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UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

Valley Sun, LLC and Western Watersheds Project, Appellants v. Bureau of Land Management, Respondent	ID-_____ Appeal of March 26, 2010 Final Decision By Challis Field Manager Dave Rosenkrance To Cancel Valley Sun, LLC Grazing Permit **APPEAL, STATEMENT OF REASONS, AND PETITION FOR STAY**
Valley Sun, LLC and Western Watersheds Project, Appellants v. Bureau of Land Management, Respondent	ID-330-2009-03 Appeal of May 18, 2009 Final Decision By Challis Field Manager Dave Rosenkrance Denying Conservation Non-Use By Valley Sun, LLC For 2009 Season (Related Case; Motion To Consolidate Pending)

NOTICE OF APPEAL

Appellants Valley Sun, LLC (Valley Sun) and Western Watersheds Project (WWP) hereby appeal the Final Decision dated March 22, 2010 by BLM's Challis Field Manager David Rosenkrance to cancel the 2002 10-year grazing permit held by Valley Sun for the Spud Creek, Bradshaw Basin, and Thompson Creek allotments, located in the BLM's Challis Field Office, Idaho.[1]

STATEMENT OF STANDING

Valley Sun is an Idaho limited liability corporation, which holds the 2002 permit for the Spud Creek, Bradshaw Basin, and Thompson Creek allotments at issue here. Challis Field Manager Dave Rosenkrance issued a Final Decision dated March 22, 2010 to cancel the Valley Sun permit, which is the Final Decision challenged here.

Valley Sun owns the base property for that permit, comprising 432 acres of private land along the East Fork Salmon River, just above its confluence with the main Salmon River outside Clayton, Idaho. Formerly known as the Abatti Ranch, this property is now called the Greenfire Preserve. Valley Sun acquired this property, and its associated water rights and federal permits, in 2000. The Spud Creek allotment is located directly adjacent to the Greenfire Preserve, and lies within both the East Fork Salmon River and main Salmon River watersheds. The other two allotments are a short distance away, within the Salmon River watershed.

Valley Sun will be immediately and irreparably injured if the Final Decision revoking its 2002 permit is not stayed and set aside, including because of the financial loss associated with

[1] Manager Rosenkrance also issued a final decision on May 18, 2009 to deny Valley Sun's application for conservation non-use in 2009, which is under appeal in No. ID-330-2009-03. The parties have agreed to consolidate these appeals because they involve the same permit and overlapping issues; so Appellants are filing an Unopposed Motion to Consolidate herewith.

the cancellation of the permit. In addition, Valley Sun will be irreparably harmed because, if its permit is cancelled, BLM will approve ecologically damaging grazing by other parties on the allotments, harming both Valley Sun's restoration goals and the environment. (*See* Petition for Stay, below).

Western Watersheds Project ("WWP") is an Idaho non-profit organization with over 1200 members that works to protect and restore western watersheds and wildlife through education, public policy initiatives and litigation. WWP's members regularly visit and recreate on the public lands of the East Fork Salmon River and upper Salmon River watersheds, including the Valley Sun allotments at issue here; and they intend to continue to do so. WWP and its members have a keen interest in protection of biodiversity, restoration of damaged public lands, and the protection of important aquatic and terrestrial habitats for native wildlife in this region.

WWP owned Valley Sun, LLC from 2001 to 2007; and has played an active management role on the Greenfire Preserve and associated federal land permits since 2000. The Greenfire Preserve serves as WWP's headquarters; and WWP regularly hosts board meetings, staff retreats, and public functions at the Greenfire Preserve. During these events, WWP staff and members visit the Valley Sun allotments for scientific, educational, recreational, and aesthetic pursuits. WWP members and staff plan to continue to use the Preserve and the BLM allotments regularly and at specific times in the future.

WWP staff and members have suffered injury to their aesthetic, recreational, scientific and other interests due to the destructive livestock grazing that BLM has previously allowed to occur on the allotments in question here, which include damage to native vegetation that is important to many wildlife species; soil loss and erosion; water quality degradation; harm to fisheries habitat; and other such harms. If BLM's Final Decision canceling the Valley Sun

permit is not stayed and set aside, WWP staff and members will experience further irreparable harm as BLM will allow other ranchers in the area to overgraze the allotments and damage fragile resources.

STATEMENT OF REASONS

I. INTRODUCTION AND SUMMARY.

BLM's Final Decision to cancel the Valley Sun permit represents a retaliatory action against one of BLM's most prominent critics over its livestock grazing management. The Final Decision is arbitrary and capricious; violates the BLM grazing regulations, the Spud Creek Allotment Management Plan, and the governing Challis Resource Management Plan; and represents an unconstitutional deprivation of due process and equal protection guarantees. Accordingly, the Final Decision must be reversed and set aside upon appeal.

WWP acquired ownership of Valley Sun, LLC – and hence the Greenfire Preserve – in 2001. Inspection by its staff at that time documented that the federal allotments (BLM and Forest Service) associated with this base property were heavily damaged by prior livestock grazing, with their fences and water projects badly dilapidated and non-functional. WWP repeatedly advised BLM and Forest Service of these problems, and sought – unsuccessfully – their cooperation in conducting site inspections to assess conditions and determine how to improve them.

Notably, both the Spud Creek Allotment Management Plan and the governing Challis Resource Management Plan call for protection and restoration of wildlife habitats that have been damaged by livestock grazing; and the Valley Sun permit likewise mandates that grazing must comply with strict terms and conditions intended to protect listed salmon.

Given the resource concerns about protecting salmon and other fish and wildlife habitat in this area, it is little surprise that, for several years, BLM regularly approved Valley Sun's annual conservation "non-use" applications, which advised that Valley Sun would not graze the BLM allotments in order to improve their resource conditions. Notably, such conservation non-use is expressly allowed under the BLM grazing regulations. 43 C.F.R. § 4130.2(g).

BLM also approved issuance of a renewed 10-year permit to Valley Sun in 2002, which is the permit that BLM now seeks to cancel in the Final Decision challenged here. In approving this permit while at the same authorizing conservation non-use by Valley Sun, BLM at least tacitly acknowledged that past grazing had harmed vegetation, soils, and other resources on the allotments, requiring rest from grazing to improve resource conditions; and BLM never asserted that Valley Sun could not hold the permit because of its conservation activities or relationship with WWP.

BLM thus cannot pretend now to have been somehow misled about how Valley Sun and WWP have sought to protect the public lands and resources of the Valley Sun allotments, including by taking conservation non-use in order to allow recovery of degraded resource conditions there. Indeed, each and every year since obtaining the BLM permit, Valley Sun has advised BLM that it would not be grazing the allotments. And every year through 2008, BLM accepted non-use of the allotments.

BLM's recognition that Valley Sun was benefiting the public lands by resting the allotments from grazing began to change, however, with the arrival of a new district manager, David Rosenkrance, in about 2005. Mr. Rosenkrance has extensive ties to the ranching community in this area; and demonstrated himself to be an aggressive opponent of WWP and its mission. Mr. Rosenkrance has also presided over extensive violations of law in BLM's

management of public lands grazing in the Challis Resource Area. WWP has thus brought numerous federal court cases against Mr. Rosenkrance and BLM for these violations, including under the Endangered Species Act, in recent years.

Mr. Rosenkrance has evidenced his animus toward WWP and Valley Sun in many ways, including by refusing to "consult, cooperate, and coordinate" over management of the Valley Sun allotments; ignoring trespass onto the Spud Creek allotment by other ranchers, even when documented by WWP; working to allow other ranchers to make use of the Spud Creek allotment; and in 2009, denying Valley Sun's conservation non-use application (currently on appeal).

