United States Department of the Interior

BUREAU OF LAND MANAGEMENT
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DEPARTMENT OF ADMINISTRATION
OFFICE OF THE DIRECTOR
BUDGET AND PLANNING DIVISION

In Reply Refer To:
4.472
(NV-062)

DEC - 5 2005

Dear Interested Public:

On October 21, 2005, an Appeal and Petition for Stay was submitted by Charles W. Parsons regarding the Simpson Park Allotment portion of the Simpson Park Complex Final Multiple Use Decision (FMUD). In accordance with CFR 4.472(a), the Battle Mountain Field Office's response to the Appeal and Petition for Stay is attached.

If you have any further questions, please contact Michele McDaniel, Rangeland Management Specialist, at (775) 635-4083 or myself at (775) 635-4056.

Sincerely,

Douglas W. Furtado
Assistant Field Manager
Renewable Resources

Enclosures: BLM Response to Petition for Stay

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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

Charles W. Parsons Appellant vs. Bureau of Land Management Respondent.	Appeal of BLM's Final Multiple Use Decision dated September 30, 2005 For the Simpson Park Allotment

MOTION TO DISMISS FOR LACK OF JURISDICTION;
RESPONSE TO STAY PETITION;
MOTION FOR SUMMARY JUDGMENT

The Bureau of Land Management (BLM), through the undersigned attorney, hereby submits its timely response to the Appellant's Notice of Appeal and Petition for Stay received by the Department of the Interior on October 21, 2005. For the reasons stated below, the BLM herein requests that the Board dismiss Appellant's notice of appeal for lack of jurisdiction. If this Motion is not granted, the BLM also responds to Appellant's petition for stay of BLM's Decision

and moves for Summary Judgment as a matter of law.

I. BACKGROUND

The Simpson Park Allotment is located approximately 12 miles east/northeast of Austin, Nevada and consists of 97,192 acres of public land managed by the BLM's Battle Mountain Field Office. Five permittees, including Parsons Ranching Co.,[1] hold grazing permits authorizing livestock grazing (cattle, horse, or sheep) on the Simpson Park Allotment. See Simpson Park Complex Evaluation dated July 22, 2005 at 15. At the time of the allotment evaluation and through most of the process leading to the development of the FMUD, Ken and Karen Woodland held the lease for the Parsons Ranching Co. base property and as lessees of the base property, also held the grazing permit. See Final Multiple Use Decision for the Simpson Park Allotment, September 30, 2005 ("FMUD"). On September 8, 2005, Appellant called the BLM to discuss taking non-use for the 2005 use season because he would not be renewing the base property lease with Ken Woodland. See BLM Conversation Record dated September 9, 2005.

In 2004, the BLM initiated its analysis, interpretation and evaluation of monitoring data collected for the Simpson Park Allotment between 1990 and 2004, in order to determine whether the standards and objectives for the allotment (including standards for rangeland health) were being met under the existing grazing system. On July 22, 2005, the BLM issued the Simpson

[1]The Parsons Ranching Co. holds title the base property to which the grazing preference for the Simpson Park Allotment attaches. Charles W. Parsons is one of the partners for the Parsons Ranching Co. and has represented the interests of the Parsons Ranching Co. before the BLM for purposes of its grazing permit. For purposes of this appeal, the BLM therefore assumes Appellant Charles W. Parsons is acting on behalf of the Parsons Ranching Co.

Park Complex Evaluation[2] ("Evaluation") to the permittees and other interested parties for review and comment. The Evaluation summarized BLM's analysis and interpretation of the monitoring data collected for the Simpson Park and Kingston Allotments. As noted in the Evaluation, a particular concern for the Simpson Park Allotment was that use areas within the Allotment had not been established between individual permittees and "overlapping periods of use has resulted in limited rest for the vegetative communities and excessive use." Evaluation at 35. Grazing from July 15 through the end of September, or hot season grazing, was also identified as having had negative impacts to riparian areas within the Simpson Park Allotment. See Evaluation at 36. BLM received comments from several permittees, including Karen and Ken Woodland, and Western Watersheds Project. See Simpson Park Complex Conformance Determination, dated August 2005, at 2 ("Conformance Determination"). Appellant did not provide any comments.

