Argenta Allotment have exceeded the drought triggers beyond which continued grazing jeopardizes vegetative and riparian health. Furthermore, compliance inspections on August 7-8, 2014 showed that cattle were still grazing in eight out of the nine use areas well after the seven days allowed for removal. The permittees' failure to remove all livestock from the use areas where drought triggers were exceeded and where extreme drought and overgrazing in prior years puts public land resources at risk of continued and potentially irreversible degradation has resulted in the need to take additional action to ensure that livestock grazing on the Argenta Allotment does not continue to degrade resources during the ongoing drought. BLM has determined that issuing this full force and effect decision is necessary to provide immediate protection of public land resources in the Argenta Allotment from further degradation.

....

Riparian areas comprise only a small portion of the landscape, but are among the most ecologically productive and diverse of all terrestrial habitats, and the influence of moving water within stream riparian zones often results in rapid and dynamic habitat changes (Naiman et al. 1993). Unfortunately, the disturbance and successional patterns of riparian areas are highly vulnerable (Groeneveld and Or 1994, Busch and Scott 1995).

Riparian areas are especially sensitive to livestock grazing during drought, because: 1) as water levels decline, surface waters are reduced and cattle tend to concentrate around the remaining resources, 2) the magnitude and duration of livestock grazing on riparian plants is increased because the upland plants dry out earlier in the season, but the riparian plants remain palatable and attract cattle, 3) high temperatures cause livestock to seek refuge and concentrate in the cooler, shadier riparian locations, and 4) reduced soil moisture in riparian areas can stress riparian plants and decrease their resilience to grazing. Because riparian health and stability is highly dependent on the presence of vigorous, diverse and deep rooted plant communities, preventing over-utilization is paramount during drought.

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In riparian ecosystems, stubble height is appropriate as an annual monitoring tool or indicator for adaptive management. Stubble height has been shown to be related to two important areas of concern for riparian health: 1) the effect of grazing on the physiological health of the individual plant, and 2) the ability of the vegetation to provide streambank protection and to filter out and trap sediment from overbank flows.

Generally, a minimum of four inches of stubble is recommended in riparian areas to capture sediment, build floodplains, protect stream banks and shorelines, reduce consumption of woody plants, retain water, dissipate flood energy and ensure sufficient biomass to improve plant health and vigor (Clary and Leininger 2000). Continued drought conditions, compounded by repeated overgrazing by livestock, leads to accelerated deterioration of rangeland health and associated wildlife habitat. Continued over-utilization of drought-stressed resources by livestock will impede or prevent the recovery of vegetation in these areas following drought and cause erosion thereby accelerating nonfunctional riparian condition.

....

The seven use areas that will remain closed to livestock grazing during drought plus one growing season have large areas with riparian resources and intact native shrub communities. These use areas provide extensive areas of sagebrush categorized as Greater Sage-Grouse Preliminary Priority Habitat (PPH). On March 23, 2010, the US Fish and Wildlife Service (USFWS) made a "warranted but precluded from listing finding" for the Greater Sage-Grouse (50 CFR Volume 75, No. 55). As a result, all sage-grouse populations in Nevada, except the Bi-state population along the Nevada-California border, are classified as Candidate Species. Currently, the USFWS is preparing a decision on whether sage-grouse should be listed as a Threatened or Endangered species. For the BLM, conservation management of sage-grouse is critically important. Policies and procedures are being developed by the BLM to demonstrate that measures are in place adequate to protect sage-grouse populations for the long-term. BLM Washington Office Instruction Memoranda (IMs) 2012-044 and 2012-043 provide direction on managing sage-grouse PPH and preliminary general habitat (PGH). Per 1M 2012-043, the BLM instructs managers to manage habitats to