Most recently, Mr. Rosenkrance has apparently conspired with ranching interests to retaliate against WWP and Valley Sun, including by moving to cancel the Valley Sun permit so that other ranchers can obtain grazing privileges on the allotments; and by using the Final Decision here as way of asserting that Valley Sun and WWP made false statements, when in fact Mr. Rosenkrance and BLM know full well there have been no false statements, as will be demonstrated at hearing herein. Moreover, the information currently available to Appellants indicates that Mr. Rosenkrance – or other BLM staff under his direction and control – have even disseminated false and misleading information to livestock interests and the media to attack and defame WWP and Valley Sun, including WWP Executive Director Jon Marvel. Again, discovery and hearing in this matter will flesh out this abuse of power by Mr. Rosenkrance and BLM.

As briefly discussed below, and as will be demonstrated in detail at hearing, the Final Decision to cancel Valley Sun's permit cannot be justified on any of the three grounds cited by Mr. Rosenkrance in his Final Decision.

First, BLM's assertion that the permit should be cancelled because Valley Sun has supposedly "lost control" of the base property – the Greenfire Preserve – is absurd on its face, when BLM knows full well that WWP acts in a management capacity and Valley Sun continues to own and control the base property. BLM routinely deals with ranch managers who are different than property owners, and cannot selectively discriminate against Valley Sun here on this phony rationale.

Second, BLM falsely asserts that the permit must be cancelled because Valley Sun and WWP have supposedly failed to provide BLM with information about how they will maintain water projects on the allotments. In fact, Valley Sun and WWP have repeatedly documented to BLM that these range projects were extremely dilapidated and dysfunctional when Valley Sun acquired them; and repeatedly requested that BLM work with them to determine whether any should be reconstructed (which requires NEPA evaluation). Mr. Rosenkrance selectively ignores all these communications in his Final Decision here; and BLM's refusal to conduct site inspections, meet with Valley Sun and WWP, or even respond to their written letters all demonstrate that the Final Decision violates BLM's duties to consult, cooperate and coordinate under the BLM regulations.

Third, Mr. Rosenkrance's final rationale for canceling the permit – the assertion that Valley Sun and WWP supposedly made false statements in grazing non-use applications – is completely false and further evidence of improper retaliation. Again, Valley Sun advised BLM every year that it would not be grazing the allotments; and BLM is fully aware that WWP has managed the Greenfire Preserve for natural restoration and wildlife purposes since Valley Sun acquired it in 2000. The specific statements that Mr. Rosenkrance alleges were false – which were made in non-use applications submitted in 2006 and 2007 – were in fact truthful (as Mr.

Rosenkrance could have determined if he simply "consulted, cooperated, and coordinated" with Valley Sun, as he was both required and invited to do). In those statements, as in statements made in prior years, the applicants expressly and consistently advised BLM that Valley Sun would not be grazing the allotments.

Moreover, BLM never even responded to these non-use applications, so it cannot claim to have relied on them in any way. Especially fallacious is Mr. Rosenkrance's assertion, in his Final Decision, that Mr. Marvel and Valley Sun's owner, Mr. Gordon Younger, have not contested the allegations of false statements. As will be shown at hearing, Mr. Rosenkrance has known, and knows, full well that BLM's allegations of false statements have been vigorously disputed at all times by Marvel and Younger. Mr. Rosenkrance's misrepresentation of such an incontrovertible fact further demonstrates the erroneous nature of his Final Decision.

The disparity in BLM's treatment of Valley Sun and other permittees is also significant in demonstrating improper discrimination and retaliatory motive here. Similar to Valley Sun, there are many ranchers in the Challis Field Office who have not grazed livestock or maintained range projects for many years on their federal land allotments, without any action by BLM to revoke their permits. These include, for instance, a co-permittee on the Bradshaw Basin allotment, which is part of Valley Sun's 2002 BLM permit at issue here – who did not graze for many years, and apparently did not even file non-use requests with BLM. Yet BLM has <u>not</u> taken action against these ranchers to penalize them for not grazing or maintaining water projects, and certainly has not attempted to revoke their permits.[2]

[2] In the related appeal over BLM's denial of conservation non-use in 2009, *Valley Sun, LLC v. BLM*, ID-330-2009-03, Appellants submitted discovery requests to BLM in January 2010 aimed at getting more information about other such non-use. However, BLM ignored these discovery requests, and failed to provide any discovery responses within the March 2010 deadline established by the Administrative Law Judge. BLM's failure to engage in discovery has thus

In short, the Final Decision is arbitrary and capricious under these and other facts, which will be proven in detail at hearing; and the Final Decision cannot be justified on any of the three rationales cited by BLM, which the evidence will show are false and pretextual reasons motivated by animus toward Appellants. Moreover, the Final Decision itself was adopted in violation of BLM's own grazing regulations and Challis Resource Management Plan; and is an unconstitutional denial of due process and equal protection. All these reasons require that the Final Decision be stayed until the Administrative Law Judge can understand the full facts through hearing, and then set aside following hearing.

II. STATEMENT OF FACTS.

The following Statement of Facts briefly recounts facts supporting Appellants' Statement of Reasons and Petition for Stay. Much of the discussion below references documentation between Valley Sun and BLM that will be in the record, and that is too voluminous to submit with this Statement of Reasons and Petition for Stay. However, a few key documents are submitted herewith (along with the accompanying Declaration of Brian Ertz) to help underscore the facts set forth here; and the full record will be established at hearing, pursuant to the procedures set forth in 43 C.F.R. Part 5 (governing appeals).

In 2000, Valley Sun, LLC acquired the now-Greenfire Preserve, which serves as the base property for the allotments at issue, and executed a management agreement with WWP. In 2001, Western Watersheds Project became the owner of Valley Sun. The permit at issue authorizes grazing on the Spud Creek, Bradshaw Basin, and Thompson Creek allotments.

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impaired Appellants' ability to present that evidence now, and is another reason why a stay should be granted here.

WWP's then-board member, Gene Bray, and other WWP representatives began visiting the allotments and documenting their resource and range project conditions. As detailed in notebooks prepared by Mr. Bray, which are replete with photographs, maps, and other data, the allotments reflected heavy degradation of vegetation, soils, water, and wildlife habitat due to livestock grazing; and fences, water troughs, and pipes were in such decrepit conditions as to be non-functional. Moreover, many springs were dry, apparently due to the impacts of a 1983 earthquake, demonstrating that livestock grazing at authorized levels could not be sustained in light of the lack of available water.

In 2001, Valley Sun executed a Conservation Agreement with WWP under which WWP agreed to assist Valley Sun in restoring the base property. Valley Sun annually sought, and BLM (under then-manager Renee Snyder) granted, non-use for "resource protection" from 2001–2003.

The BLM permit was renewed in 2002, even though Valley Sun had previously sought non-use for conservation purposes. Moreover, the 2002 permit acknowledged that grazing upon the Thompson Creek allotment "may affect" salmon listed under the Endangered Species Act, and thus the permittee must "fully and completely" implement protective measures, including "strict compliance" with a utilization standard. The permit further incorporated all terms and conditions of a 1981 Spud Creek Allotment Management Plan,[3] which in turn contains a series of objectives dedicated entirely to improving the environment on the allotment and reducing livestock impacts. This includes by decreasing siltation and erosion, improving plant

[3] The Spud Creek allotment includes both BLM and Forest Service lands, which have been jointly managed for decades, even though the agencies have not conducted comprehensive or up-to-date NEPA analysis. WWP brought litigation against the Forest Service over its NEPA and other violations, resulting in a settlement agreement requiring new NEPA, which is now underway on the Forest Service allotment. *See WWP v. Montoya*, No. 04-342-BLW (D. Idaho). BLM apparently is not participating in that NEPA process.

density to enhance blue and sage grouse habitat, and improving areas in "poor" and "fair" condition. The 2004–2006 applications likewise requested non-use, as discussed further below.

