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Department of Water Resources
Eastern Region

Kenneth M. Sebby, Esq.
U.S. Department of the Interior
Boise Field Solicitors Office
University Plaza
960 Broadway Avenue, Suite 400
Boise, Idaho 83706
Telephone: (208) 334-1911
Facsimile: (208) 334-1918
EMAIL: Kenneth.Sebby@sol.doi.gov

Attorney for Respondent

**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
801 N. QUINCY ST., MS 300-QC
ARLINGTON, VIRGINIA 22203**

WESTERN WATERSHEDS PROJECT,	)	IBLA No. 2010-143
	)	
Appellant,	)	#ID-330-2010-02
	)	
vs.	)	Challis Field Manager's
	)	FONSI/DR dated April 21, 2010
	)	Implementing Environmental Assessment
BUREAU OF LAND MANAGEMENT,	)	#ID-330-2009-EA-3584
	)	
	)	Judd Whitworth-Goldburg Creek Diversion
Respondent.	)	Project
	)	

**BUREAU OF LAND MANAGEMENT'S RESPONSE
TO PETITION FOR STAY**

COMES NOW The Bureau of Land Management (BLM), by and through its Attorney of Record, Kenneth M. Sebby, and files herein the **BUREAU OF LAND MANAGEMENT'S RESPONSE TO PETITION FOR STAY** with respect to the above-captioned matter.

I. OVERVIEW OF THE DECISION

Western Watersheds Project (WWP) seeks a stay of the Final Decision for the granting of a right of way (ROW) issued on April 21, 2010. The Final Decision grants the right of way for three reasons: 1) Consultation was completed with the United States Fish and Wildlife Service (USFWS) and NOAA Marine Fisheries Service (NMFS) under Section 7(a)(2) of the Endangered Species Act 1973 (as amended), which did not result in any modifications of the proposed action; 2) Granting of the ROW would allow the applicant to increase water and energy efficiencies by reducing the total amount of water diverted from Goldburg Creek and converting the irrigation system to a gravity feed; and 3) The proposed action was consistent with the Challis Resource Area, Resource Management Plan (BLM, 1999).

II. BACKGROUND

On December 12, 2003 Judd Whitworth filed an Application for Transportation and Utility Systems and Facilities on Federal Lands for the purpose of burying a pipeline on lands administered by the Bureau of Land Management – Challis Field Office (BLM-CFO). The processing of this application required additional information which was submitted; BLM-CFO requested this additional information on April 20, 2006 and December 4, 2006. The requested information was not received and the case was closed on February 2, 2007. On June 23, 2007 a new application was filed for the same purpose with the additional information and was accepted by the BLM-CFO. Additional information was again requested on November 1, 2007. This information was received by September 28, 2009.

In April of 2006, Mr. Whitworth filed an application for transfer with IDWR (Idaho Department of Water Resources) pursuant to I.C. (Idaho Code) §42-222. The reason for filing the

transfer was to “gain elevation for gravity system; add a re-diversion point,” to Goldburg Creek (Whitworth, 2006). This transfer was advertised in the Challis Messenger (local newspaper) on February 14 & 21, 2008 pursuant to I.C. §42-203A & §42-222. The BLM-CFO protested this application on February 15, 2008 due to the applicant not having obtained a right of way for the pipeline. On March 3, 2008 Western Watersheds Project also filed a protest to the transfer application. A prehearing conference was held on December 10, 2008 at which time it was determined by IDWR that proceedings in this matter would be suspended until such time as a ROW application for the pipeline had been processed by the BLM-CFO.

Consultation with the National Marine Fisheries Service (NMFS) and the United States Fish and Wildlife Service (USFWS) was initiated September 29, 2009 pursuant to Section 7 of the Endangered Species Act (ESA), 1973, as amended. Through this consultation it was determined that the action “May affect, but is not likely to adversely affect” (NLAA) Columbia Basin bull trout; it was determined that the action “May affect, and is likely to adversely affect” (LAA) unoccupied designated critical habitat for Snake River spring/summer Chinook salmon. These determinations were concurred upon and documented in a letter of concurrence (LOC) from USFWS received October 6, 2009, and in a Biological Opinion (BO) from NMFS received February 26, 2010. It was determined by NMFS in their BO that the proposed action was not likely to result in the adverse modification or destruction of unoccupied critical habitat for Chinook salmon. Therefore, NMFS did not provide an incidental take statement and did not mandate the BLM to implement reasonable and prudent measures to modify the proposed action to avoid adverse modification or destruction of habitat. Thus, the BLM-CFO was able to issue a final decision to grant a Right of Way for the proposed action.

Following completion of Section 7 ESA consultation with USFWS, and preceding issuance of the Final Decision, the USFWS proposed critical habitat for Columbia Basin bull trout on January 14, 2010 and Goldburg Creek was included. BLM-CFO fisheries biologist, Ryan Beatty, discussed this issue with the USFWS on April 8, 2010 for the purpose of clarifying BLM's responsibilities under section 7 of the ESA. They concluded that it is the responsibility of the action agency to conference on a proposed action for proposed critical habitat when the action is likely to jeopardize the continued existence of a proposed species or adversely modify or destroy proposed critical habitat. In a memo from Ryan Beatty to the BLM-CFO Field Manager David Rosenkrance, dated April 8, 2010, the BLM-CFO documented their rationale for why issuance of the Final Decision and implementation of the proposed action would not jeopardize the continued existence of a proposed species or adversely modify or destroy proposed critical habitat. Largely this rationale was based on expert analysis developed by NMFS in their BO regarding effects to critical habitat for Chinook salmon. Because the BLM-CFO determined the proposed action would not jeopardize the continued existence of a proposed species or adversely modify or destroy proposed critical habitat the BLM-CFO issued a final decision to grant a ROW for the proposed action.