On September 2, 2005, the Proposed Multiple Use Decision (PMUD), the Conformance Determination, and an Environmental Assessment for the Simpson Park Complex were sent to permittees and interested parties. The Conformance Determination found that historic and current livestock management was the causal factor for non-attainment of the Shoshone-Eureka Resource Area Resource Management Plan objectives, Standards for Rangeland Health

[2]The Simpson Park Complex encompasses the Simpson Park Allotment and contiguous Kingston Allotment. The Battle Mountain Field Office combined the two allotments into one evaluation since the allotments fall within the same watershed and the BLM was establishing an Appropriate Management Level for burros within Hickison Herd Management Area, which occurs on both allotments.

(Standards 2 and 3),[3] and multiple use objectives. See Conformance Determination at 49-53. The distribution of livestock contributed to the non-attainment of these standards and objectives, and wild horse use was also found to be a causal factor for the non-attainment of Standard 2. See id.; see also FMUD at 2.

The PMUD outlined management actions that would allow for the attainment of standards and objectives for the Simpson Park Allotment. See Proposed Multiple Use Decision for the Simpson Park Complex, dated September 2, 2005 ("PMUD"). These management actions included establishing use areas for individual permittees to address the problems of overlapping periods of use and distribution of livestock within the Allotment, elimination of hot season grazing throughout the majority of Simpson Park Allotment, deferment of livestock grazing during the critical growth season for the majority of the allotment to provide for the orderly administration of the range, and management of wild horses and burros at appropriate management levels. See id. at 18-47, 53-57.

BLM received two protests to the PMUD–one from Appellant and one from Western Watersheds Project. See Charles W. Parson Protest dated September 12, 2005; Western Watersheds Project Protest dated September 19, 2005. After reviewing and responding to the protests, the BLM issued the Final Multiple Use Decision for the Kingston and Simpson Park Allotments ("FMUD") as well as the Finding of No Significant Impact (FONSI) and Decision

[3]Standard 2 requires that riparian and wetland areas exhibit a properly functioning conditions; Standard 3 requires that habitats exhibit a healthy, productive and diverse population of native and/or desirable plant species, provide suitable feed, water, cover and living space for animal species, and meet life cycle requirements of threatened and endangered species. See Evaluation Appendix I: Standards and Guidelines for Nevada's Northeastern Great Basin Area at 3-4.

Record for the Simpson Park Complex Environmental Assessment on September 30, 2005. The FMUD implements several changes to the livestock grazing system in the Simpson Park Allotment due to the failure to meet objectives and standards under the previous season-long grazing system. The FMUD reduces total active permitted use from 6,042 AUMs to 3,446 AUMs, distributing these AUMs to each permittee based on the percent of active permitted use held by each permittee prior to the September 30, 2005 decision. See FMUD at 20. The FMUD also establishes use areas for each of the five permittees to promote better distribution of livestock throughout the allotment and modifies the season-of-use to ensure progress in attaining the standards and objectives for the allotment. See FMUD at 22. The use areas were developed after consultation with all permittees, including Appellant and Appellant's then-lessee. See FMUD at 2-3.

Under the FMUD, Appellant is authorized to graze in 7 of the 11 use areas established for the Simpson Park Allotment. See FMUD at 22. The use areas were assigned to each permittee to be consistent with each permittee's authorized AUMs and historic grazing areas. See FMUD at 22. Following issuance of the PMUD and review of Appellant's Protest Points, the BLM made minor modifications to the boundaries of the Rye Patch-Long Spring Use Area, in which Appellant is authorized to graze, to include adjacent water sources where Appellant claims water rights. See FMUD at 3. These modifications were possible because they were closely tied to topographic features of the landscape in that use area. See id. Although BLM did not authorize Appellant to graze in all of the use areas where Appellant has asserted water rights,[4] BLM