In 2007, Mr. Younger acquired Valley Sun from WWP, including the BLM grazing permit. On May 14, 2007, Valley Sun wrote BLM and indicated it wished to designate Spud Creek for non-use during the 2007 grazing season. BLM did not respond. On November 1, 2007, BLM wrote to Valley Sun pertaining to NEPA compliance issues, but made no reference to the non-use of the Spud Creek allotment during the 2007 season.

In early May 2008, Valley Sun again requested non-use. By letter dated May 20, 2008, BLM responded stating that it would accept non-use for the 2008 season, but not for conservation purposes. The letter indicated that BLM was in the process of completing a Rangeland Health evaluation of the allotments. At no time prior to May 20th had BLM notified Valley Sun of this process, or invited it to participate. The letter also stated that Valley Sun must be prepared to make substantial grazing use in 2009 or jeopardize its permit.

On June 3, 2008, Valley Sun responded, asking if its consultants could participate in the assessment process. BLM responded on June 20, 2008, stating that while "BLM encourages involvement in managing public land," the data collection for Spud Creek had been completed and the assessment of that data itself was nearing completion. The facts subsequently revealed that BLM is basing its rangeland health determination on data collected several years prior.

On October 6, 2008, BLM mailed a Notice of a Proposed Decision to renew Valley Sun's permit – even though the 2002 permit did not expire until the end of 2012 – along with a Categorical Exclusion Documentation and a Spud Creek allotment Rangeland Health Assessment. Notably, the Proposed Decision did not mention any concerns with Valley Sun's management, such as range project maintenance or alleged false statements about Valley Sun's

grazing intentions. The Spud Creek Assessment also confirmed that "[s]ome springs appeared unable to have enough flow to deliver water to troughs, other springs were dry when assessed."

On October 14, 2008, WWP's representative Debra Ellers faxed and mailed to BLM a brief report (including photos) based on a visit to the Spud Creek allotment. Her photos showed that the fencing surrounding a private inholding in the allotment was completely nonfunctional, allowing livestock from the private land to trespass on the public lands. Her photos showed that the impacts of the trespass included bank shearing on Spud Creek and the trampling of LMB spring. Additional photos of trespass impacts were sent in a report dated October 28, 2008.

On October 15, 2008, BLM abruptly reversed course and sent a Notice of Withdrawal of the Proposed Decision. On October 29, 2008, Debra Ellers telephoned Kevin Lloyd at BLM to try to learn why, and to informally inquire as to BLM's possible response if Valley Sun were to pursue relinquishment in accordance with the Challis RMP's direction on relinquished permits.

BLM responded in a letter of November 6, 2008, in which it mischaracterized Ms. Ellers' informal inquiry as a formal request to pursue such a relinquishment, advising that "BLM cannot however allocate the AUMs to wildlife." BLM also issued an ultimatum requiring, within 15 days, either a relinquishment letter or proof of ownership of cattle.

On November 14, 2008, Valley Sun responded by letter requesting authority for the ultimatum and reminding BLM that it had approved every season of nonuse requested by Valley Sun. Valley Sun also requested a meeting to discuss the status of the Spud Creek permit and attempt to reach common ground without further contested proceedings. BLM responded by letter of December 19, 2008, in which it reiterated the ultimatum, but failed to provide any legal authority—and failed to respond to Valley Sun's request for a meeting.

On April 1, 2009, BLM issued a proposed grazing decision "to deny temporary non-use for Valley Sun, LLC for the 2009 grazing season" – even though Valley Sun had not yet submitted a non-use request. BLM's rationale was that Valley Sun had taken temporary non-use for three consecutive years, 2006–2008, and that BLM regulations "prevent[] the BLM from approving a fourth consecutive year of temporary non-use." It also asserted that "BLM currently has no information to support non-use for conservation purposes."

On the same day, BLM issued a Proposed Decision and environmental assessment ("EA") to grant a temporary non-renewable ("TNR") livestock grazing permit on the Spud Creek allotment to local rancher Richard D. Baker.

On April 15, 2009, Valley Sun submitted its annual application for the 2009 grazing season, requesting "non-use for conservation purposes." It supported its application by reference to Debra Ellers' October 14, 2008 report on allotment conditions, and noted that BLM's data on allotment conditions had only been collected from years *2003 or earlier*. Valley Sun also clarified that it had neither requested nor taken "temporary non-use" in 2007, but instead conservation non-use; and thus had not taken temporary non-use for three consecutive years as alleged in the proposed nonuse decision. Valley Sun and WWP submitted separate protests of the proposed non-use decision.

On May 6, 2009, WWP submitted a report on the condition of range improvements on the Spud Creek allotment. Among other things, the photos showed that the trough at LMB spring was so badly rusted that it needed replacement. WWP also submitted a geological report with the same date prepared by Don Clarke, a sedimentation geologist. The report, titled Watershed Conditions on the Spud Creek Allotment, reviewed the geology of the allotment and concluded that "[t]he combination of friable surfaces, slowly permeable subsoils, low infiltration

rates, steep slopes, salinity and rapid surface runoff makes the area unsuited for the additional stresses of cattle traffic, grazing and browsing." It also noted that the allotment's characteristics "lead towards very efficient delivery of sediment to the East Fork Salmon River and the Salmon River," and that "[s]prings and water courses downstream from springs and Spud Creek downstream from the private inholding are being trampled, heavily browsed and heavily grazed by cattle."

On May 18, 2009, BLM, through Mr. Rosenkrance, issued a Final Decision to deny Valley Sun's non-use request for the 2009 grazing season. BLM noted that "[t]he 2009 grazing season will be the first season of unapproved non-use for Valley Sun, LLC on their three allotments managed by the Challis Field Office." This final decision is now pending on appeal in OHA No. ID-330-2009-03.

Also on May 18, 2009, BLM, through Mr. Rosenkrance, issued a Final Decision and EA, permitting Mr. Baker to graze the Spud Creek allotment in 2009. WWP separately appealed this decision on May 27, 2009. After BLM responded that it was not going to implement the decision after all, WWP voluntarily dismissed the appeal on June 17, 2009.

On May 27, 2009, BLM sent a letter to Valley Sun, requesting a range improvement maintenance schedule within 30 days and stating that "[f]ailure to maintain the range improvements may cause BLM to take action against your permit." The letter attached an assignment of range improvements form listing five projects in the Spud Creek allotment and four in the Bradshaw Basin allotment.

On May 29, 2009, WWP and Lighthawk flew over the Spud Creek allotment, where they observed over 40 head of livestock trespassing on the Joe Jump unit of the allotment. On the

same day, WWP submitted photos and a description of the cattle location to BLM, and requested that BLM investigate and take action against the trespasser.

Valley Sun and WWP also responded to BLM's letter on water developments on June 25, 2009. Exh. A. The letter explained that "numerous water developments are *no longer capable* of serving their purpose, even with maintenance," either because of complete dilapidation or because of the lack of water at their locations. The letter noted that rebuilding any of the projects would require NEPA compliance and determination of financial responsibility. The letter specifically requested a field visit with BLM, "to establish a common understanding of the current conditions of the improvements and what maintenance is necessary or appropriate." BLM never responded to this letter.

Instead, the very next communication from BLM on this topic was a January 29, 2010 Proposed Decision to cancel Valley Sun's grazing permit. Valley Sun and WWP submitted a joint protest on February 15, 2010. BLM issued its Final Decision to cancel the grazing permit, challenged herein, on March 26, 2010.