Pursuant to NEPA (National Environmental Policy Act 42 U.S.C. §4321 et. seq.) the BLM-CFO prepared an Environmental Assessment to analyze the potential impacts of the proposed project. During the scoping process, the BLM-CFO posted a project description to the BLM NEPA database on the internet on January 14, 2009. A scoping letter was posted the same date on November 18, 2009. A scoping letter was sent to WWP on November 20, 2009, a response to the scoping letter was not received as of the date of the decision, April 21, 2010.

III. LAW AND ARGUMENT

43 CFR 4.21 (b)(1) provides as follows:

(b) *Standards and procedures for obtaining a stay.* Except as otherwise provided by law or other pertinent regulation:

(1) A petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (i) The relative harm to the parties if the stay is granted or denied,
- (ii) The likelihood of the appellant's success on the merits,
- (iii) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (iv) Whether the public interest favors granting the stay.

43 CFR 4.21 (b)(2) provides that "[t]he appellant requesting the stay bears the burden of proof to demonstrate that a stay should be granted." The preamble to the rule states that "the burden is on the appellant to demonstrate in the petition for a stay that a stay is necessary under each of the criteria" and that a reviewing body must "consider whether all four criteria listed in § 4.21 (b)(1) have been met." 58 FR 4939, 4941 (Jan. 19, 1993).

a. Appellant Has Failed To Establish All Necessary Elements For A Stay

In order to obtain a stay in this administrative proceeding, the Appellant must establish the four elements set forth in 43 CFR 4.471(c). BLM believes that the Appellant has not, and cannot, make the necessary showing to obtain a stay of the April 21, 2010 Final Decision.

1. Relative harm to the parties if the stay is granted or denied

WWP fails to demonstrate that the relative harm to their interests outweighs the harm to the public land in not implementing the Final Decision. WWP claims that its members would incur environmental harm if the decision is not stayed.

If a stay is granted the BLM-CFO would incur harm to the resources managed within its resource area because the benefits of the proposed project would not occur. Specifically, the

proposed project will remove excess Pahsimeroi River water from the reach of Goldburg Creek managed by the BLM-CFO thereby restoring it to a more natural flow regime. Secondly, this project will remove a diesel powered pump thereby reducing emissions and improving air quality of the project area. Furthermore, the removal of the diesel powered pump will reduce noise pollution at the project area. This project has a potential for water savings of 4 CFS (cubic feet per second) in the reach of Goldburg Creek below the existing diversions, which would improve connectivity among threatened fish populations. Finally, the ROW grantee would incur financial harm if this stay is granted as he would be left with an irrigation system that is economically deficient. This harm is addressed below.

WWP claims that the proposed action would result in WWP and its members having to experience ongoing degradation of important public resources and values. Specifically, that the granting of the ROW will result in the dewatering of a 1.1 mile stretch of Goldburg Creek; the water right associated with the proposed action however is for water which is diverted from the Pahsimeroi River. The water right is numbered by the Idaho Department of Water Resources (IDWR) 73-146 and is for 6.00 CFS (Cubic Feet per Second) sourced from the Pahsimeroi River tributary to the Salmon River. This water is diverted from the Pahsimeroi River into a $\approx$ 4 mile ditch known as the Cross Valley Ditch which traverses alluvial gravels, and injects the water into Goldburg Creek. Goldburg Creek then carries the water from the point of injection downstream $\approx$ 1.5 miles to points of rediversion. Stream flow data indicates that the reach of Goldburg Creek between the point of injection and the project area gains flow from ground water influx. These hydrologic characteristics cause all of the water which is delivered into Goldburg Creek at the point of injection to be conveyed to the project area.

The delivery of upper Pahsimeroi River water rights and Goldburg Creek water rights are supervised by the Water District 73 watermaster pursuant to I.C. §42-607. Currently the water management practice is to measure the diverted flow at the point of diversion on the Pahsimeroi River. This quantity is used to determine the quantity available the points of rediversion. This system is flawed because the ≈4 mile Cross Valley Ditch likely loses water between the point of diversion and the point of injection. BLM-CFO has stipulated (Finding of No Significant Impact and Record of Decision page 7 stipulation Q) under this grant that a measuring device be added at the point of injection for the purpose of determining the amount of water available at the points of rediversion. Therefore, under the proposed action Goldburg Creek will approach a more natural flow regime. Furthermore, BLM-CFO has stipulated (Finding of No Significant Impact and Record of Decision page 7 stipulation Q) that the applicant file a transfer with IDWR pursuant to Idaho Code §42-222. IDWR will condition the approval such that ... *“The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).”* Therefore the claimed dewatering of Goldburg Creek is actually a reduction in the amount of Pahsimeroi River carried by Goldburg Creek through the reach located on lands administered by the BLM-CFO.

WWP claims that BLM would be avoiding its duties under FLPMA. Specifically that BLM would not “prevent unnecessary or undue degradation” (43 U.S.C. §1732). Unnecessary or undue degradation is defined at 43 CFR 3802:

“Undue and Unnecessary Degradation means impacts greater than those that would normally be expected from an activity being accomplished in compliance with current

standards and regulations and based on sound practices, including the best reasonably available technology."

The BLM-CFO stipulated the ROW grant such that best management practices (BMPs) would be used in this project thereby preventing unnecessary and undue degradation (See Finding of No Significant Impact and Decision Record pages 5-7 stipulations a – r). These stipulations were written to address issues associated with Fish and Wildlife populations, noxious weeds, BLM sensitive species, riparian habitats, water quality, soils, and other resource values.

The BLM-CFO is authorized at 43 U.S.C. 1761(a):

*"... are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for – (1) reservoirs, canals, ditches, flumes, laterals, pipes, **pipelines**, tunnels, and other facilities and systems for impoundment, storage, transportation or distribution;"*

Therefore BLM has fulfilled its obligations under FLPMA to prevent unnecessary and undue degradation because the proposed action is authorized, and the impacts associated with the activity will not be greater than normal because of stipulations and BMPs placed upon the ROW grant.

WWP claims that BLM-CFO has not met its multiple use mandates under FLPMA.