[4]According to the Nevada Division of Water Resources Water Rights Database, Mr. Parsons claims vested water rights, i.e., rights perfected prior to 1905 (these have not been adjudicated), and also holds certificated water rights, i.e., post-1905 certificates of appropriation

nonetheless offered Appellant several options for using and accessing his water rights in those use areas where he was not authorized to graze. As stated in BLM's response to Appellant's Protest Points:

> BLM cannot nor do we intend to deny you access to your water rights . . . If the grazing system in conjunction with the establishment of the specified use areas for each permittee results in you not being authorized to use one or more areas within the allotment, several options are available to you. First, you can pursue engaging BLM in a cooperative range improvement agreement or right of way to construct a pipeline from a water source where you have an appropriated or vested water right and divert it to an areas within the allotment where you will be authorized to graze. Secondly, you can apply to the state water engineer to change your beneficial use if one exists. You may also elect to sell your water to another operator that is also permitted to graze within the allotment.

FMUD Attachment 1, BLM Response to Charles W. Parsons Protest Point #1.

Appellant Charles W. Parson timely filed a notice of appeal and petition for stay of the Final Decision for the Simpson Park Allotment, alleging that the decision denied him access to his water rights and would therefore effectuate a taking of his water rights.

II. MOTION TO DISMISS

Appellant's allegations of BLM error center on his assertion that the BLM's Decision constitutes a "taking of my water rights." Notice of Appeal/Petition for Stay. Appellant therefore claims that the BLM's decision will result in an unconstitutional taking of his property

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under Nevada's statutory water rights system. See 1905 Nev. Stat. C. 46; 1913 Nev. Stat. c. 140; see also Application of Filippini, 202 P.2d 535, 537 (Nev. 1949). Under the 2005 FMUD, Appellant has access to all public lands where he has claimed vested water rights. However, Appellant has asserted that BLM's decision denies him access to Ackerman Spring (within the Ackerman Spring Use Area) and Old Rock Cabin Spring (within the Common Use Area), in which he has certificated water rights. Since approximately 1996, Appellant (or Appellant's lessee) has not made use of the Old Rock Cabin Spring, due to access difficulties resulting from construction of a U.S. Highway right-of-way fence, which currently divides the Common Use Area from Givens South Use Area, where Appellant is authorized to graze under the 2005 FMUD.

rights.

The Departmental regulations establishing the Board's jurisdiction and Board case law make it clear that the Board is not a court of general jurisdiction. Instead, its jurisdiction is specifically granted by delegation of the review authority of the Secretary of the Interior, which is defined and limited in the Departmental regulations at 43 C.F.R. Part 4. See 43 C.F.R. § 4.1; B.H. Northcutt, 75 IBLA 305, 307 (1983). Specifically, "the Board is authorized to issue final decisions for the Department in appeals from decisions of BLM officials relating to the use and disposition of the public lands." Exxon Corp., 95 IBLA 374, 375 (1987); see 43 C.F.R. § 4.1(b)(3). However, the question of whether the BLM's 2005 FMUD constitutes an unconstitutional taking is not within the subject matter jurisdiction of the Board. See Marietta Corp. Comstock Ore Buyers, 164 IBLA 360, 377 (2005). Since Appellant's appeal of the FMUD is based on an alleged taking of his water rights, this issue is outside the jurisdiction of this Board and the appeal should be dismissed.

III. RESPONSE TO STAY PETITION

If the BLM's Motion to Dismiss is not granted, Appellant must show justification for a stay based on the following standards:

a. The relative harm to the parties if the stay is granted or denied.
b. The likelihood of the appellant's success on the merits.
c. The likelihood of immediate and irreparable harm if the stay is not granted, and
d. Whether the public interest favors granting the stay.

43 C.F.R. § 4.21(b)(1). The appellant bears the burden of proof to show that a stay is warranted. 43 C.F.R. § 4.21(b)(2). Appellant's petition for stay fails to address the standards for a stay. However, to the extent Appellant's filing can be interpreted to discuss any of these standards,

Appellant has not demonstrated that a stay is warranted.