III. STANDARD OF REVIEW.

A final grazing decision issued by BLM will be set aside upon a showing that it is unreasonable, contrary to law, or does not substantially comply with the provisions of the federal grazing regulations found at 43 C.F.R. Part 4100. *See Wayne Klump v. BLM*, 124 IBLA 176, 182 (1992); *Jennifer J. Walt, Box D Ranch*, 172 IBLA 300, 308 (2007). A grazing adjudication issued by BLM will be regarded as arbitrary, capricious, or inequitable when it is not supported by a rational basis. *Id*.

IV. THE FINAL DECISION VIOLATES THE BLM GRAZING REGULATIONS.

The Final Decision must be reversed on appeal, first, because it violates the BLM grazing regulations in numerous respects, particularly due to how BLM consistently rebuffed Valley Sun's good-faith efforts to work with BLM to achieve the restoration goals set out in BLM's own AMP. The regulations provide that the "authorized officer shall consult, cooperate and coordinate with affected permittees" as well as the interested public, in the issuance of grazing permits, 43 C.F.R. § 4130.2(b); and further "shall provide to affected permittees or lessees . . . an opportunity to review, comment and give input during the preparation of reports that evaluate monitoring and other data that are used as a basis for making decisions to increase or decrease grazing use." *Id*. § 4130.3-3.

BLM routinely disregarded the numerous attempts by Valley Sun to set up meetings and to accompany BLM on monitoring evaluations, as well as the numerous monitoring reports prepared by Valley Sun and WWP regarding resource conditions on the allotments.

Perhaps the most egregious instance of BLM failing to cooperate came following BLM's May 2009 letter demanding a range improvement maintenance schedule. Again, Valley Sun responded in June 2009, explaining that "numerous water developments are *no longer capable* of serving their purpose, even with maintenance—either because of complete dilapidation or because of the lack of water at their locations." Exh. A. It specifically requested a field visit with BLM, "to establish a common understanding of the current conditions of the improvements and what maintenance is necessary or appropriate." It suggested possible dates for a field visit and asked BLM to advise, at its earliest opportunity, what dates were available to conduct such a field visit. Rather than engage in communication and consultation, BLM responded to this

reasonable request by Valley Sun to ascertain the scope of its duties with the decision, months later, to cancel Valley Sun's permit.

Further, BLM's selection of cancellation as the remedy for the alleged violations here further violates the grazing regulations as interpreted by IBLA. The Brinkerhoff test, used to determine penalties in trespass cases, is instructive:

> The Brinkerhoff test provides that a "severe reduction" in grazing privileges (i.e., a permanent loss of privileges or a temporary loss of significant privileges for a period of years) will be imposed in cases involving the following elements: (1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass.

Klump v. BLM, 130 IBLA 119, 136 (1994) (quoting *Eldon Brinkerhoff*, 24 IBLA 324, 337 (1976)). Thus, "cancellation should be invoked, in most cases, only when lesser sanctions have proven to be of no effect.**"** *Klump* at 145 (internal quotation omitted).

This test is instructive because it is applied under the relatively unyielding enforcement provision related to willful trespass, 43 C.F.R. § 4170.1-1(b) (BLM "**shall** suspend [or cancel] the grazing use authorized under a grazing permit, in whole or in part, for repeated willful" trespass violations) (emphasis added). In contrast, the enforcement provision for violations of **other** provisions of the regulations provides that BLM "**may** withhold issuance," "suspend," or "cancel" a grazing permit, "in whole or in part." *Id*. § 4170.1-1(a) (emphasis added). So, if anything, the factors considered in Brinkerhoff should apply with even more force for the less serious violations at issue here.

Application of the Brinkerhoff factors shows that cancellation is wildly out of proportion to the nature of the alleged violations here. The violations were not willful or repeated. The facts here demonstrate that Valley Sun attempted in good faith to work with BLM to restore the

subject allotments, through such actions as applying for nonuse every year (in contrast to many permittees) and promptly responding to all BLM communication. They did not occur over a fairly long period of time. BLM only sent Valley Sun formal notice that it was allegedly in violation of its maintenance responsibilities in May, 2009—less than one year ago. They have not involved a failure to take prompt remedial action upon notification. Valley Sun promptly responded to BLM's notice by requesting a field trip to assess the maintenance responsibilities, which BLM ignored. And no lesser sanctions have been attempted by BLM, so they certainly cannot be said to have proven to be of no effect.

These facts are far less egregious than many cases found by this Board to not warrant cancellation. For example, in *Klump,* the permittee had repeated, willful trespasses; the trespasses "were, for the most part, neither small in numbers nor brief in duration"; he had failed to turn in many required forms; and he had "attempted intimidation" and "plainly failed to recognize BLM's legitimate authority to manage the Federal range." *Klump,* 130 IBLA at 143–44. And yet, the Board held that: "Nevertheless, we will not at this time impose the most severe penalties (i.e., cancellation) where the ultimate aim is to modify Klump's grazing practices, and it has not been shown that a less severe penalty will not be adequate to this end." *Id.* at 145.

Thus, not only did BLM refuse to communicate fairly with Valley Sun and WWP, but the Final Decision does not accurately reflect the facts showing that Valley Sun and WWP have long sought to work out an understanding with BLM about management of the allotments. It is thus arbitrary and unreasonable for BLM to cancel the permit.

V. NONE OF THE RATIONALES STATED IN THE FINAL DECISION ARE VALID.

The Final Decision also must be set aside by the Administrative Law Judge because none of its three stated rationales for canceling the Valley Sun permit is legitimate or has any rational

basis. These stated rationales are: (1) Valley Sun supposedly no longer controls the base property; (2) Valley Sun did not maintain range improvements; and (3) Valley Sun knowingly or willfully made false statements. As explained below, each of these asserted rationales is false and not supported by fact or law, and accordingly the Final Decision must be reversed.

A. VALLEY SUN CONTROLS THE PERMIT AND BASE PROPERTY.

BLM's first rationale in the Final Decision is that "Valley Sun LLC controls neither the permit nor the base property." BLM alleges this violates 43 C.F.R. § 4110.2-1(d), which provides: "If a permittee or lessee loses ownership or control of all or part of his/her base property, the permit or lease, to the extent it was based upon such lost property, shall terminate immediately without further notice from the authorized officer." "Control" is further defined to mean "being responsible for and providing care and management of base property and/or livestock." *Id*. § 4100.0-5.

This argument is absurd. BLM cites no evidence showing that Valley Sun has lost control of the permit or base property. BLM's sole piece of evidence consists of the existence of the conservation agreements between Valley Sun and WWP. BLM quotes various provisions of the agreements, and an interpretation of the agreements by the Custer County Board of Equalization, to conclude that "[i]t is clear that Valley Sun LLC lost control of the base property by granting the conservation easement [sic] to WWP."

But the conservation agreements themselves do not support BLM's argument at all. In 2002, Valley Sun, LLC and WWP executed an initial Conservation Agreement. The agreement "provides direction and objectives for the management of 432 acres located on the East Fork of the Salmon River," *i.e.*, the Greenfire Preserve. The duties specified under the conservation agreement include:

> As the land owner, Valley Sun LLC agrees to manage the lands in question to protect and restore wildlife and wildlife habitat as agreed in this document. As the non-profit conservation group[,] Western Watersheds Project, Inc. agrees to supervise the implementation of this agreement and to provide expertise and other resources necessary for the successful implementation of this Conservation Agreement.

The agreement goes on to describe specific restoration goals.

Upon the transfer of Valley Sun in 2007 from WWP to Mr. Younger, the conservation agreement was amended and restated. Exh. B. The amended agreement designates WWP as a "Real Estate Manager" of the property, and states that as such its duties include maintaining "management of fish production and farming the Property," "maintaining in good standing any and all permits or licenses applicable to the Property from any source whatsoever," "coordination with state or federal agencies," and the like. This conservation agreement certainly did not transfer title to the Greenfire Preserve to WWP in any way, which continues to be held solely by Valley Sun.

