



BLUE MOUNTAINS BIODIVERSITY PROJECT,
LEAGUE OF WILDERNESS DEFENDERS

188 IBLA 143

Decided August 9, 2016



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

703-235-3750

703-235-8349 (fax)

BLUE MOUNTAINS BIODIVERSITY PROJECT,
LEAGUE OF WILDERNESS DEFENDERS

IBLA 2016-195

Decided August 9, 2016

Appeal from a decision of the Bureau of Land Management approving an integrated invasive plant management program for the Prineville District, Oregon. DOI-BLM-ORWA-P000-2011-0019-EA.

Motion to Dismiss Denied; Petition for a Stay Denied.

1. Administrative Procedure: Standing;
Rules of Practice: Appeals: Standing to Appeal

To appeal a BLM decision, an appellant must demonstrate that it is both a “party to a case” and “adversely affected” by the decision it seeks to appeal. It is the responsibility of the appellant to demonstrate both elements of standing. If either element is lacking, the Board must dismiss the appeal for lack of jurisdiction.

2. Administrative Procedure: Standing;
Rules of Practice: Appeals: Standing to Appeal

When an organization seeks to establish standing, it must demonstrate either that (1) the organization itself has a legally cognizable interest that is substantially likely to be injured by the decision or (2) one or more of its members has a legally cognizable interest in the subject matter of the appeal coinciding with the organization’s purposes, that is substantially likely to be injured by the decision.

3. Administrative Procedure: Standing;
Rules of Practice: Appeals: Standing to Appeal

A legally cognizable interest can include cultural, recreational, or aesthetic use and enjoyment of the

affected public lands. Repeated recreational use, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person, but a mere interest in a problem or concern with the issues involved is not sufficient to establish standing.

4. Administrative Procedure: Standing;
Rules of Practice: Appeals: Standing to Appeal

In order to demonstrate adverse effect, an appellant must make colorable allegations, supported by specific facts set forth in an affidavit, declaration, or other statement, that establish a causal relationship between the approved action and alleged injury to a legally cognizable interest. In establishing an adverse effect, an appellant need not prove that an injury is certain, but the appellant must show that the threat of an injury and its effect on the appellant are more than hypothetical.

5. Rules of Practice: Appeals: Motions;
Rules of Practice: Appeals: Stay

A party requesting a stay bears the burden of proof to demonstrate that a stay should be granted by showing sufficient justification based on the four standards listed in 43 C.F.R. § 4.21(b)(1). A failure to satisfy any one of the stay criteria will result in denial of a petition for stay. In considering whether to stay a decision, the Board's review is preliminary in nature and necessarily more cursory than a full review of the merits of the appeal.

APPEARANCES: Karen Coulter, Director, Blue Mountains Biodiversity Project, Fossil, Oregon, for appellant; Brad Grenham, Esq. and Jeffrey P. Bernstein, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE RIECHEL

Blue Mountains Biodiversity Project, League of Wilderness Defenders (BMBP) appeals and asks the Board to stay the effect of the Bureau of Land Management's (BLM) May 2016 decision to increase the number of herbicides agency personnel can use when implementing its invasive plant management program in the Prineville

District. Because BMBP's standing to appeal and to seek a stay of BLM's decision was not readily apparent, the Board permitted BMBP the opportunity to demonstrate standing and held BMBP's stay petition in abeyance until the parties could brief the standing matter. We have determined, after reviewing the parties' respective pleadings, that BMBP has established standing by showing that it is a party to the case whose legally cognizable interests are substantially likely to be injured by BLM's decision. Even though BMBP has established standing, however, it has not established that the harm it will suffer if we deny its stay petition is greater than the potential harm to BLM if we grant it. Therefore, BMBP cannot prevail on its petition for stay, and we deny it.