Multiple Use is defined at 43U.S.C. §1702(c):

*"The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination **that will best meet the present and future needs of the American people**; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic,*

scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.” (Emphasis added to those portions cited by WWP)

Based upon the complete definition of Multiple Use, BLM-CFO is meeting its mandates under FLPMA. Specifically with relation to visual management ... “The anticipated visual contrasts are within the allowable limits for VRM (Visual Resource Management) class II areas and are not out of character for the site.” (ID-330-2009-EA-3584, p. 12 referred to hereinafter as EA). Therefore this use, in combination with other uses currently existing at the site, would not alter the experience of public land users at the location of the project site.

The ROW grantee is working with the United States Department of Agriculture – National Resources Conservation Services (USDA- NRCS) through the Environmental Quality Improvement Program (EQIP) program which:

“... Provides assistance to eligible farmers and ranchers to address soil, water, air, and related natural resources concerns, and to encourage enhancements on their lands in an environmentally beneficial and cost-effective manner...” (7CFR §1466.1)

Under this program the applicant is required to submit an EQIP Plan of Operations which must include

- “(1) A description of the participant’s specific conservation and environmental objectives to be achieved;*
- (2) To the extent practicable, the quantitative or qualitative goals for achieving the participant’s conservation and environmental objectives;*
- (3) A description of one or more conservation practices in the conservation management system to be implemented to achieve the conservation and environmental objectives;*
- (4) A description of the schedule for implementing the conservation practices, including timing and sequence; and*
- (5) Information that will enable evaluation of the effectiveness of the plan in achieving the environmental objectives”* (7CFR §1466.9)

The submitted plans are then evaluated by NRCS based upon national, state and local conservation priorities to determine which projects will be funded under this program. The national priorities are:

- "(1) Reduction of nonpoint source pollution, such as nutrients, sediment, pesticides, or excess salinity in impaired watersheds consistent with TMDLs where available as well as reduction of groundwater contamination and the conservation of ground and surface water resources;*
- (2) Reduction of emissions, such as particulate matter, nitrogen oxides, volatile organic compounds, and ozone precursors and depleters that contribute to air quality impairment violations of National Ambient Air Quality Standards;*
- (3) Reduction in soil erosion and sedimentation from unacceptable levels on agricultural land; and*
- (4) Promotion of at-risk species habitat conservation" (7 CFR §1466.4)*

The proposed project meets these national priorities because changing a portion of land from flood irrigation to meteoric sprinkler irrigation has multiple benefits. The first is that reduction of soil erosion and sedimentation in Goldburg Creek pursuant to priority 3; flood irrigation results in overland flow of water which transports sediment into Goldburg Creek. Meteoric irrigation under pivot is designed to be one of the most efficient means of irrigation, using the least amount of water possible. As a result, the majority of the water applied is used by the crop for growth, greatly reducing the amount of runoff. This efficiency also results in as much as a 50% annual volume reduction relative to flood irrigation resulting in the conservation of surface water resources pursuant to priority 1; the reduction in volume of water used, and the reduction of sediment contribution to Goldburg Creek supports priority 4. Pivots require three phase power to operate. The existing power infrastructure in the vicinity of the project area does not supply 3 phase power, as result a diesel generator has been used to operate the existing pivot. The conversion of the system to a gravity operated system would eliminate the need for this

pump and be in support of priority 3. Therefore, the granting of a stay would prevent this project's contribution to meeting these national priorities.

WWP claims that if a stay is permitted, no financial harm to the ROW grantee would occur. WWP also claims the decision is not necessary because the current system is sufficient for the purpose of irrigating the existing fields. However, a problem with the current system has arisen from the increase in the cost of petroleum based fuels. The absence of three phase power in the vicinity of the project area requires that a diesel generator be used to operate the pivot. The cost of the diesel to run the pivot exceeds the value of the crop produced by irrigation under the pivot. The expected continued rise in cost of petroleum products will only exacerbate this problem. Therefore, in order for the ROW grantee to have an irrigation system which will be cost effective the use of diesel to pump water must be eliminated. There are two methods to accomplish this, first is the proposed action which requires a ROW and is worthy of EQIP assistance, second would be to revert the entire system back to flood irrigation. The result of reversion of the system back to flood irrigation would be an increase of volume and diversion rate used to irrigate the property, and an increase in the sediment contribution to Goldburg Creek. Currently the ROW grantee is operating the system at a loss using a diesel generator; it is unlikely that this will continue in perpetuity. The EQIP assistance was allocated based upon the ROW grantee being able to complete the project and numerous time extensions have been granted to date. Therefore, if a stay is granted the potential result will be that the entire system is reverted to flood irrigation.

For the reasons outlined above, the BLM feels that the appellants have not met the burden of proof required with respect to the element of the relative harm to the parties and the request

for stay should be denied.

2. The likelihood of the appellant's success on the merits

WWP claims that the BLM-CFO did not fulfill its obligations under NEPA, FLPMA, ESA, CWA (Clean Water Act as amended 33 U.S.C. §1251 et seq.) and the RMP. WWP had sufficient opportunity (1+ year) to comment on the proposed action and did not submit comments. The proposed project was posted to the BLM on-line NEPA database on January 14, 2009 and also posted in a scoping letter to the same database on November 18, 2009.

Additionally, WWP was sent a scoping letter on November 20, 2009. The BLM responded to all comments which were received, WWP failed to comment on the claimed violations at that time. WWP's claims are broad and baseless, failing to identify which specific portions of these laws have been violated.

(1) WWP claims that BLM-CFO did not meet its obligations under NEPA. Firstly, WWP claims that BLM-CFO refused to consider in the decision the direct and cumulative impacts of the project in conjunction with livestock grazing. Contrary to WWP's claim, BLM-CFO did analyze impacts to range resources ... *"The proposed project is located in the River Pasture of Upper Pahsimeroi allotment. No impacts to grazing management are expected because the impact area is less than 1% of the allotment area"* (p.12 EA). The impact of the project is both temporally and spatially negligible relative to range resources because it is both short term (i.e. all disturbed ground will be reclaimed and reseeded) and the spatial footprint of the project relative to the allotment is minor in terms of impacts.