Moreover, the agreement is clear that Valley Sun remains in control and is ultimately "responsible for" all activities, with WWP simply acting in the capacity of an agent: "WWP shall manage and coordinate the activities identified in paragraph 3 [the enumerated management activities] **on behalf of Valley Sun**." (emphasis added). At this same time, the parties added an enforcement clause providing that WWP "shall have all legal remedies available to it to enforce the provisions of this Conservation Agreement," including the right to seek relief from a Court.

Thus, the conservation agreements designate WWP as a Real Estate Manager of the property—with duties including restoration of the base property and maintenance of permits in good standing—at the behest of Valley Sun. Nothing in these agreements provides for WWP to take action unauthorized by Valley Sun; nor do the agreements allow WWP to take "control" over Valley Sun in any way, or be ultimately "responsible for" the base property under 43 C.F.R.

§ 4100.0-5. Nor does the enforcement clause of the 2007 agreement provide any support for BLM's argument. The clause simply allows WWP to enforce the provisions of the Conservation Agreement. However, it can only enforce any rights that had been delegated to it in the agreement—which does not include any control or ultimate responsibility over the base property or Valley Sun.

Furthermore, BLM's argument is unsupported by IBLA caselaw. The Board has held:

> [t]o have control of a place is to have authority to manage, direct, superintend, or regulate. "Control" does not import absolute or even qualified ownership, but means the power or authority to direct, govern, administer, or oversee. The word applied to real property implies possession.

Gordon v. BLM, 140 IBLA 112, 118 (1997) (quoting *Briggs v. BLM*, 75 IBLA 301, 303 (1983)). The terms of the agreements above meet this test. The agreements do not transfer title; do not transfer possession; and do not transfer the power to direct, govern, administer, or oversee. BLM's assertion that the agreements constitute loss of control is inconsistent with this test. Indeed, virtually all cases discussing this provision involve title or ownership disputes. *See Watts v. United States*, 148 IBLA 213, 214, 218 (1999) (permittee's interest in allotments terminated when he "forfeited his title to the base property" via foreclosure); *Smith v. BLM*, 129 IBLA 304 (1994) (upholding cancellation of permit upon foreclosure of base property); *Cooper v. BLM*, 144 IBLA 44 (1998) (discussing applicability of Section 4110.2-1(d) in context of active title dispute).

BLM's argument would have every permittee who hires a ranch manager to make day-to-day decisions on base property and communicate with BLM lose control over its permit. This would require BLM to cancel thousands of grazing permits where the property owners hire ranch managers. Further demonstrating the absurdity of BLM's argument is Valley Sun's continued and extensive correspondence with BLM, as highlighted above, demonstrating that Valley Sun

never lost control or responsibility for the permit. Accordingly, the first rationale for cancellation of the permit cited in the Final Decision is irrational and unfounded, requiring reversal.

B. DRY, NONFUNCTIONAL RANGE IMPROVEMENTS ARE NOT CAPABLE OF BEING MAINTAINED.

BLM's second rationale is that Valley Sun has not maintained range improvements as required by 43 C.F.R. §§ 4120.3-1 & 4140.1(a)(5). These regulations provide that: "[BLM] may require a permittee or lessee to maintain and/or modify range improvements on the public lands . . . ," *id*. § 4120.3-1(c); and that "[r]efusing to install, maintain, modify, or remove range improvements when so directed by the authorized officer" is a prohibited act. *Id*. § 4140.1(a)(5). Importantly – but ignored by BLM – the regulations also provide that: "[p]roposed range improvement projects shall be reviewed in accordance with the requirements of [NEPA]." *Id*. § 4120.3-1(f).

As evidence to support cancellation of the Valley Sun permit for supposedly not heeding BLM's requirements for maintaining range projects on the allotments, BLM cites to statements and documentation from WWP indicating that the range projects are in disrepair – as if this constitutes some admission that Valley Sun has not performed required maintenance. That reading is flatly wrong; and again demonstrates that the Final Decision must be reversed.

BLM ignores the fact that Valley Sun and WWP have explained to BLM for years that the majority of the range improvements are in fact <u>beyond repair or maintenance</u>. When Valley Sun obtained the permit in 2000, the range projects were in a dilapidated state, due in no small part to a 1983 earthquake that changed the hydrology of the area and dried up many springs. BLM itself acknowledges this. In its 2001 "Upper Salmon River Watershed/East Side Allotments" Grazing Permit Renewal Environmental Assessment (EA# ID-040-9098), BLM

stated: "Bradshaw Basin Allotment has no current grazing system due to the loss of water sources as a result of the 1983 earthquake."

BLM likewise admitted in the 2008 Spud Creek Assessment that "[s]ome springs appeared unable to have enough flow to deliver water to troughs." To the best of Appellants' knowledge, only one developed spring, LMB Pipeline, contains water; but it is in a state of disrepair so severe that maintenance is not possible, because the trough is badly rusted through and riddled with holes, as demonstrated in WWP's May 6, 2009 report. The report further documented that the Spud Creek Pipeline "did not have water supplied to it." *Id*. at 7. As further evidence of the Spud Creek allotment range project conditions, a Declaration of Brian Ertz filed herewith establishes, consistent with BLM's 2008 Assessment, that three developed springs have gone completely dry; and that two undeveloped springs (ponds) are in fact properly functioning.

"Maintenance" is simply not possible on a dry water development, or a trough falling apart from rust. Appellants cannot squeeze water from stone. For this reason, when Valley Sun received BLM's letter of May 2009 demanding a maintenance schedule, Appellants promptly responded by writing back stating that many springs are now dry, and that no "maintenance" can or should be required of dry water developments. Exh. A. The letter also raised the concern that if BLM wished Appellants to reconstruct the projects, NEPA analysis might be needed. And Appellants requested a field visit with BLM, "to establish a common understanding of the current conditions of the improvements and what maintenance is necessary or appropriate" – yet BLM never responded. In the face of this undisputed evidence of water developments gone dry and BLM's refusal to assess the developments with Valley Sun, BLM's pretext for the canceling the Valley Sun permit based on alleged failure to maintain range project is unfounded and arbitrary.

C. VALLEY SUN DID NOT MAKE ANY FALSE STATEMENTS ON ITS GRAZING APPLICATIONS.

BLM's final rationale is that Valley Sun has knowingly or willfully made false statements or representation in grazing applications in violation of 43 C.F.R. § 4140.1(8). BLM's evidence here consists of Mr. Rosenkrance selectively rephrasing the grazing applications from 2001–2009, and asserting that "Valley Sun LLC and WWP have provided BLM with baffling, contradictory, and apparently false statements or representations from which I can only conclude that Valley Sun LLC never intended to purchase livestock to activate their permit." Mr. Rosenkrance further asserts that this rationale is supported by BLM's issuance of violation citations recently to Gordon Younger and Jon Marvel, which were resolved by payment of a $250 collateral forteiture.

Again, Mr. Rosenkrance flatly misstates the facts here in order to retaliate against WWP and Valley Sun by using this pretext to cancel the permit. Mr. Rosenkrance specifically states, in the Final Decision, that Gordon Younger and Jon Marvel did not "contest" the allegations they made false statements, since they paid a collateral forfeiture to resolve the citations. In fact, as Mr. Rosenkrance knows, Mr. Younger and Mr. Marvel have vigorously disputed – and continue to dispute – any allegations that they made false statements. Their payment of the collateral forfeiture on the violation notices expressly states this, saying: "Enclosed payment is neither a guilty plea nor an admission of making any false statement(s), which are expressly denied. Payment is made only as the most expedient way to resolve a doubtful and contested claim."