The Decision on Appeal

BLM's Prineville District in Oregon issued a May 2016 Decision Record approving "Integrated Invasive Plant Management for the Prineville District." In this decision, BLM approved the expansion of the Prineville District's invasive plant management program by increasing the kinds of plants controlled from noxious weeds to all non-native, invasive plants and by increasing the number of herbicides available for BLM's use from 4 to 14.¹ BLM analyzed the expansion of the plant management program in an environmental assessment (EA), and based upon this EA, BLM issued a finding of no significant impact.² BLM concluded that expansion of the program will provide several benefits, including allowing the use of additional herbicides that are more effective at controlling invasive plants while reducing potential risks to applicators, the public, tribes, and surrounding resources.³

The Board's Order to Show Cause and the Parties' Responses

Upon review of BMBP's appeal, the Board issued an order to BMBP to show cause why its appeal should not be dismissed for lack of standing.⁴ In response to the Board's order, BMBP filed a revised Notice of Appeal, Request for Stay, and Request for Relief.⁵ The revised document included a declaration from Karen Coulter, who identified herself as the Executive Director for BMBP since 2003. BMBP also filed a revised statement of reasons.

¹ Decision Record (DR) at 2 (May 5, 2016).

² Integrated Invasive Plant Management for the Prineville District, Revised EA DOI-BLM-ORWA-P000-2011-0019-EA (May 2016) (EA); Finding of No Significant Impact (May 5, 2016).

³ DR at 2-3.

⁴ Order to Show Cause – Standing (June 22, 2016).

⁵ Notice of Appeal, Request for Stay, and Request for Relief Regarding the Integrated Invasive Plant Management for the Prineville District Revised EA, Decision Record, and FONSI (June 27, 2016) (Appeal).

BLM filed a document titled Information Supporting Dismissal for Lack of Standing, which directed the Board to the State of Oregon's Secretary of State's Corporations Division's online registry for information about BMBP's corporate status.⁶ We considered BLM's filing a motion to dismiss BMBP's appeal for lack of standing. To allow time for BMBP to respond to BLM's motion, we issued an order holding BMBP's stay petition in abeyance until briefing on the motion to dismiss was complete.⁷ BMBP responded to the motion to dismiss by explaining BMBP's structure and its relationship to the League of Wilderness Defenders and providing additional declarations describing its interests in BLM's decision and the impact of the decision on BMBP.

BMBP Has Standing to Appeal BLM's Decision

To maintain an appeal and petition for a stay, an appellant must have standing under the Board's regulations. We find that BMBP satisfied the standing requirements, and we therefore deny BLM's motion to dismiss.

[1] To establish standing to appeal a decision, an appellant must demonstrate that it is both a "party to a case" and "adversely affected" by the decision it seeks to appeal.⁸ It is the responsibility of the appellant to demonstrate both of these elements of standing.⁹ If either element is lacking, the Board must dismiss the appeal for lack of jurisdiction.¹⁰

A. BMBP Is a Party to the Case

Under the Board's regulations, a "party to a case" includes one who has "participated in the process leading to the decision under appeal, e.g., . . . by commenting on an environmental document"¹¹ The purpose of the requirement that an appellant be a party to the case "is *not* to limit the rights of those who disagree with Bureau actions, but to afford a framework by which decisionmaking at the [D]epartmental and State Office level may be intelligently made":

⁶ Information Supporting Dismissal for Lack of Standing (July 6, 2016).

⁷ Order: Petition for Stay Held in Abeyance (July 18, 2016).

⁸ 43 C.F.R. § 4.410(a).

⁹ *Cascadia Wildlands*, 188 IBLA 7, 9 (2016); *Western Watersheds Project (WWP)*, 185 IBLA 293, 298 (2015).

¹⁰ *Cascadia Wildlands*, 188 IBLA at 9; *WWP*, 185 IBLA at 298; *WildEarth Guardians*, 183 IBLA 165, 170 (2013).

¹¹ 43 C.F.R. § 4.410(b).