A. Appellant Has Not Shown that the Relative Harms and Irreparable Harm Favor a Stay

Appellant contends that he will be harmed by the BLM's Decision because it denies him access to his water rights at Ackerman Spring and Old Rock Cabin Springs, and because the sheep permit will cause excessive use on Willow Creek and tributaries, thereby depriving him of the necessary irrigation water that this water right provides. See Notice of Appeal/Petition for Stay. None of these claims is supported by the record or by case law.

BLM's decision implements a grazing management system for the Simpson Park Allotment. It does not make any decisions relative to Appellant's access to any water rights he may hold. In the BLM's response to Appellant's Protest of the proposed decision, the BLM explicitly stated that it could not and did not intend to deny Appellant access to his water rights. See FMUD Attachment 1, BLM Response to Charles W. Parson's Protest Point #1. Indeed, the BLM offered Appellant several different options for accessing those water rights. See id. Appellant has not sought any access to those water rights.

Since Appellant has not requested or been denied access to his water rights, Appellant's appeal is essentially an assertion that he is entitled to graze his livestock within the vicinity of waters in which he holds a water right. As discussed more fully below, this assertion is without any support in the case law, since the Ninth Circuit has long held that a water right on public lands does not include an appurtenant right to graze, even if that water right has historically been used for watering livestock on the public lands. Hunter v. United States, 388 F.2d 148, 154 (9th Cir. 1967). Even if the 2005 FMUD does not authorize Appellant to graze on public lands where

he holds water rights, this is not synonymous with a denial of access to Appellant's water rights. Appellant has not shown that he is harmed by BLM's decision regulating grazing use in the Simpson Park Allotment, since BLM has not denied him access his water rights, and he has no right to graze appurtenant to those water rights.

B. Appellant is Unlikely to Succeed on the Merits

To the extent that Appellant's Petition for Stay can be read to assert BLM error, Appellant claims: (1) that BLM denied him access to his water rights, (2) this results in a taking of his water rights, and (3) that BLM had only issued a one day "trail through" sheep permit prior to the 2005 FMUD and its decision to issue a sheep permit will cause excessive use on the Willow Creek and tributaries, thereby depriving Appellant of his right to irrigation water. See Notice of Appeal/Petition for Stay. As discussed below, Appellant is not likely to succeed on the merits of any of these three bases of asserted BLM error or wrong-doing.

BLM Has Not Denied Appellant Access to His Water Rights

In response to Appellant's contention that the proposed livestock grazing management system for the Simpson Park Allotment would deny him access to his water rights, the BLM specifically informed Appellant that it would work with Appellant to ensure appropriate access to those water rights. One option put forth by the BLM in response to Appellant's concerns, was for Appellant to request a right-of-way for the construction of a pipeline to divert water to those use areas where he is authorized to graze. See FMUD Attachment 1, BLM Response to Charles W. Parsons Protest Point #1. Appellant has not sought access to his water rights in the Ackerman Spring or Old Rock Cabin Spring, and BLM's decision implementing a livestock grazing management system for the Allotment does not deny Appellant access to his water rights

in those springs if he wishes to divert that water to pastures in which he is authorized to graze.

BLM's Establishment of Use Areas for the Allotment is Not a Taking of Appellant's Water Rights

Appellant's argument that the BLM's regulation of his grazing in the Simpson Park Allotment effects a taking of his water rights is without legal support. The United States has broad authority to manage the public lands to meet its statutory obligations. As such, the United States "can prohibit absolutely or fix the terms on which its property may be used," consistent with Congressional direction. Light v. United States, 220 U.S. 523, 536 (1911). BLM's regulation of livestock grazing on the Simpson Park Allotment is an exercise of its mandated responsibility to manage the public lands pursuant to the Taylor Grazing Act, Federal Land Policy Management Act, and regulations at 43 C.F.R. Subpart 4180.