Their forfeiture of collateral to resolve the violation citations does not constitute any admission of guilt or wrongdoing. *See Dean v. United States*, 418 F. Supp. 2d 149 (E.D.N.Y. 2006) (holding that forfeiture of collateral does not constitute an admission of guilt or

conviction, unless so specified by local district rules); District of Idaho Local Rules (containing no such provision that forfeiture of collateral constitutes a guilty plea or admission).

Moreover, Mr. Rosenkrance's invocation of the alleged false statements is also unfounded and irrational, because it ignores the actual facts. Again, Valley Sun and WWP repeatedly advised BLM over the years that Valley Sun would not graze the allotments to allow for resource recovery; and the two non-use applications submitted in 2006 and 2007 specifically stated that non-use was sought because "livestock would not be available" – a true statement. BLM apparently did not even respond to the 2006 or 2007 non-use applications; and it certainly did not call or write to ask for more information, as Valley Sun expressly invited it to do. In fact, it issued a Proposed Decision to renew the permit in 2008, which stated absolutely no concerns with Valley Sun's management or its 2006 and 2007 applications. In 2008 and 2009, Valley Sun again made clear that it would not graze the allotments, and sought conservation non-use. But BLM has now determined not to allow conservation non-use (the 2009 denial is being appealed, as noted above), and in doing so has misrepresented the record and its own actions.

In short, BLM and Mr. Rosenkrance have seized upon isolated statements in two grazing non-use applications from several years ago, which BLM never even responded to, never had concerns with at the time, and apparently did not rely upon in any way, to suddenly allege that Valley Sun's permit should be cancelled now for alleged false statements, when BLM knows full well that Valley Sun and WWP vigorously dispute having made any false statements. The timing of this action – coming after BLM attempted unsuccessfully to allow Mr. Baker to graze the Spud Creek allotment in 2009, after BLM has ignored years of trespass on the allotment; and after WWP has filed numerous lawsuits against Mr. Rosenkrance and BLM for their mismanagement of grazing in the Challis Field Office – demonstrates that this alleged rationale

is simply a pretext for retaliation. As such, the rational is false and unfounded, and requires reversal on appeal.

VI. THE FINAL DECISION VIOLATES THE GOVERNING ALLOTMENT MANAGEMENT PLAN AND RESOURCE MANAGEMENT PLAN.

As noted, the governing Allotment Management Plan for the Spud Creek allotment provides for, as its sole objectives, restoration and improvement of the allotment, including to decrease siltation, increase forage production, improve plant density for blue and sage grouse, and maintain browse species to provide maximum winter forage for deer, antelope and elk.

Similarly, the governing Challis Resource Management Plan contains many provisions providing for the improvement and restoration of fisheries and wildlife habitat. Among the Challis RMP's wildlife requirements, BLM is obligated to "[s]ustain diverse and abundant wildlife populations . . . by improving wildlife habitat currently in unsatisfactory condition, and maintaining habitat currently in satisfactory condition." Wildlife Habitat Goal 2. With respect to special status species (such as sage-grouse), BLM must "maintain populations of special status species and/or their habitat over the range of natural distribution and habitat conditions. Eliminate the need for listing of sensitive and candidate species and contribute to recovery of listed species by increasing the number or size of populations or by removing threats to species and their habitats." Special Status Species Goal 2.

With respect to livestock grazing management, BLM must "[m]anage livestock grazing levels in line with the long term capacity of the land, considering multiple use and climatic variability, to maintain, improve, or make significant progress towards improving ecological condition." Livestock Grazing Goal 1.

The Challis RMP further requires that BLM protect riparian habitats, including by requiring BLM to "[m]anage stream riparian areas to maintain or achieve proper functioning

condition . . . to ensure desired functions, improve water quality, prevent and minimize flood and sediment damage, and establish conditions which support attainment of healthy and productive aquatic habitat." Riparian Areas Goal 1. BLM also must "[r]estore and rehabilitate upland watersheds found to be in unsatisfactory condition, and maintain satisfactory condition watersheds." Upland Watershed Goal 1.

BLM's denial of conservation non-use in 2009 and its move to cancel the Valley Sun permit now – thus preventing further conservation non-use, and allowing BLM to grant "temporary" or other grazing use on the allotments, as it tried to do in 2009 – are unfounded and subject to reversal because they ignore and violate these requirements. The ecological importance of the East Fork Salmon River and upper Salmon River watersheds cannot be understated; and BLM is violating the Endangered Species Act and its own management requirements by not limiting grazing to allow recovery of damaged resource conditions, such as those documented on the Valley Sun allotments.

VII. THE FINAL DECISION VIOLATES DUE PROCESS AND EQUAL PROTECTION GUARANTEES.

BLM's Final Decision also must be reversed because it violates the federal constitution's guarantees of due process and equal protection.

"A fair trial in a fair tribunal is a basic requirement of due process." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). Consequently, "a biased decision-maker is constitutionally unacceptable" in either a judicial and or administrative proceeding. *Id.* A party may establish that it has been denied its right to an impartial hearing in two ways. First, it may demonstrate that the decision-maker had actual bias. Second, it may show that the decision-maker had a stake in the outcome of the case that created an appearance of impartiality. *Stivers v. Pierce*, 71 F.3d

732, 741 (9th Cir. 1995). These two considerations taken collectively may support a finding of bias. *Id.*

The Supreme Court has identified a number of instances where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). One such instance arises where the decision-maker has "a conflict arising from his participation in an earlier proceeding." *Caperton v. A.T. Massey Coal Co., Inc*., 129 S.Ct. 2252, 2261 (2009) (citing *In re Murchison*, 349 U.S. 133 (1955)). Courts have found bias where a party previously criticized the decision maker. *See Murchison*, 349 U.S. 133 (finding bias where judge had previously found party in contempt); *Eklund v. City of Seattle*, 2009 WL 1916066 (W.D.Wash. 2009) (sufficient evidence to find bias based on prior accusations).

In this case, a multitude of circumstances demonstrate, not only that Mr. Rosenkrance had actual bias against Valley Sun and WWP, but that this bias was the motivating factor behind his decision to revoke Valley Sun's permit. As noted above, and as will be demonstrated in detail at hearing, Mr. Rosenkrance has extensive personal ties to the ranching industry in central Idaho. He has also been the defendant in numerous WWP lawsuits challenging BLM's violations of the Endangered Species Act and other laws.[4]

[4] These include: *WWP v. Rosenkrance*, 2005 WL 1076098 (D. Idaho 2005) (BLM violated NEPA in failing to prepare EIS for stone quarry expansion in Salmon River wild and scenic corridor, and instead issuing EA without public comment); *WWP v. Rosenkrance*, No. 09-cv-291 (D. Idaho) (challenging BLM's Dry Creek grazing authorization); *WWP v. Rosenkrance*, No. 09-cv-298 (D. Idaho) (challenging BLM decisions to approve grazing and build pipelines and troughs in key sage grouse habitat in Grouse Creek, Meadow Creek, Trail Creek, and Rock Creek allotments); *WWP v. Rosenkrance*, No. 09-cv-365 (D. Idaho) (challenging BLM Burnt Creek grazing authorization in WSA); *WWP v. Rosenkrance*, No. 09-cv-532 (D. Idaho) (challenging BLM violations of ESA in Pahsimeroi watershed); *WWP v. Rosenkrance*, No. 09-cv-611 (D. Idaho) (challenging BLM and Forest Service violations of ESA in Morgan Creek, Challis Creek, Bayhorse Creek, and Garden Creek watersheds).