Secondly, WWP claims that the BLM-CFO refused to consider a full range of alternatives. The BLM-CFO analyzed the proposed action, a no action alternative, with an alternative for

minimal disturbance being considered but not analyzed because the ROW would have occurred entirely within a Riparian Habitat Conservation Area. The petitioner had ample opportunity to suggest other alternatives, but did not do so. Furthermore, the BLM-CFO is required to

- “(a) Rigorously explore and objectively evaluate all **reasonable** alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.*
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.*
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.*
- (d) Include the alternative of no action.*
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.*
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.” (emphasis added)(40 CFR §1502.14)*

Pursuant to item (a) BLM-CFO evaluated all reasonable alternatives.

“Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.” (Question 2a, CEO, Forty Most Asked Questions Concerning CEO's NEPA Regulations, March 23, 1981).

The reasonableness of an alternative is also defined relative to the purpose and need for the action:

“The purpose of this action is for the BLM-CFO to issue a pipeline ROW to the applicant. The need for the action is for the BLM-CFO to fulfill its multiple-use, Federal land managing agency mandate, as established by the Federal Land Policy and Management Act (FLPMA). This mandate obligates the BLM to consider applications for rights-of-way. The applicant's need is to increase irrigation efficiency by using a gravity flow system.” (p.4 EA)

The purpose of the NEPA document as defined by the above captioned purpose and need statement was to consider the issuance of a ROW. The proposed action was considered and analyzed in detail, while a minimal disturbance alternative was considered and determined to not

be reasonable (p. 9 EA). Pursuant to item (d) BLM-CFO also analyzed a not action alternative. The alternatives were analyzed in the EA pursuant to item (b). The proposed action alternative was for actions which were to occur both under the jurisdiction of the BLM-CFO, IDWR, and U.S. Army Corps of Engineers thereby complying with item (c). (Item (e) pertains only to EIS and is therefore not addressed here). The BLM-CFO developed additional mitigation measures beyond those included in the proposed action to minimize impacts and thereby complying with item (f).

Thirdly, WWP claims that the BLM-CFO did not provide a “hard look.” WWP failed to provide input or additional information to the BLM-CFO during the NEPA scoping process. Moreover, a “hard look” is defined as a reasoned analysis containing quantitative or detailed qualitative information. BLM-CFO made a reasoned analysis, based upon the best available information, regarding impacts to all pertinent resources (Table 1 p. 11-13 of the EA). The result of this hard look is further shown in the ≈100 analysis documents available in the administrative record; furthermore this can be evidenced by the numerous meetings held with NMFS, USFWS and NRCS (the notes for most of these meetings are contained in the administrative record). NEPA does not require the BLM-CFO to provide all documentation associated with the hard look, it requires the BLM-CFO to provide for the public the Environmental Assessment which is defined as

“(a) Means a concise public document for which a Federal agency is responsible that serves to:

- 1. Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.*
- 2. Aid an agency's compliance with the Act when no environmental impact statement is necessary.*

3. *Facilitate preparation of a statement when one is necessary.*

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” (40 CFR §1508.9)

WWP describes no specific deficiencies as basis for their claim nor do they provide analysis supporting the claim. Therefore the BLM-CFO believes, through the development of NEPA documents, it has taken a hard look.

Fourthly, WWP claims that BLM-CFO should have denied the ROW grantee's request because it is against public interest and violates public trust. The granting of this ROW will result in the reduction of Pahsimeroi River water through the 1.1 mi stretch of Goldburg Creek on BLM-CFO administered lands, returning the creek to a more natural state. The granting of the ROW will remove the use of a diesel powered pump reducing noise and emissions improving air quality and reducing noise pollution in the vicinity of the project area.

Finally, WWP claims that the BLM-CFO made an improper decision not to prepare an EIS for a project that may significantly affect the quality of the human environment. However the impacts associated with this action do not meet the definition of significance as defined at in 40 CFR §1508. A detailed explanation of the specifics is given in the Finding of No Significant Impact and Decision Record p. 1-5.

(2) WWP claims that under ESA, the BLM-CFO refused to consider effects of public and private grazing and diversion of Goldburg Creek. WWP also claims that the BLM-CFO would allow adverse modification of designated critical habitats, and would allow use of a substandard fish screen that would result in injury or mortality (e.g. “take”). The BLM-CFO asserts these

claims are false, based on several facts: 1) the cumulative effects of grazing were considered in the BA (dated 9/28/2009), on pages 17-18 under the section titled "*Cumulative Effects*" 2) BLM received a Biological Opinion from NMFS on 3/3/2010, which explained why adverse modification of designated critical habitat is not likely to occur on pages 24-25 under the "*Conclusion*" section; 3) the potential for "take" of bull trout was analyzed in the BA and determined to be discountable, and USFWS concurred with the BLM's effect determination in a Letter of Concurrence dated October 6, 2009.

(3) WWP claims that the BLM-CFO would be ignoring the requirements of FLPMA and the Challis RMP for issuing new ROWs for water diversions by private parties from BLM-managed public lands. The BLM-CFO is authorized to grant ROW's for pipelines at 43 U.S.C. 1761:

*"... are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for – (1) reservoirs, canals, ditches, flumes, laterals, pipes, **pipelines**, tunnels, and other facilities and systems for impoundment, storage, transportation or distribution;"*

With regards to water diversions from public to private lands, the RMP states under Land Use and Tenure Goal 3 Item 8 p. 27:

"New rights-of-way for water to be diverted from public land by a private claimant would only be granted if (a) the diversion facility is controllable, measurable, and/or designed to divert, at most, that amount of water permitted in the water right, and (b) the diversion would have no significant impact on existing resource values, and (c) granting the right-of-way would not adversely affect achievement of riparian management or aquatic objectives, and (d) when appropriate, the diversion facility is designed and constructed in accordance with the latest fish screening and bypass criteria. When renewing existing rights-of-way for water diversion, stipulate the renewed right-of-way to achieve (a), (b), (c) and (d) above, to the extent possible."