BLM's regulation of grazing on public lands does not effect a taking of private water rights. The Ninth Circuit has long held that ownership of a water right on public lands does not confer an attendant right to graze livestock on those lands. See Hunter v. United States, 388 F.2d 148 (9th Cir. 1967). In Hunter v. United States, plaintiff appealed from an injunction obtained by the federal government to prevent plaintiff from grazing and watering his livestock within the Death Valley National Monument, arguing that he possessed water and grazing rights that had vested long before the monument was established. See id. at 151. The Ninth Circuit agreed that plaintiff's water rights within the Death Valley National Monument vested well before establishment of the monument, and that plaintiff had continuously used those water rights for stockwatering purposes, grazing his livestock on the federal lands. Id. at 153. However, the Ninth Circuit rejected plaintiff's claims that plaintiff's vested water right carried an appurtenant

right to graze on the federal lands, stating that "He claims too much. The appurtenance must be limited to that which is essential to the use of the right granted; it does not include the thing with which the right granted is used." Id. at 154. Thus, the Ninth Circuit concluded that "Hunter is not entitled to an easement to graze livestock on the lands within the boundaries of the Monument," but found that "he should be allowed a right of way over those lands to divert the water by one of the methods contemplated by the [Act of 1866]." Id. at 154.

Recently, in the case of Colvin Cattle Co. v. United States, the Federal Claims Court ruled that the government's cancellation of plaintiff's grazing permit, where plaintiff had vested water rights, did not effectuate a taking of those water rights. Colvin Cattle Co. v. United States, 67 Fed. Cl. 568; 2005 U.S. Claims LEXIS 267 (September 2, 2005). Plaintiff argued that the federal government could not deny him access to public lands for grazing purposes, where he had vested rights to water located on the public lands. The Court rejected all of plaintiff's claims of a right to graze based on vested water rights. The Court found that Nevada water law did not recognize any right to graze on federal lands appurtenant to vested water rights, see 2005 U.S. Claims LEXIS at *18-19 (analyzing Itcaina v. Marble, 55 P.2d 625 (Nev. 1936); Ansolabehere v. Laborde, 310 P.2d 842 (Nev. 1957); In re Calvo, 253 P. 671 (Nev. 1927)), and that assertions of an appurtenant right to graze were also expressly rejected by the Ninth and Tenth Circuits. See id. at *19- 20 (analyzing Hunter v. United States, 388 F.2d 148 (9th Cir. 1967); Gardner v. Stager, 892 F. Supp. 1301, 1303-04 (D. Nev.1995), aff'd, 103 F.3d 886 (9th Cir. 1996); Diamond Bar Cattle, 168 F.3d 1209 (10th Cir. 1999)). As a result, the Court found that BLM's cancellation of plaintiff's grazing permit and plaintiff's loss of access to the public lands for stockwatering purposes, did not result in a taking of plaintiff's water rights and similarly, did not result in a

taking of plaintiff's ranch. See id. at *24 and *26.

Appellant has not shown that he can succeed on his claim that the BLM's regulation of grazing on the public lands, to the extent it limits his ability to graze livestock within the vicinity of his water rights, is taking of those water rights. Indeed, it is well-established in the case law that a vested water right does not include an appurtenant right to graze on public lands. The BLM's decision to limit Appellant's grazing to certain use areas only in order to effectively manage the public lands to meet standards and objectives for the allotment, is not a taking of Appellant's water rights, so long as the BLM provides Appellant with reasonable access to divert the water. Appellant has not sought such access from the BLM.

Sheep Grazing Was Previously Authorized in the Allotment and Has Been Reduced Under the 2005 FMUD

Notwithstanding Appellant's allegation that the BLM did not authorize sheep grazing in the Allotment prior to the 2005 FMUD, there has been a long-standing sheep grazing permit for the Simpson Peak Allotment. See Evaluation at 100-101. This permit has been held by the Silver Creek Ranch, Inc. since 1995. Prior to issuance of the 2005 FMUD, the permitted sheep use in the Allotment was 795 AUMs from May 1 to September 30. See Environmental Assessment at 18; FMUD at 33. Under the 2005 FMUD, the sheep AUMs were reduced by 43%, with a total of 454 AUMs now authorized from June 1 to June 30. See FMUD at 30. The level of AUMs of sheep use authorized under the 2005 FMUD mainly allows trailing through the Willow Creek/Barton Use Area. See Environmental Assessment at 29. As such, the sheep use that is being implemented in the Willow Creek/Barton use area will result in the marginal use of water in Willow Creek. Since the 2005 FMUD significantly reduces sheep use and allows only

limited sheep use in the Willow Creek/Barton Use Area through trailing, Appellant has not demonstrated that such use would have any impact, let alone result in a "taking" of water rights he holds in the Willow Creek.