If an individual has been a “party to a case” and seeks review of the Bureau's actions, it is presumed that the Bureau had the benefit of that individual’s input when the original decision was made; thus the BLM was fully aware of the adverse consequences that might be visited upon such an individual as a result of its actions.^[12]

BMBP asserts that it is a party to the case because it submitted comments on BLM’s Integrated Invasive Plant Management EA.¹³

The information BLM brings to our attention in its motion to dismiss raises a question about whether the BMBP entity that filed the appeal is the same BMBP entity that commented on the EA. BLM consulted the Oregon Secretary of State’s registry and discovered two BMBP entities: (1) BMBP, Inc., which was registered as a non-profit corporation in Oregon in 1999 and administratively dissolved on February 11, 2016,¹⁴ and (2) BMBP, which was registered as a non-profit corporation in Oregon on June 8, 2016.¹⁵ Comparing this information to the procedural history of this case, BLM deduced that BMBP, Inc. submitted comments on the EA in January 2016, but a different corporate entity, BMBP, signed the Notice of Appeal on June 4, 2016, four days before it was registered as a nonprofit corporation in Oregon. BLM reasonably concluded that BMBP cannot be a party to the case because it did not comment on the EA.

BMBP responded that neither of the entities BLM identified on the Oregon Secretary of State’s registry is the actual appellant in this case.¹⁶ Instead, the appellant is “BMBP, League of Wilderness Defenders.”¹⁷ BMBP explained the League of Wilderness Defenders has “projects” that carry out its program activities, and BMBP is one of those projects.¹⁸ BMBP explained that a project is not a discrete entity, but

¹² *California Association of Four Wheel Drive Clubs*, 30 IBLA 383, 385 (1977) (quoted in *Wildlands Defense*, 187 IBLA 233, 237 (2016)).

¹³ Appeal at 3.

¹⁴ Information Supporting Dismissal for Lack of Standing, Attachment 3 (July 6, 2016) (http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_detl?p_be_rsn=236819&p_srce=BR_INQ&p_print=FALSE (last visited July 26, 2016)).

¹⁵ *Id.* at Attachment 1 (http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_detl?p_be_rsn=1838490&p_srce=BR_INQ&p_print=FALSE (last visited July 26, 2016)).

¹⁶ Response to Bureau of Land Management’s Additional Information for Use in the Evaluation of Appellant’s Standing at 4 (July 22, 2016) (Response); Supplemental Declaration of Karen Coulter at 2-3 (July 21, 2016).

¹⁷ Response at 1-4.

¹⁸ *Id.* at 2.

rather is “a constituent part of the [League of Wilderness Defenders’] corporate structure.”¹⁹ BMBP further demonstrated that the League of Wilderness Defenders has been an active nonprofit corporation in Oregon since 1987.²⁰

As noted above, the purpose of the party-to-the-case requirement is to ensure that the Department is not challenged by an entity that did not participate in the decision and therefore did not alert the Department of its arguments and the possible consequences of the Department’s decision. Despite inconsistencies in the precise name BMBP has used to identify itself to BLM and this Board, we have little doubt that, consistent with this purpose, BMBP’s interests were conveyed to BLM in the comments BMBP submitted on the EA so that BLM was fully aware of the possible consequences for BMBP when it issued its decision. BMBP, League of Wilderness Defenders is in fact identified both on the comments on the EA and in the Notice of Appeal and subsequent filings to this Board.²¹ We therefore conclude that BMBP has shown that it is a party to this case.

B. BMBP Has Demonstrated That It Is Adversely Affected by BLM’s Decision

[2] A party to a case is adversely affected by a decision “when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest.”²² When an organization seeks to establish standing, it must demonstrate either that (1) the organization itself has a legally cognizable interest that is substantially likely to be injured by the decision,²³ or (2) one or more of its members has a legally cognizable interest in the subject matter of the appeal, coinciding with the organization’s purposes, that is substantially likely to be injured by the decision.²⁴ An organization may demonstrate adverse effect by submitting an affidavit, declaration, or other statement by a member attesting to the fact that he or she uses the lands or resources at issue and that this use is or is

¹⁹ Supplemental Declaration of Karen Coulter, Exhibit 1.