Pursuant to item (a), the BLM-CFO communicated with IDWR via email regarding a lockable and measurable head gate. IDWR stated that they would condition the approved transfer:

"The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s)." (Email Received from IDWR 3/17/ 2010)

Water right 73-146 is for 6.00 CFS, the proposed point of diversion can divert at maximum capacity a total of 3.7 CFS. Therefore, the diversion will be lockable and controllable, and designed to divert less than the total water right. Therefore, pursuant to item (a) the diversion would be lockable and measurable and designed to divert less water than the water right allows (note - water right 73-146 does not have a volume limitation). The impacts associated with this action do not meet the definition of significance as defined at in 40 CFR §1508. A detailed explanation of the specifics is given in the Finding of No Significant Impact and Decision Record p. 1-5 and therefore the proposed ROW meets item (b). The effects to riparian management and aquatic objectives were analyzed in the EA (see Table 1 p. 11), and no significant impacts were found, therefore BLM-CFO met item (c). Because Goldberg Creek lacks salmon and steelhead it does not qualify for financial assistance from the Idaho Fish and Game Screen Shop for diversion fish screening (see Administrative record field meeting notes dated 12 Dec. 2007). The Gooby Flat Plate Turbulent Screen was proposed by the applicant, BLM-CFO consulted on this diversion structure under section 7 of ESA. Consultation did not result in modification to the proposed diversion therefore BLM-CFO has met item (d).

WWP claims that the BLM-CFO will fail to follow the requirements of the CWA and the Idaho State Surface Water Standards by allowing further degradation of streams that are on Idaho's 303(d) list. WWP's claims are broad and do not identify any specific portions of these laws with which they claim that the BLM-CFO is not compliant. Moreover, WWP's claims that

the affected reach of Goldburg Creek is 303(d) listed is erroneous, according to the Idaho Department of Environment Quality 2008 Integrated 303(d) /305(b) report. Goldburg Creek is only 303(d) listed in the reach above Grave Springs (Map of Listed Streams near Whitworth Pipeline Project 3 Dec. 2009). The BLM-CFO is neither the State nor the Federal water management agency. These agencies are the IDWR and the US Army Corps of Engineers respectively. The CWA exempts the proposed action from 404 permitting, and the Idaho IDAPA code exempts the proposed action from requiring a stream channel alteration permit (EA p. 5-6). Furthermore, the proposed action will not result in the 303(d) listing of Goldburg Creek. Therefore the BLM-CFO has complied with the CWA and Idaho Water Quality Standards.

WWP claims that by adding another POD, the BLM failed to ensure that the applicant would not take twice as much water from Goldburg Creek. The BLM-CFO denies this claim because the ROW grantee, as a water user, will be monitored by a watermaster and will therefore be unable to take water excess of the decreed water right 73-146. Moreover, the BLM-CFO is not the water management agency and therefore BLM-CFO relies on the IDWR to enforce Idaho State water law. IDWR has the authority to administer water rights and transactions in the state of Idaho pursuant to the Idaho State Constitution Article XV and Idaho Code §42-101. Distribution of water from Goldburg Creek and the Pahsimeroi River is regulated by the watermaster for Water District 73 which is supervised by the Director of the IDWR pursuant to Idaho Code §42-602 (for further details see the IDWR Watermaster Handbook contained in binder 1 of the appeal record).

WWP claims that the potential water savings is unlikely. Therefore the only water users which could divert the “saved” water would be other users on Goldburg Creek downstream with Pahsimeroi River water rights downstream of the ROW grantee’s PODs. The ROW grantee’s

water system consists of a portion on the south side, and the north side of Goldburg Creek. The portion on the south side of Goldburg Creek will be converted to sprinkler irrigation under two pivots. The portion of the system on the north side of Goldburg Creek is currently under flood irrigation and will continue to be irrigated under this method. The calculated water savings accounted for the continued flood irrigation in this northern portion of the system. The only other water diversion downstream of the ROW grantees system which is authorized to divert Pahsimeroi River (and is junior to the ROW grantees water right) irrigates 15.7 acres, the full irrigation requirement for flood irrigation is 0.03-0.04 CFS per acre which means that this diversion would take at most 0.47-0.63 CFS of the 4 CFS water savings. Therefore BLM-CFO denies the petitioners claim because a water savings is certain to occur, but acknowledges the exact amount and duration will vary.

The appellant has provided no basis for their conclusory statements, therefore they cannot meet the burden of proof required with respect to the element of likelihood of success on the merits and the request for stay should be denied.

3. The likelihood of immediate and irreparable harm if the stay is not granted

WWP claims immediate and irreparable harm, yet they did not respond to the BLM-CFO when a scoping letter was sent to them on November 20, 2009. Furthermore, the project was posted on the BLM on-line NEPA database on January 14, 2009, with a general scoping letter being posted to the same database on November 18, 2009. The purpose of the scoping process is for the interested and/or the affected public to comment on proposed actions allowing the BLM an opportunity to respond and/or alter the proposed actions.