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maintain, enhance, or restore conditions that meet sage-grouse life history needs. Sage-grouse telemetry and occurrence data indicate that the most important sage-grouse habitat in the Argenta Allotment exists at higher elevations sites that contain sagebrush cover and riparian areas. The majority of the priority sage-grouse habitat in the Argenta Allotment lies within the seven use areas designated for complete temporary closure (i.e., Indian Creek, Mill Creek, North Fork of Mill Creek, Trout Creek, Corral Canyon, Maysville South, and Maysville North). Riparian areas are critical to sage-grouse during brood-rearing because young birds depend on riparian forbs and insects for nutritional development (Johnson and Boyce 1990; Thompson et al. 2006). In Nevada, the value of riparian areas is greatly disproportionate to their geographic extent, and the occurrence of even small areas with perennial and intermittent streams is critical to sage-grouse population viability (Atamian 2010). The importance of these small riparian areas is elevated during drought years when wetland complexes may have more limited value because of low food availability, ultimately causing low recruitment (Aldridge 2000). Appropriate management of these riparian areas, therefore, is key to the conservation of sage-grouse populations. . . .

The remaining use areas (Slaven and Sansinena), which have large areas dominated by invasive annual grasses, will have a modified season of use after the 2014 grazing season closure. The purpose for the modified season of use is to allow targeted grazing in areas that are dominated by annual grasses (such as cheatgrass), a management tool identified in the Drought EA to alleviate grazing pressure on other areas that are dominated by native species. Additionally, grazing cheatgrass prior to seed maturity can reduce levels of cheatgrass and grazing after seed maturity is less effective (Mosley and Roselle 2006). Limited spring grazing from 3/15 to 5/15 is consistent with these guidelines.

BLM is required pursuant to the Fundamentals of Rangeland Health at 43 CFR §4180 to manage livestock grazing consistent with the land health standards and guidelines. These standards and guidelines are identified in Appendix C of the "Bureau of Land Management Standard and Guidelines for Nevada" (BLM, 1997). These Standards and Guidelines are: 1) Upland soils exhibit infiltration and permeability rates that are appropriate to soil type, climate and

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landform. 2) Riparian and wetland areas exhibit a properly functioning condition and achieve state water quality criteria. 3) Habitats exhibit a healthy, productive, and diverse population of native and or desirable plant species, appropriate to the site characteristics, to provide suitable feed, water, cover and living space for animal species and maintain ecological processes. Habitat conditions meet the lifecycle requirements of threatened and endangered species. This decision is consistent with meeting these requirements during extreme drought.

The MLFO is issuing this Full Force and Effect Decision, in accordance with 43 CFR §4110.3-3(b) which provides that the authorized officer may close allotments or portions of allotments to grazing by any kind of livestock or to modify authorized grazing use when it determines that soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought. This Decision is effective upon issuance pursuant to 43 CFR §§ 4110.3-3(b) and 4160.3(f) and is in accordance with BLM Nevada drought policy (NV Handbook H-1730-1, WO 1M 2013-094). The need to take immediate action to protect public land resources from degradation as a result of continuing extreme drought conditions and overgrazing is based on monitoring data BLM collected July 9-11, 2014. The field data BLM collected shows that the drought triggers have been exceeded on public lands in nine use areas in the Argenta Allotment.

On August 29, 2014, BLM conducted a compliance inspection and found 167 head of cattle owned by the Permittees remaining in the closed areas. Most (147) were owned by Julian Tomera Ranches Inc.

B. Discussion

To prevail on a stay petition, the petitioner must show, in accordance with 43 C.F.R. § 4.471(c), sufficient justification based on four criteria:

- (1) the relative harm to the parties if the stay is granted or denied,
- (2) the likelihood of the petitioner's success on the merits,
- (3) the likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) whether the public interest favors the granting of 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); *W. Wesley Wallace*, 156 IBLA

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277, 278 (2002); *Oregon Natural Resources Council*, 148 IBLA 186, 188 (1999). Based upon a preliminary review of the record and pleadings, and as more fully explained below, the Permittees' stay petition must be denied because a stay would afford them no relief or, in the alternative, because they have not established that the balance of harms to the parties favors a stay or that the public interest favors granting a stay.

1. No Effective Relief

If a stay were granted, grazing would continue at the level of use authorized by the permits in existence prior to issuance of BLM's decision, *see* 43 C.F.R. § 4160.3(d) (2005).² This would include the drought trigger limits on use imposed by the June 6, 2014 decision. That decision specifically states to the Permittees that it "temporarily modifies the terms and conditions of your permit for the 2014 grazing year" Because those limits have been reached for the nine use areas and the June 6, 2014 decision was not stayed, the Permittees were obligated under that decision to remove their livestock within 7 days of BLM notification of reaching those limits. BLM gave that notification six weeks ago so the Permittees would not be entitled to graze those nine use areas even if an interim stay of the August 22, 2014 decision were granted.