²⁰ Response at 4; Declaration of Paula Hood (July 22, 2016) (explaining that the League of Wilderness Defenders’ corporate status was reinstated in July 2016); http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_detl?p_be_rsn=345324&p_srce=BR_INQ&p_print=FALSE (last visited July 26, 2016).

²¹ E-mail from Paul Hood to BLM (Jan. 1, 2016) and attachment (Prineville BLM Invasives EA comments); *see, e.g.*, Appeal.

²² 43 C.F.R. § 4.410(d).

²³ *Board of County Commissioners of Pitkin County, Colorado*, 186 IBLA 288, 308-10 (2015).

²⁴ *Cascadia Wildlands*, 188 IBLA at 10; *WWP*, 185 IBLA at 298-99; *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 86 (2005).

substantially likely to be injured by the decision.²⁵ The information provided by a member of an organization should “provide as much specific evidence as possible about what interests are allegedly injured and what the connections are between those interests and the decision it seeks to appeal.”²⁶

To establish a legally cognizable interest that is substantially likely to be injured by BLM’s decision, BMBP submitted two declarations by Karen Coulter in her personal capacity as “the Executive Director and a member” of BMBP²⁷ and one by Tom Buchele, a “supporter and volunteer” for BMBP since 2009.²⁸ For purposes of establishing organizational standing, we deem Ms. Coulter’s and Mr. Buchele’s declarations those of “members” of BMBP.²⁹

1. *BMBP’s Recreational Use of the Lands Constitutes a Legally Cognizable Interest*

[3] A legally cognizable interest can include cultural, recreational, or aesthetic use and enjoyment of the affected public lands.³⁰ For example, we have held that “[r]epeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person.”³¹ A “mere interest in a problem or concern with the issues involved” is not sufficient to establish standing.³²

In her original declaration, Ms. Coulter describes her recreational use of the land and resources in the Prineville Integrated Invasive Plant Management Plan planning area. Ms. Coulter states that she has lived a short distance from the

²⁵ *Cascadia Wildlands*, 188 IBLA at 10; *WildEarth Guardians*, 183 IBLA at 170.

²⁶ *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 88.

²⁷ Declaration of Karen Coulter at 1; Supplemental Declaration of Karen Coulter at 3.

²⁸ Declaration of Tom Buchele at 2 (July 22, 2016).

²⁹ See, e.g., *Biodiversity Conservation Alliance*, 183 IBLA 97, 108 (2013) (accepting declarations of “staff and/or members” to demonstrate standing); *WWP v. BLM*, 182 IBLA 1, 4, 10 (2012) (accepting declaration of state WWP Director to establish standing); *Defenders of Wildlife*, 152 IBLA 1, 4 (2000) (accepting statements about use by “staff and members” and an affidavit of an “employee-member[.]” to demonstrate standing).

³⁰ *Cascadia Wildlands*, 188 IBLA at 9-10; *WWP v. BLM*, 182 IBLA at 7.

³¹ *WWP v. BLM*, 182 IBLA at 8 (quoting *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000)).

³² *Board of Commissioners of Pitkin County*, 173 IBLA 173, 178 (2007).