The burden of proof is on WWP to show that the BLM's decision has a likelihood of causing immediate and irreparable harm. WWP's primary reasoning for irreparable harm is based on the proposed action withdrawing enough stream-flow to dewater Goldburg Creek and the BLM's failure to adequately address impacts through NEPA and ESA procedures. The petition does not define dewatering, but implies, consistent with the BLM's usage in the EA and BA, that it constitutes enough removal of water to create a fish barrier via a dry channel or insufficient flow to allow fish passage. For example, this is implied in the petition on page 5, item # 6, which states: "Increased risk of extinction of local populations of bull trout and Westslope cutthroat trout with creation of fish barrier with 1.1 mile dewatered reach." WWP claims on page 4 of their petition, under *I. The Likelihood of Irreparable Harm Favors Issuance of a Stay* that issuance of the Final Decision would cause irreparable harm because "*it will dewater a 1.1-mile reach of stream that is Snake River spring/summer Chinook salmon critical habitat and proposed for designation as bull trout critical habitat.*" WWP also indicates that other fish, including bull trout and Westslope cutthroat trout, occupy Goldburg Creek and its tributaries upstream of the proposed action area. Based on the assertion that the proposed point of diversion would dewater a 1.1-mile of Goldburg Creek, the petitioner states that "*such harm to endangered species is one of the most serious types of irreparable harm.*"

WWP's claims that a fish barrier would be created via channel dewatering, and that the BLM-CFO failed to address impacts through NEPA and ESA procedures is false. Based on BLM's analysis of authorized diversion rates, quantified stream-flow estimates and observed diversion rates, it was determined that the proposed action would not dewater Goldburg Creek. The Decision would actually allow the Grantee to divert less stream-flow relative to the existing

system. The BLM Decision also included ROW stipulations that would allow for more accurate measurement of flow diverted than currently exists. The BLM discussed the significance of channel dewatering and types of impacts associated with flow diversion in the EA on page 17, which stated: *“Habitat disturbance, in-stream structures, and flow removal associated with water diversion can impact fish and fish habitat in a several ways, including: 1) altered flow, sediment, and temperature regimes can render habitat unsuitable; 2) diversion structures can inhibit fish movement and fragment habitat; and 3) points of diversion can cause mortality as fish are entrained in the ditch or impinged on debris screens. Under the proposed action, operation of the POD within the ROW would decrease flows by 3.7-ft³/second in the stream reach (approximately 1 mile) between the existing diversions (Map B) and the new POD. The diversion of up to 3.7-ft³/second would occur during the irrigation season, April 1 to October 31, with the greatest impact on stream-flow occurring during low-flow conditions of August – October. However the proposed POD would not dewater the proposed stream reach upstream of the existing diversions. For example, in September of 2007 stream-flow near the proposed POD was 9.7-ft³/sec, and at these flows, the withdrawal of 3.7- ft³/sec would constitute approximately a 38% reduction. This is not anticipated to prevent fish occupancy or migration”.*

The EA then immediately after (page 17) described the results of the BLM estimates of current diversion rates, and the impact of the proposed action on water quantity, which stated: *“A potential benefit of increased irrigation efficiency is more water will be left in the stream downstream from the existing diversion structures (Map B) In this instance, the BLM estimated that the existing irrigation system requires approximately 10.8 ft³/sec to irrigate at maximum capacity (including flood and 2 pivots). Under the proposed action, to irrigate at maximum*

capacity, the irrigation system would require approximately 4 ft³/sec to run 2 pivots and 2.9 ft³/sec for remaining flood irrigation. A net reduction in withdrawal by the applicant would result in a water savings of approximately 4 ft³/sec and convey some additional surface water to downstream reaches of Goldburg Creek, and potentially improve connectivity for fish passage and occupancy within the flow limited reaches downstream of the proposed project reach”.

The EA then described (page 18) impacts related to sediment introduction, water temperature, and fish habitat and fish passage, and potential for mortality due to the diversion structure. And based on the results of ESA consultation, local hydrologic data, threatened fish distribution, project design features, and ROW stipulations, the BLM described why significant impacts were not anticipated. For example, the EA stated on page 18-19: *“Increases in fine sediments can have negative impacts on spawning habitat and quality of pools. Elevated levels of fine sediments are present in Goldburg Creek, probably due to excessive introductions during construction and maintenance of the cross-valley irrigation ditches. The proposed project would remove approximately 15-lineal feet of streambank to install the ditch and bypass pipe outlet. Direct contribution of sediment and short duration turbidity would occur as a result of this action. To reduce the amount of sediment, delivery machinery would only operate from the top of bank and the bucket excavation below the water line would be minimized to the extent necessary to achieve project objectives. Measureable increases in surface fines downstream of the POD are not anticipated. Reoccurring direct contributions of sediment would occur during installation and removal of the earthen plug (4' x 4' x 1.5'), located in ditch channel, in front of the screen and pipeline intake. However, a substantial portion of this sediment would end up in the pipeline, and not bypass flow to Goldburg Creek (D. Gooby, NRCS, personal comm.). Following short*

term bursts of turbidity, a measureable increase in surface fines is not anticipated. Sediment input resulting from hand placing and removing native rocks or rip-rap composing a weir (if necessary), would be negligible.

"Regarding the projects effect on water temperature, it is anticipated that diversion during low flow periods could exacerbate already elevated water temperatures within the project reach (Table 3). However a significant increase in temperature is not anticipated. This is due to groundwater expression in the flow gaining stream reach of the project area, which can mediate the effect of ambient air temperature (Constantz, 1998)".

"Irrigations diversions and associated infrastructure can impede fish movement and fragment habitat by making conditions unsuitable (temperature and volume) or even completely dewatered. The proposed POD is not anticipated to include an in-channel weir, so no physical impediments to movement would result. And the extent of flow withdrawal would not reduce flow volume enough to prevent fish passage. A downstream water savings, if realized, would have a beneficial impact of fish passage within reaches currently subject to dewatering for portions of the irrigation season. However, movements by fish that enter the ditch and interact with the proposed POD would be impeded temporarily. Design features, including the bypass pipe, are intended to return fish and debris to Goldburg Creek. As fish interact with the proposed POD there is a potential for fish to be impinged on the screen-face, which can result in injury or mortality. For example, in an evaluation of the proposed bubble screen, NMFS fish passage engineers reviewed it compared to NMFS criteria screens, as an alternative technology fish screen (NMFS 2006). Their test fish was a 75-mm brook trout, and the test did not assess the screen for substantially larger or smaller fish. It was determined that only 18% of the test fish

were able to successfully exit the bubble screen via the bypass system without contacting the screen face. It was also noted that the screen configuration did not allow fish to leave the screen within 60 seconds, a NMFS criterion for canal screens. NMFS also indicated there were areas of wide ranging velocities on the screen face that often exceed NMFS criteria approach velocities of 12.2 cm/s; this can result in fin injury or impingement. Brook trout known to occupy the action area could be harmed or impinged on the screen face. Given the potential for brook trout and bull trout hybridization, any injury or mortality of brook trout would be a potential benefit”.