The Permittees argue that the portion of June 6, 2014 decision imposing the drought triggers was vacated by this Office in an August 18, 2014 Order prior to issuance of the August 22 decision and therefore that the permits in existence immediately prior to issuance did not contain the drought trigger terms. This argument ignores the fact that the reason for vacating that portion of the June 6 decision was to allow for remand of jurisdiction over the subject matter to BLM for issuance of the August 22 decision. These events were all part of the process for issuing the new August 22 decision. If the June 6, 2014 decision had not been on appeal, BLM would have simply issued the August 22 decision. The status quo

² 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, implementation of those regulatory amendments has been enjoined. *Western Watersheds Project v. Kraayenbrink, et al.*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd in relevant part*, 632 F.3d 472, (9th Cir. 2011), *cert. denied*, 132 S.Ct. 366 (2011). 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.

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prior to the August 22 decision-issuing process, which a stay is supposed to reinstate, is the permits as modified by the June 6, 2014 decision.

Accordingly, entry of a stay will not afford the Permittees any effective relief. Where issuance of a stay will not result in any effective relief, the appropriate course is to simply decline to enter a stay. *W. Wesley Wallace v. BLM*, 156 IBLA 277, 279 (2002).

2. If Effective Relief is Available

The Permittees argue that BLM breached the 2014 Agreement in numerous respects. The June 6, 2014 decision is based upon that agreement. Assuming, *arguendo*, that these alleged breaches render the livestock removal provisions of the June 6, 2014 decision unenforceable, or that a separate decision was required to implement the removal provisions,³ then the Permittees could be granted the effective relief of continued grazing on the nine use areas if a stay of the August 22, 2014 decision were granted. However, even under this assumption, the Permittees are not entitled to a stay because the balance of harms and public interest do not favor granting a stay.

a. The Balance of Harms

BLM has more than adequately explained why continued grazing in the nine use areas during the drought is likely to lead to further resource degradation, particularly in the riparian areas, and how those areas are vital to wildlife, including the sage-grouse. Indeed, they are vital to livestock grazing as well. Continued damage to these areas is a serious harm to BLM, the public, and even the Permittees' interest in a healthy range, that is not easily rectified.

The Permittees attempt to minimize the extent of this harm by focusing on the small amount of riparian acreage in the nine use areas in comparison to the total acreage for those areas. This simplistic attempt falls short, as they have not successfully refuted BLM's explanation of the great importance of these areas and how the riparian areas suffer most from grazing under drought conditions both past and present.

³ BLM has provided well-reasoned refutations of the Permittees' claims of breach of the Agreement and of a likelihood of success on the merits of its appeal of the August 22 decision, but they are not further discussed herein in the interest of issuing a prompt ruling on the stay petition.

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Referencing their own monitoring data on forage production, the Permittees contend that there is plenty of forage for continued grazing as a result of the spring rains. BLM persuasively counters that while there may be pockets of abundant forage, this is largely because such forage occurs in areas that experience under-use or nonuse by livestock, such as steep hillsides, areas remote from water, or where there are fewer palatable or desirable plant species for livestock to consume. Also, there is an overall lack of grass within the interspace of the sagebrush, with many grasses found in the armored portions of the shrubs where they are unavailable for livestock.

Furthermore, the Permittees assumed 50% utilization across every single acre of each use area, when all areas cannot be treated equally and 50% utilization is too high during drought. Finally, there are other considerations dictating closure, including that the utilization and stubble height triggers have already been met or exceeded in all the use areas; that the spring rains were not enough to eliminate the extreme drought conditions, as evidenced by the U.S. Drought Monitor Maps and BLM monitoring observations of range conditions; and that the riparian areas are suffering badly in particular.

Indeed, the U.S. Drought Monitor is globally considered the current state-of-the-art drought monitoring tool. While the spring rains reduced meteorological drought, they had much less impact on vegetative drought and almost no impact on hydrological drought. The Allotment is still suffering from extreme drought.