Most recently, Appellants believe Mr. Rosenkrance has demonstrated his actual bias against Valley Sun and WWP by apparently "leaking" information to livestock interests and the media about the now-dismissed criminal prosecution, which was based on allegations that Mr. Marvel and Mr. Younger made alleged false statements in Valley Sun's non-use applications in 2006-2007. Anti-environmental interest groups have sought to use and publicize this investigation and the allegations of false statements as a way of attacking WWP and Mr. Marvel; and Appellants believe that Mr. Rosenkrance has actively assisted in those efforts, including not only by disseminating information to industry associations and the media, but also using the guise of the cancellation decision to repeat the false and defamatory allegations. These facts, and the full record to be created at hearing, thus show that Mr. Rosenkrance is biased and violated Valley Sun's due process rights by misusing his authority.

Likewise, Mr. Rosenkrance and BLM violated Valley Sun's equal protection rights as well. The federal equal protection clause guarantees the "the right to be free from invidious discrimination in statutory classifications and other [federal] governmental activity." *Doe v. U.S.*, 419 F.3d 1058, 1062 (9th Cir. 2005) (citing *Harris v. McRae*, 448 U.S. 297, 322 (1980)). An individual who has suffered discrimination on the basis of a suspect classification other than race or gender may seek legal redress by demonstrating that he or she has been treated differently on the basis of a classification that bears no rational relationship to a legitimate state interest. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588-589 (9th Cir. 2008) (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988)). A classification bears no such relationship to the government's stated goal when the relationship is "so attenuated as to render the distinction arbitrary or irrational." *Id.* (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985)).

The *Lazy Y* ruling from the Ninth Circuit is squarely on point. Lazy Y Ranch was formed by Mr. Younger specifically to bid on state grazing leases in order to manage them for environmental restoration and resource protection, while providing higher returns to the state endowments for which the state lands are held in trust. Just as BLM has discriminated against Valley Sun and WWP here for attempting to promote conservation on federal lands, State of Idaho officials discriminated against Lazy Y in its similar efforts on state lands. *Id.* The Ninth Circuit affirmed the District of Idaho's ruling that it violates equal protection to discriminate against conservation applicants for state leases. *Id.*

Here, Mr. Rosenkrance and BLM have similarly arbitrarily and irrationally singled out Valley Sun, apparently motivated by antagonism against Valley Sun and WWP. Illustrating the discriminatory treatment that BLM and Rosenkrance have shown here – in seeking to cancel Valley Sun's permit because it has not been grazing the public lands, and instead seeks to improve resource conditions on them – numerous other BLM permittees in the Challis Field Office, the Idaho Falls District (in which the Challis office is located), and elsewhere in the State of Idaho have taken nonuse for extended periods of time, and have failed to conduct range improvement maintenance. Yet BLM has not taken similar enforcement actions against them for such non-use of the grazing allotments or non-maintenance of projects.

For example, the Bradshaw Basin allotment was for years shared by Valley Sun and two other permittees.[5] It is a matter of public record that one of the permittees did not graze the Bradshaw Basin allotment for years, and Appellants possess BLM documents establishing that he frequently failed to file either requests for non-use or actual use forms. Presumably, since he was not grazing, he likewise failed to maintain the (dry) Bradshaw Basin allotment water

[5] Appellants understand one of the permits was recently transferred.

developments—the very developments over which BLM proposes to cancel Valley Sun's permit here. Yet, BLM has taken no action against this permittee. A similar situation exists on the BLM Morgan Creek allotment, also within the Challis Field Office, where a permittee has taken long periods of non-use without making the required written requests – presumably again failing to maintain water developments. Again, BLM has taken no action against this permittee. The examples multiply if one considers all permittees within the Idaho Falls District, or the Idaho State BLM.[6]

In short, BLM's Final Decision represents an unconstitutional denial of due process and equal protection, which must be reversed on appeal. It is unfounded, and unconstitutional, for BLM and Mr. Rosenkrance to attempt to retaliate against one of BLM's most persistent and effective critics – WWP – for having sought to improve BLM's track record of grazing mismanagement in the Challis Field Office and other parts of Idaho and the West. It is equally unacceptable for Mr. Rosenkrance to allow bias to dictate his official actions, and to abuse his governmental authority by attempting to defame and injure WWP, Valley Sun, and their leaders. Accordingly, the Final Decision must be reversed.

PETITION FOR STAY

Appellants hereby petition for stay of the Final Decision, pursuant to 43 C.F.R. § 4.470.[7] A stay of the BLM's 2010 Final Decision canceling Valley Sun's permit is necessary to prevent irreparable harm to both Valley Sun and the environment. Cancellation of the permit would

[6] As noted above, Appellants have sought information about such non-use through discovery in the 2009 non-use appeal, but BLM violated the discovery order there by failing to provide any requested information. This has prevented Appellants from providing more information now, which they will seek to obtain from BLM through further discovery.

[7] Counsel for BLM previously indicated, in a conference call with the Administrative Law Judge in the 2009 non-use denial appeal, that BLM would not likely object to staying any permit cancellation pending resolution of the appeal on the merits. More recently, counsel advised that BLM would not agree to a stay.

cause financial loss to Valley Sun. It would also allow BLM to place the allotments into grazing use, which would create irreparable environmental harm due to the fragile soils of the allotments and the fact they have not healed from past grazing impacts. In contrast to typical final decisions for violations of permit conditions, in this case there are no countervailing environmental harms that would result from staying the decision. The interests of the public and the relative harms to the parties thus favor staying the permit cancellation under the Final Decision, until this appeal has been resolved.

I. LEGAL STANDARD FOR A STAY.

The issuance of a stay is appropriate when the relative harm to the parties justifies issuing a stay, the appellant is likely to succeed on the merits of its appeal, imminent and irreparable harm is likely to occur unless a stay is granted, and the public interest favors the granting of the stay. 43 C.F.R. § 4.471(c); *Oregon Natural Resources Association*, 148 IBLA 186, 188 (1993). Further, in balancing the likelihood of movant's success against the potential consequences of a stay on the other parties, the Board has held that "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, et al*., 153 IBLA 379, 388 (2000) (quotation omitted). Maintaining the status quo during pendency of appeal "can be of considerable importance since the effectiveness of any relief may be compromised if actions objected to are allowed to go forward during the period of adjudication." *W. Wesley Wallace*, 156 IBLA 277, 278 (2002).

II. LIKELIHOOD OF IRREPARABLE HARM.

A. Harm to Valley Sun.

Although a grazing permit "convey[s] no right, title, or interest held by the United States" to permittees, 43 C.F.R. § 4130.2(c), it is a privilege that adds value to a base property. As such, its cancellation financially harms the permittee who owns that base property. IBLA jurisprudence favors granting stays of permit revocations until the merits of an appeal have been heard.

Valley Sun's BLM grazing permit was appraised by a real estate appraiser in 2002 and found to have a substantial market value. Exh. C. The rate associated with the appraisal, $50 per AUM, has only increased with inflation. A 2006 academic article concludes that "grazing permits are valued at about $255 per AUM." G. Cornelis van Kooten, Roy W. Thomsen, and Tom Hobby, Resolving Range Conflict in Nevada? Buyouts and Other Compensation Alternatives, 28 Rev. Agric. Econ. 515 (2006). Using this later figure, the value of the permit is now much higher. Cancellation of the permit would thus harm Valley Sun by decreasing the value of its base property.

Cancellation would also harm Valley Sun by negating its restoration interests in the subject allotments. The allotments have suffered from livestock damage. BLM's Spud Creek AMP stated that a total of 307 of the allotment's 8,856 acres—less than 3.5%—were in "good" condition. Thus, the AMP set objectives to decrease siltation, increase forage production, improve plant density for blue and sage grouse habitat, and maintain browse species to provide maximum winter forage for deer, antelope and elk. While partial restoration has occurred, chronic livestock trespass continues to impede restoration from occurring in key areas such as LMB Spring, as documented in several reports from WWP.