“There is limited potential for threatened bull trout or sensitive westslope cutthroat trout to interact with the bubble-screen in a negative fashion, and this is based on several factors, including: 1) an apparent absence or sparse distribution of these species in the project area makes it unlikely that individuals would end up in the ditch and interact with the screen and bypass outlet; 2) It is unlikely that fish returned to Goldburg Creek via the bypass outlet would be harmed by entering a dry channel (e.g. sufficient flow would exist downstream of the POD); 3) Although the proposed screen does not meet all NMFS criteria, it does serve to prevent fish entrainment in the pipeline, and return fish to Goldburg Creek via bypass flow”.

As evidenced in documents related to ESA consultation in the Administrative Record, spanning from 2007 to 2010, including a letter of concurrence (LOC) and biological opinion (BO), it is apparent that the BLM fully engaged in and completed ESA consultation for all aspects of the action and used the best available information. Through ESA consultation, BLM, USFWS, and NMFS considered effects related to sediment, temperature, and fish habitat (pools, bank stability, riparian zone vegetation). For example, a more detailed analysis of effects associated with flow diversion in the project reach and rationale for why the proposed action

would not dewater Goldberg Creek, would not prevent fish passage, or render habitat unsuitable, was provided in the BA used for ESA consultation. Within the BA, flow measurement data and discussion occurs on pages 10-12, under the *Description of Action Area -Hydrology* section. The rationale and conclusion that Goldberg Creek would not be dewatered and that the proposed diversion would not impede fish passage is discussed in context of effects to critical habitat for Chinook salmon and habitats potentially used by bull trout on page 13, under the *Analysis of Effects – Water Quantity and Quality* section. The aforementioned sections also described that the proposed action could have a beneficial effect to reaches of Goldberg Creek downstream of the action area. Due to a net reduction in flow diversion, the proposed action is expected to result in more water being delivered downstream of the existing diversions, a stream reach on private lands that is seasonally dewatered due to flow diversion.

WWP also claims irreparable harm would occur due to the type of diversion structure the Grantee and NRCS propose to use. The petition states on page 4 of the petition, that: *“By employing a trash rack instead of a National Marine Fisheries Service (“NMFS”) criteria fish screen for juvenile and adult salmonids, the new POD and diversion works may cause take, including lethal take, of ESA-listed bull trout and westslope cutthroat trout, a Sensitive species.”*

The type of diversion structure and fish screening requirements were discussed early and often as part of ESA consultation and project scoping. Plans for the proposed diversion structure (Gooby Flat-Plate Screen / Bubble-screen) were distributed to NMFS during the October 24, 2007 Level-1 Meeting among BLM, NMFS, and USFWS. These plans were submitted by NMFS for review and to determine if the proposed structure met NMFS screening criteria. On November 16, 2007, BLM was provided results of a February 27, 2006 review of the Gooby Flat-

Plate Turbulent Screen, which identified reasons why the structure did not meet NMFS criteria. The BLM also inquired with the Idaho Department of Fish and Game about the adequacy of the proposed structure and the cost of NMFS criteria screens. On December 12, 2007, representatives from IDFG, BLM, NRCS, and the applicant met at the project site to discuss screening options and the possibility of pursuing additional funding to add screens to existing ditches and to employ NMFS criteria screens. Ultimately, NMFS criteria screens were cost-prohibitive to the applicant and available NRCS funding, and any benefits would be largely negated by unscreened diversions downstream. On February 4, 2008 an email from NMFS to the BLM indicated that a NMFS criteria screen would not be immediately required, due to a lack of anadromous fish in Goldburg Creek. In a meeting among NRCS, USFWS, and BLM on February 6, 2008, the potential for additional funding for NMFS criteria screens was further discussed. It was determined by USFWS that they were not interested in pursuing additional funding because of a lack of bull trout in the project area, the applicant's unwillingness to cooperate, and federal land ownership to complicate funding allocation. At that point, USFWS determined if NMFS would allow a non-NMFS criteria screen then the BLM should complete consultation based on the proposed action. At that point, the BLM decided to move forward with ESA and NEPA procedures based on the proposed action and the proposed bubble-screen.

The BLM, through ESA consultation and the Final September 28, 2009 BA, addressed the potential for effects to bull trout from the proposed diversion structure. Detailed discussion of the diversion and effects analysis can be found in the Final BA (9/28/2009) under *Analysis of Effects – Safe Passage* (Page 16) and under *Determination of Affect and Rationale for Bull Trout and Designated Critical Habitat - Direct effects to individuals during POD construction and*

operation (Pages 30-31). The BLM made the determination that the proposed action including the subject diversion structure “May affect, but is not likely to adversely affect bull trout.” The BLM received concurrence on this determination from USFWS in a letter of concurrence dated October 6, 2009.

WWP also claims that the Decision may cause irreparable harm to Pygmy rabbits and Sage Grouse. Based on review of BLM files, there was no documentation of T & E or sensitive species within the project area. Based on the best available information regarding species distribution, an analysis of impacts was done under NEPA. Rational was written in the “Resources Considered in the Analysis” table of the EA for not carrying the species mentioned in the petition forward. The petition failed to demonstrate immediate and irreparable harm to pygmy rabbits. Office files were reviewed and there was no recorded presence of pygmy rabbits within the project area. The project area is mapped as “Key” habitat for sage grouse. “Key” sage grouse habitat is defined as “areas of generally intact sagebrush that provide sage-grouse habitat during some portion of the year” (Idaho Sage-grouse Advisory Committee, 2006). “Key” habitat, as explained in the Conservation Plan for the Greater Sage-grouse in Idaho, “was initially developed cooperatively by BLM, IDFG and other partners in 2000, to facilitate wildland fire suppression planning and other habitat conservation efforts.” The petition states that sage grouse “will be disturbed during all phases of the diversion project”. However, no leks or critical seasonal habitat has been identified within the project area.