BLM confirmed that drought conditions existed through visible signs observed by its experts, including reduced shoot and leaf growth of perennial grasses and reduced seed head development. Shallow subsurface and surface waters are also extremely low. Deep and dense-rooted, soil-stabilizing riparian plants are being replaced by shallow and fine rooted plants, reducing stream channel stability. Concentration of livestock in riparian areas is evidenced by trampling, degradation, soil compaction, bare ground, and erosion.

The Permittees' expert also repeatedly states that the removal of livestock will not remedy the range degradation, but this does not equate to saying that removal of the livestock will not prevent further degradation from livestock grazing. The stated rationale for the August 22, 2014 decision is, at least in part, to prevent further degradation and the Permittees have not shown that BLM's concern for likely additional degradation is unwarranted.

The Permittees argue that BLM has not shown that current grazing use is

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causing any "disturbance" or that continued grazing will result in immediate and irreparable harm.⁴ In fact, BLM has explained in detail:

- how the range is suffering from drought conditions;
- how the drought triggers were selected to prevent degradation likely to occur once the triggers are met or exceeded, including adverse impact in the ability of vegetation to recover;
- how stubble height is appropriate as an annual monitoring tool or indicator for adaptive management in riparian ecosystems. Stubble height has been shown to be related to two important areas of concern for riparian health: 1) the effect of grazing on the physiological health of the individual plant, and 2) the ability of the vegetation to provide streambank protection and to filter out and trap sediment from overbank flows;
- how the four-inch stubble height trigger is appropriate, especially in drought conditions, to forestall degradation of the range;
- how riparian areas are critically important;
- how riparian areas are especially sensitive to livestock grazing during drought as livestock concentration there increases; and
- how observations and measurements during repeated monitoring confirmed that the conditions throughout the allotment, and particularly the riparian areas, were adversely impacted by excessive grazing utilization during drought.

The likely harm to range resources, particularly riparian areas and sage-grouse, outweighs the harm to the Permittees' livestock operations which may occur. The Permittees have already removed most of their cattle from the closed areas and continued grazing would be detrimental to their own interests in a healthy range. While the Permittees project losses in the hundreds of thousands of dollars from range closure, the balance of harms favors denial of their stay petition under the existing extreme drought conditions.

b. Public Interest

Given that a stay is akin to an injunction, the following principle is germane

⁴ There is no requirement that BLM show that the harm would be immediate and irreparable. Nevertheless, BLM has shown that substantial harm is likely if grazing is allowed to continue, including impairing the ability of the vegetation to recover from over utilization during drought conditions.

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in assessing whether the public interest favors granting a stay: “[g]enerally, the public interest is best served when an injunction is granted in favor of the party suffering the most harm by the denial or grant of the injunction.” *Hodges v. Abraham*, 253 F.Supp.2d 846, 874 (D.S.C. 2002), *aff’d* 300 F.3d 432 (4th Cir. 2002). In the present case, the party who will likely suffer the most harm by a ruling against it on the stay petition is BLM in frustration of its interest in protecting the public lands from degradation.

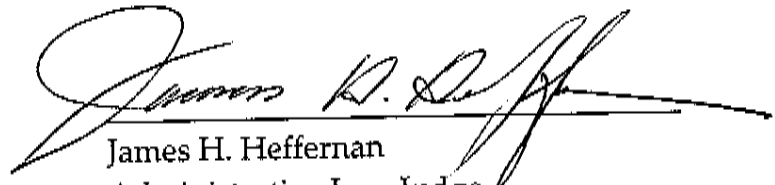
Also, the public has an interest in preventing harm to the public resources caused by livestock grazing during drought which outweighs the threat to the public’s interest in the economic stability of livestock operations during the time it takes to adjudicate the Permittees’ appeal. In summary, the public interest favors denying a stay in this case.

II. Motion for Leave to File Reply Denied

Given that the Permittees’ stay petition is being denied, BLM’s motion for leave to file a reply is moot and therefore is denied.

III. Conclusion

Based upon the foregoing, **THE PERMITTEES’ STAY PETITION AND BLM’S MOTION FOR LEAVE TO FILE A REPLY ARE DENIED.**


James H. Heffernan
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 stay petition denial 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.

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