Valley Sun wishes to see the restoration continue, either through continued authorized nonuse, light grazing, or eventually through administrative or statutory retirement. If the Valley Sun permit is cancelled, and temporarily or permanently assigned to another permittee, Valley Sun will lose all such opportunities. For these reasons, a stay is needed to prevent imminent and irreparable harm to Valley Sun.

B. Environmental Harm.

Cancellation of the permit will foreseeably lead to environmental harm on the subject allotments. The governing Challis RMP provides that:

> Grazing privileges that are lost, retired, relinquished, canceled, or have base property sold without transfer would have attached AUMs held for watershed protection and wildlife habitat until allotment vegetative objectives are reached. Once vegetative objectives are reached, these AUMs would remain unallocated to any particular livestock permittee, but may be used to provide short term (less than three years) flexibility to permittees for vegetation treatments or other management actions affecting their base permit.

Challis RMP at 65.

BLM's position is that vegetative objectives have been reached on the subject allotments. Thus, the allotments will immediately become available to provide grazing for up to three years for any permittee whose permit is affected by vegetation treatments "or other management actions." *Id*. This provision is undefined and extraordinarily vague, meaning nothing would prevent BLM from allowing permittees to use the allotments if their allotments are subject to any conceivable problem.

Such "flexibility" grazing would irreparably harm the environment. As noted, sedimentation geologist Don Clarke submitted a report to BLM in 2009 concluding that "[t]he combination of friable surfaces, slowly permeable subsoils, low infiltration rates, steep slopes, salinity and rapid surface runoff makes the area unsuited for the additional stresses of cattle

traffic, grazing and browsing." Exh. D. He also explained that grazing would cause sediment delivery to the East Fork Salmon River, habitat for Chinook salmon and steelhead trout, both listed as threatened under the Endangered Species Act. *Id*.

BLM's Final Decision, like its 2009 denial of conservation non-use to Valley Sun, ignores these impacts to soil, vegetation and water that are continuing due to past overgrazing, and that will accelerate if grazing is allowed to resume. Such environmental harms, of course, represent irreparable damage for which injunctive relief is normally appropriate. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). *See also National Wildlife Federation et al. v. BLM,* 140 IBLA 85 (1997) (affirming injunction of grazing in Comb Wash allotment); *IWP v. Hahn,* 307 F.3d 815 (9th Cir. 2002) (affirming injunction limiting grazing in Owyhee Resource Area).

III. RELATIVE HARM TO THE PARTIES.

The relative harm to the parties also favors the issuance of a stay. As described, permit cancellation would cause financial harm to Valley Sun and environmental harm. In contrast, BLM would suffer no harm under a stay. Valley Sun has taken nonuse on the allotment since 2001. BLM approved the nonuse, either explicitly or implicitly, **every year through 2008**. And even its denial of nonuse in 2009, currently under appeal, cites no harm to BLM. BLM did not permit any grazing on the parcels in 2009, nor has it announced any plans to do so in 2010. There will be no harm to BLM in continuing with nonuse for another year.

In fact, canceling the permit and allowing grazing would greatly increase BLM's administrative burdens, showing that a stay is actually in BLM's interest. For example, the Challis RMP provides that: "Livestock would not be allowed in pasture until range improvements under cooperative agreement or permit are functional and properly maintained."

RMP at 40. As noted above, the fences and water projects on the allotments are largely non-functional due to decades of neglect and drying up of springs. It will be a significant task for BLM to ensure that any subsequent permittee restores the now-dry water developments to functionality, or to restore them itself; and the developments will likely require reconstruction and hence NEPA analysis. BLM would also be faced with increased monitoring responsibilities.

The rationales presented in BLM's Final Decision further show a distinct lack of urgency. The Final Decision's first rationale regarding "loss of control" is based on a Conservation Agreement executed in 2002 and amended in 2007. The second rationale regarding lack of range project maintenance is based on no action in particular, but on conditions that have existed on the allotments for decades. The third rationale, alleged false statements, is based on grazing permit applications submitted in 2006 and 2007. In fact, on October 6, 2008, BLM issued a Proposed Decision to reissue the permit to Valley Sun, citing **no** violations of terms and conditions, loss of control, problems with range improvement maintenance, false statements, or any problems whatsoever with Valley Sun. BLM can hardly argue that implementation of the Final Decision is an urgent matter.

This Final Decision also stands in stark contrast to most permit cancellation decisions – in which permittees are accused of trespass or a similar violations of permits that have cause resource damage – in which the Court must balance the permittee's financial harm with a need to protect the environment from damage. And yet, even in those cases, permittees frequently receive reprieve in the form of a stay pending appeal. *See, e.g. Hanley Ranch P'ship v. BLM*, ID-BD-3000-2010-004, slip. op. at 4–8 (Mar. 16, 2010) (granting stay of decision to fail to renew Mike Hanley permit for Owyhee allotments based on years of trespass violations, citing financial harms to permittee). Here, in contrast, both factors tip the same way: towards a stay.

IV. VALLEY SUN IS LIKELY TO SUCCEED ON THE MERITS.

The Appellants' likelihood of success on the merits also favors granting a stay because the appellants have shown that the Final Decisions are "unreasonable and do not substantially comply with the provisions of the federal grazing regulations found at 43 C.F.R. part 4100." *Eason v. BLM*, 127 BLM 259, 262 (1993).

As explained in the foregoing Statement of Reasons, Appellants have demonstrated that they are likely to succeed on the merits of their appeal based on numerous challenges – including that BLM has violated the grazing regulations and Challis RMP; its stated rationales for canceling the Valley Sun permit are also unfounded; and it has violated federal constitutional due process and equal protection rights. At a minimum, the Appellants have raised "fair ground for litigation and thus for more deliberative investigation," *Wyoming Outdoor Council, et al*., 153 IBLA at 388, showing that the Final Decision should be stayed pending final resolution of their appeal.

As another Administrative Law Judge recently held in granting a stay in the Mike Hanley case, cited above, "[d]etermining whether complete cancellation of a permit is the appropriate penalty involves many factors and is an inherently subjective exercise typically requiring a more deliberative investigation afforded by a full hearing on the merits." *Hanley Ranch P'ship*, slip. op. at 8. If permittees who commit trespass violations that cause resource damage to the public lands win stays of permit actions based on these considerations, then surely Valley Sun and WWP – which have sought only to restore public lands resources – deserve a similar stay while their appeal is adjudicated.

V. THE PUBLIC INTEREST SUPPORTS A STAY.

Finally, the issuance of a stay would serve the public interest. As OHA has recognized, "The public interest favors maintaining the status quo until the merits of a serious controversy can be fully considered." *Raymond Page v. BLM*, CA-N070-090-01, slip. op. at 14 (Nov. 18, 2009) (citing *Valdez v. Applegate,* 616 F.2d 570, 572-573 (10th Cir. 1980)).

Parties occasionally invoke an interest in maintaining and stabilizing livestock operations as a public interest. That factor is not applicable here, because no permittee has legally grazed the allotment in ten years. Thus there can be no reliance interest by any party in grazing this allotment, and the livestock industry would not be affected by a stay.

Finally, there is an inherent public interest in upholding the grazing regulations, FLPMA, and ensuring that due process and equal protection guarantees are adhered to here. To allow the BLM to proceed with its action canceling Valley Sun's permit in contravention of these regulations, laws, and principles would harm the public's interest in the values protected by these regulations and statutes, and in lawful governance itself.

CONCLUSION

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

Dated this 29th day of April, 2010.

Respectfully submitted,

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