The appellant’s claims provide no factual data or evidence of immediate and irreparable harm which would refute the data collected and analyzed by the BLM in preparation of the

Environmental Assessment, therefore they cannot meet the burden of proof required with respect to this element and the request for stay should be denied.

4. Whether the public interest favors granting the stay

To demonstrate entitlement to a stay, WWP must show that the public interest demands a stay. WWP claims that the proposed action will not be in the public interest because it somehow violates FLPMA, NEPA and other federal laws, however these broad claims fail to describe how the BLM-CFO has failed to comply with federal law in any specific manner. The BLM-CFO has shown that the proposed action is in the public interest because; the proposed action will reduce noise and air pollution by removing a diesel powered irrigation pump, by returning Goldburg Creek to a more natural flow regime, and by requiring a measuring devise at the point of injection of the cross valley ditch into Goldburg Creek to ensure water savings. The BLM-CFO has complied with FLPMA, NEPA, and other federal laws as described above. The BLM-CFO has analyzed the effects of the proposed action on pertinent resource values in the EA and through consultation under section 7 of ESA. Consequently, the BLM-CFO determined in the Finding of No Significant Impact and Decision Record that the impacts of this project would not be significant. The ROW grantee will be economically harmed if the petition for stay is granted. Further as outlined under the EQIP programs national priorities the NRCS has found that this project has public benefits. Finally, if WWP believed that this action was counter to the public interest and were provided with an opportunity during the scoping process (1+ year) to comment, they chose not to do so. As of the date of decision, April 21, 2010, no comments were received.

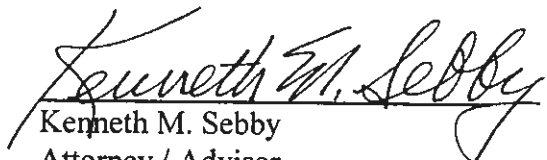
WWP fails to provide any evidence supporting a claim of public interest favoring the granting of a stay and therefore cannot meet the burden of proof necessary to sustain the standard

with respect to whether the public interest favors granting the stay.

IV. CONCLUSION

Based on the foregoing, the BLM-CFO contends that the petitioner has not, and cannot establish the necessary elements to obtain a stay in the above captioned matter. The BLM-CFO respectfully requests that the Interior Board of Land Appeals deny WWP's Petition for Stay. The potential benefits of the proposed project outweigh WWP's interest in obtaining the stay. Those benefits include a reduction in noise and air pollution as a result of the removal of a diesel powered irrigation pump. Goldberg Creek will be returned to a more natural flow regime through its reach on lands administered by the BLM-CFO by the removal of Pahsimeroi River water. This project will also result in potentially 4 CFS of water no longer being diverted from Goldberg Creek.

Dated this 7th day of June, 2010.


Kenneth M. Seby
Attorney / Advisor

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2010 I caused to be mailed, postage prepaid, by regular mail, a true and correct copy of the foregoing **BLM'S RESPONSE TO PETITION FOR STAY** to the following:

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
801 N. QUINCY ST., MS 300-QC
ARLINGTON, VIRGINIA 22203 (via regular mail and facsimile to 703-235-3750)

Larry Zuckerman
Central Idaho Director
Western Watersheds Project
P.O. Box 1322
Salmon, Idaho 83467

(via regular mail)

Bureau of Land Management
Idaho Falls District
Manager, Challis Field Office
801 Blue Mountain Road
Challis, Idaho 83226

(via facsimile to 208-879-6219)

Judd Whitworth
Whitworth Ranches
PO Box 126
Ellis, Idaho 83235

Alonzo Coby, Chairman
Shoshone Bannock Tribes
Fort Hall Business Council
PO Box 306
Fort Hall, Idaho 83203

Dave Carlson
Id Dept of Water Resources
900 N. Skyline Dr. Ste A
Idaho Falls, Idaho 83402

Chad Colter
Fish and Wildlife Director
Shoshone Bannock Tribes
PO Box 306
Fort Hall, Idaho 83203

Karma Bragg
Project Manager
Custer County Soil and Water
Conservation District
PO Box 305
Challis, Idaho 83226

Damien Miller
US Fish and Wildlife Service
Snake River Basin Sub Office
4425 Burley Dr. Ste A
Chubbuck, Idaho 83202

Mark Olson
USDA NRCS
District Conservationist
945 River Front Dr.
Salmon, Idaho 83467

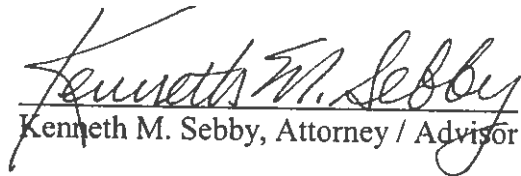
Yvette Tuell
Environmental Program Manager
Shoshone Bannock Tribes
PO Box 306
Fort Hall, Idaho 83203

Jim Lukens
Id Dept of Fish & Game
PO Box 1336
Salmon, Idaho 83467

Dave Mabe, State Director
NOAA Fisheries
Snake River Habitat Branch Office
10215 W. Emerald Ste 180
Boise, Idaho 83704

Carolyn Boyer Smith
Cultural Resources Coordinator
Shoshone Bannock Tribes
PO Box 306
Fort Hall, Idaho 83203

Claudio Broncho
Fisheries Policy Representative
Shoshone Bannock Tribes
PO Box 306
Fort Hall, Idaho 83203


Kenneth M. Sebby, Attorney / Advisor