C. The Public Interest Does Not Favor a Stay

The BLM is mandated to manage grazing allotments so as to meet or make significant progress in meeting the standards for rangeland health. See 43 C.F.R. § 4180. The public interest is served when BLM meets its statutory and regulatory mandates. BLM's evaluation of monitoring data collected for the Simpson Park Allotment demonstrated that the grazing system was not allowing for the attainment of allotment standards and objectives. Among the causal factors leading to the non-attainment of these standards and objectives was the overlapping season-long use by multiple permittees within the Simpson Park Allotment that was leading to over-utilization of certain rangeland resources and poor distribution of livestock within the allotment. As a result, the BLM determined that by assigning specific use areas to each of the permittees holding grazing preferences and permits for the Simpson Park Allotment, and by adjusting the season-of-use and AUMs authorized, it could make significant progress in meeting the standards for rangeland health and in meeting its objectives for management of multiple uses on these public lands. BLM followed an extensive public process, with repeated consultations with permittees, to identify use areas most compatible with the permittees' livestock management practices and needs. Appellant was provided numerous opportunities to be involved and to participate as an active participant in this process.

The public interest does not favor a stay, since a stay would perpetuate the failure to achieve allotment objectives and the standards for rangeland health. It would clearly not be in

the public interest to allow grazing to continue to occur under the livestock grazing management system that has resulted in a failure to meet the standards and objectives established for these public lands. The public interest therefore favors a denial of Appellant's petition for stay.

IV. MOTION FOR SUMMARY JUDGMENT

A summary judgment may be rendered where "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). The material facts in the present case are undisputed. As a matter of law, however, Appellant alleges that BLM's regulation of grazing within the Simpson Peak Allotment, to the extent it restricts his access to public lands on which Appellant holds water rights, is a taking of his water rights. As previously discussed, because as a matter of law Apellant's water rights do not include an appurtenant right to graze on the public lands, BLM's regulation of Appellant's grazing on the public lands cannot result in a taking of Appellant's water rights, absent a showing that the BLM restricted Appellant's access to public lands for the purpose of diverting such water. Appellant has not alleged that he requested access to his water rights, or that such access was denied by the BLM. Instead, the record reflects that BLM has acknowledged Appellant's right to access public lands for the purpose of diverting water to which he holds a water right. As there are no questions of material fact raised by Appellant, and the case law is clear that Appellant's water rights do not include an appurtenant right to graze on public lands, the BLM is entitled to judgment as a matter of law.

V. CONCLUSION

For the reasons stated above, the BLM respectfully requests that the Board dismiss Appellant's Appeal and Stay Petition. Alternatively, if the Appeal is not dismissed, the BLM

requests that the Board deny Appellant's stay request and grant its motion for Summary Judgment.

Dated this 31st day of October, 2005.

Respectfully submitted,

Nancy S. Zahedi
Assistant Regional Solicitor

CERTIFICATE OF SERVICE

RE: Charles W. Parsons vs. BLM

I, the undersigned, declare that :

I am a citizen of the United States, over the age of eighteen, and am not a part to this litigation. On October 31, 2005, I served the

"MOTION TO DISMISS FOR LACK OF JURISDICTION; RESPONSE TO STAY PETITION; MOTION FOR SUMMARY JUDGMENT"

by placing a true copy enclosed in a sealed envelope via Federal Express and facsimile at Sacramento, California, addressed as follows:

US. Department of the Interior
Office of Hearings & Appeals
Hearings Division
139 East South Temple, Suite 600
Salt Lake City, UT 84111
Phone 801-524-5344
Fax 801-524-5539

by placing a true copy enclosed in a sealed envelope via certified mail at Sacramento, California, addressed as follows:

Charles W. Parsons
HC31 Box 9
Austin, NV 89310

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 31st day of October, 2005, at Sacramento, California.

James Hines
Secretary