Prineville District since 1991.³³ She states that she hikes, camps, bird-watches, and identifies plants and wildlife in various parts of the District.³⁴ Ms. Coulter also states that she swam regularly in the John Day River, participated in fishing trips, and rafted.³⁵ The date range of her activities is broad and vague (“countless hours over many years”)³⁶ and in one instance dates to “May three years ago.”³⁷ Ms. Coulter declares that she intends to continue to engage in these activities in “future visits to the Prineville District.”³⁸

Also, in its response to BLM’s motion to dismiss, BMBP filed a declaration by Tom Buchele, a “supporter and volunteer” for BMBP since 2009.³⁹ Mr. Buchele states that he “recreate[s] often, camping and hiking” on property owned by a client in BLM’s Prineville District and the surrounding BLM lands.⁴⁰ Mr. Buchele states that he has hiked in the Prineville District most recently in 2014 and “intend[s] and would like to continue recreating” there.⁴¹

While some of our case law has required more specificity in the dates of activities to establish a legally cognizable interest,⁴² in this case, where Ms. Coulter lives near the Prineville District and effectively asserts continuous use of the area, we conclude that the recreational activities Ms. Coulter lists are sufficient to establish a legally cognizable interest. Mr. Buchele also established a legally cognizable interest by describing his recreational activities in the Prineville District and specifically identifying the dates of those activities. We therefore find that Ms. Coulter and Mr. Buchele have demonstrated a legally cognizable interest in the subject matter of the appeal on behalf of BMBP.

³³ Declaration of Karen Coulter at 2.

³⁴ *Id.*

³⁵ *Id.* at 2-3.

³⁶ *Id.* at 4.

³⁷ *Id.* at 3.

³⁸ *Id.* at 2, 3.

³⁹ Declaration of Tom Buchele at 2 (July 22, 2016).

⁴⁰ *Id.*

⁴¹ *Id.* at 3.

⁴² See, e.g., *WWP*, 185 IBLA at 300 (“We do not believe [WWP’s Idaho Director’s] allegations of limited use in 2011 and indefinite prior and future use are sufficient to demonstrate that WWP held a *legally cognizable interest at the time of the Field Manager’s January 2015 DR.*”). But see *Wildlands Defense*, 187 IBLA at 240 (repeated recreational use “over the years” and an intent to return were sufficient to demonstrate a legally cognizable interest).

2. *BMBP Has Shown that BLM's Decision is Substantially Likely to Injure its Legally Cognizable Interest*

[4] In order to demonstrate adverse effect, an appellant must make colorable allegations, supported by specific facts set forth in an affidavit, declaration, or other statement, that establish a causal relationship between the approved action and alleged injury to a legally cognizable interest.⁴³ In establishing an adverse effect, an appellant need not prove that an injury is certain, but the appellant must show that the threat of an injury and its effect on the appellant are more than hypothetical.⁴⁴ “[M]ere speculation that an injury might occur in the future will not suffice.”⁴⁵

Ms. Coulter explains that BLM’s decision to approve the Integrated Invasive Plant Management program authorizes the use of herbicides in many of the areas where she engages in recreational activities.⁴⁶ Noting that BLM’s decision “expands herbicide use to include use against all invasive plants,” Ms. Coulter asserts that BLM is now allowed to apply herbicides in areas she uses that were not previously subject to herbicide treatments.⁴⁷ Ms. Coulter alleges that she has observed adverse impacts from herbicide use, including “dead and damaged plants . . . and missing or harmed wildlife.”⁴⁸ Ms. Coulter states that BLM’s decision “will irreparably damage [her] opportunities to enjoy spending time in the planning area in its natural state undisturbed by herbicide use,” and she will “be unable or unwilling to continue to conduct [her] preferred recreational activities on many of those impacted BLM lands.”⁴⁹

Likewise, Mr. Buchele states that he will not want to recreate in areas within the Prineville District where BLM will spray herbicides because he does not want to see the adverse impacts of that spraying, including visible damage to native plants and disappearance of native wildlife species.⁵⁰ Mr. Buchele also will not want to hike and

⁴³ *Cascadia Wildlands*, 188 IBLA at 10; *Native Ecosystems Council*, 185 IBLA 268, 273 (2015); *The Fund for Animals, Inc.*, 163 IBLA 172, 176 (2004).

⁴⁴ *Cascadia Wildlands*, 188 IBLA at 11 (quoting *Native Ecosystems Council*, 185 IBLA at 273).

⁴⁵ *WWP*, 185 IBLA at 299 (quoting *Colorado Open Space Council*, 109 IBLA 274, 280 (1989)).

⁴⁶ Supplemental Declaration of Karen Coulter at 4.

⁴⁷ *Id.*

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 4.

⁵⁰ Declaration of Tom Buchele at 3-4.

camp in the Prineville District after the herbicide treatments because he often brings his dogs with him, and he will not want to expose them to herbicides.⁵¹

We conclude that, on behalf of BMBP, a party to the case, Ms. Coulter and Mr. Buchele have demonstrated that BLM's approval of the "Integrated Invasive Plant Management for the Prineville District" is substantially likely to affect their legally cognizable interests. Although BLM's EA explains that the use of the new herbicides is likely to result in fewer impacts to people and resources because the new herbicides are more species-specific and may be used in lower quantities, it is not unreasonable to assume that application of the herbicides will have some adverse effects upon vegetation and perhaps on wildlife. Whether any such effects will interfere with Ms. Coulter's and Mr. Buchele's recreational activities is not certain, but it is more than hypothetical. We therefore find that BMBP has demonstrated standing, and we deny BLM's motion to dismiss.

*BMBP Does Not Satisfy All of the Elements Necessary to
Justify the Board Granting a Petition to Stay BLM's Decision*

Since we have determined that BMBP has standing to appeal BLM's decision to expand the Prineville District's plant management program, we now consider BMBP's request for a stay of that decision. Under the Board's regulations, we may grant a stay if an appellant shows sufficient justification based on four factors, including the relative harm to the parties if the stay is granted or denied. Because we find that the balance of harm favors leaving BLM's decision in effect during BMBP's appeal, we deny BMBP's stay petition.

A. The Requirement to Show Sufficient Justification for a Stay

[5] Under the Board's regulations, a party requesting a stay bears the burden of proof to demonstrate that a stay should be granted.⁵² Specifically, the petition for a stay must show sufficient justification based on the following standards: (1) the relative harm to the parties if the stay is granted or denied; (2) the likelihood of appellant's success on the merits; (3) the likelihood of immediate and irreparable harm if the stay is not granted; and (4) whether the public interest favors granting the stay.⁵³ A failure to satisfy any one of the stay criteria will result in denial of a petition for stay.⁵⁴ In considering whether to stay a decision, the Board's review is

⁵¹ *Id.* at 4.

⁵² *Id.* § 4.21(b)(2).

⁵³ *Id.* § 4.21(b)(1).

⁵⁴ *Petan Company of Nevada v. BLM*, 186 IBLA 81, 91 (2015) (citing *Oregon Natural Resources Council Action*, 148 IBLA 186, 188 (1999)).

preliminary in nature and necessarily more cursory than a full review of the merits of the appeal.

B. The Balance of Harms Does Not Favor BMBP

In arguing in favor of a stay, BMBP asserts that the harm it will incur if a stay is denied far outweighs the potential harm to the government from granting a stay.⁵⁵ Without citing any supporting evidence, BMBP alleges that implementing the expanded invasive plant management program and, specifically, aerial spraying of herbicides will have “significant effects . . . very quickly, with consequent significant harm to wildlife and fish species, water quality, native plants, indigenous peoples’ cultural uses of the land, and/or individual people’s health.”⁵⁶ BMBP claims that, “[o]nce herbicides are sprayed and contamination is widespread, the harm to ecosystems and habitats cannot be undone.”⁵⁷

In contrast, BMBP asserts that a stay would not harm the government at all.⁵⁸ BMBP explains that “[t]he government can simply implement the project at a later time.”⁵⁹ If the government would suffer any harm, BMBP claims it would be economic.⁶⁰ In support of its position that its environmental injury outweighs any injury to the government, BMBP cites a 1987 Supreme Court case in which the Court stated that, when environmental injury is “sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment.”⁶¹

In its response to BMBP’s request for a stay, BLM counters that the environment may suffer more harm if a stay is granted than if it is not and cites various portions of the Revised Integrated Invasive Plant Management EA as support. First, BLM explains that, if the expanded Prineville District invasive plant management program is stayed, BLM may continue to use the four previously-approved herbicides, which are less targeted and less effective at controlling invasive species.⁶² Under the expanded program, however, the additional herbicides are more species-specific, may

⁵⁵ Appeal at 9.

⁵⁶ *Id.* at 14 (under likelihood of immediate and irreparable harm criterion); *see also id.* at 9.

⁵⁷ *Id.* at 14

⁵⁸ *Id.* at 9.

⁵⁹ *Id.*

⁶⁰ *Id.* at 10.

⁶¹ *Id.* at 9 (quoting *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)).

⁶² BLM Response to Stay Request at 6 (June 17, 2016).

be used in lower quantities, and pose less environmental and human health risk.⁶³ Further, because the 10 additional herbicides are more effective, under the expanded program, BLM could avoid repeat applications and therefore apply herbicides at lower rates than are required under the previous program.⁶⁴

Second, in response to BMBP's assertion that BLM can simply implement the program later, BLM notes that some invasive plant species cannot be controlled by either non-herbicide methods or the 4 herbicides already approved for use under the previous program.⁶⁵ BLM states that "[w]ithout effective controls, these invasive annual grass infestations continue to increase in size and density, displacing native vegetation, preventing wildfire rehabilitation, degrading Greater Sage-Grouse habitat, and increasing the risk of wildland fire."⁶⁶ BLM emphasizes the need for the expanded invasive plant management program for post-fire stabilization during the 2016 wildfire season, when BLM needs to conduct herbicide treatments to protect soil resources and prevent the return and spread of invasive annual grasses on burned areas.⁶⁷

Finally, BLM challenges BMBP's fundamental assumption that the expanded herbicide program will harm the environment. BLM references risk assessments conducted by BLM and the U.S. Forest Service that support the conclusion that BLM's decision presents low or no measurable risk to herbicide applicators, the public, desirable flora and fauna, and soil, air, and water when standard operating procedures, mitigation measures, project design features, and other measures designed to limit risk are followed.⁶⁸

Having carefully reviewed both the request for a stay and BLM's response, we find that the potential harm to the government from granting a stay outweighs the potential harm to BMBP from denying a stay. Contrary to BMBP's assertion, this case does not pose a simple balance between environmental harms and economic loss, nor can BLM simply wait to implement the expanded invasive plant management program without suffering harm. In contrast to BMBP's conclusory assertions of harm that would result if we deny a stay, BLM has cited analyses in support of its argument that

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 7.

⁶⁶ *Id.*

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* at 6-7 (citing DR at 3 and EA, Appendix A (Project Design Features, Standard Operating Procedures, Mitigation Measures, Conservation Measures, Prevention Measures, and Best Management Practices)); *see also* EA at 67 (Human Health and Ecological Risk Assessments).

granting a stay would harm the environment by impeding its wildfire management efforts this summer and requiring the use of less effective herbicides in higher quantities, consequently posing greater environmental and human health risk.

We therefore conclude that BMBP has not shown sufficient justification for a stay based on the relative harm to the parties if the stay is granted or denied. Because BMBP has not carried its burden to demonstrate sufficient justification for a stay based on this regulatory criterion, we need not consider the other regulatory criteria and must deny the petition for a stay.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁶⁹ the Board denies BLM's motion to dismiss and denies BMBP's petition for a stay.

_____/s/
Silvia M. Riechel
Administrative Judge

I concur:

_____/s/
Amy B. Sosin
Administrative Judge

⁶⁹ 43 C.F.R. § 4.1.