

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Case No. 1:12 cv-00265-JLK

RAGS OVER THE ARKANSAS RIVER, INC.,

Plaintiff,

v.

THE BUREAU OF LAND MANAGEMENT;  
KEITH E. BERGER, in his official capacity as Field Manager for the Royal Gorge Field Office  
of the Bureau of Land Management;  
GREG SHOOP, in his official capacity as District Manager for the Front Range District of the  
Bureau of Land Management;  
HELEN HANKINS, in her official capacity as Colorado State Director of the Bureau of Land  
Management; and  
KENNETH SALAZAR, in his official capacity as Secretary of the Department of the Interior,

Defendants.

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**PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO AMEND**

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**A. FACTUAL DEVELOPMENTS SINCE THE FILING OF CROSS-MOTIONS TO AMEND THE COURT'S ORDER OF JULY 5, 2012 STAYING THIS ACTION WITH CONDITIONS.**

In its Motion to Amend, the Bureau of Land Management ("BLM") states that "[t]he current factual scenario has not substantially changed since the Defendants filed their original motion [requesting the stay]." Defendants' Motion to Amend Stay Order (ECF No. 15) at 2. This is no longer a true statement. During a visit to Colorado on July 31, 2012, Christo and his Over the River ("OTR") team met with local officials and the press regarding the status of the project in light of the Court's July 5, 2012 Order. At that time, OTR issued the following statement:

Recent news may have reminded you that legal challenges have been filed against the Bureau of Land Management (BLM) for its November, 2011 Record of Decision and against Colorado State Parks for its 2011 Agreement with OTR. Both agencies approved Christo and Jeanne-Claude's vision for *Over The River* and authorized the project to move forward. However, a federal court order a few weeks ago to delay the lawsuit against BLM is further indication it will be some time before these challenges are resolved.

This is a pivotal moment for *Over The River*. Many years of successfully securing permits are drawing to a close and Christo is preparing for installation. The transition to the next phase requires significant investment in materials and equipment to begin installation work in the canyon. Under the current schedule, anchor installation activities would be slated to get underway in just a few months.

Christo recently met in Cañon City with a group of local supporters to inform them that he must work through this legal process. **While Christo remains confident that the legal challenges will not succeed, it would be unwise to order materials and begin installing the project before the lawsuits are successfully resolved.**

Christo remains committed to realizing *Over The River*, despite this situation which is not unusual for his temporary works of art. He and Jeanne-Claude have faced similar challenges before the realization of previous works. It is unclear how the pending litigation will affect the project schedule, but Christo will continue to work on several aspects of *Over The River* as the legal process proceeds, including the bighorn sheep treatment program and the completion of the installation Event Management Plan.

As Christo said in Cañon City, "I am fully committed to *Over The River* just as Jeanne-Claude and I have always envisioned it and I look forward to having these legal hurdles behind us so we can realize this temporary work of art in Colorado's Arkansas River Valley".

Press Release, *Christo Informs Supporters of Temporary Delay of OTR Exhibition*, from the OTR website (July 31, 2012), available at <http://www.overtheriverinfo.com/index.php/latest-news/>.<sup>1</sup>

As various news outlets have subsequently reported, OTR has unequivocally stated that the project is "indefinitely suspended" pending resolution of legal challenges. See Edie

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<sup>1</sup> The complete statement by Christo and his spokesman can be viewed here: [http://www.canoncitydailyrecord.com/specialsection/overtheriver/ci\\_21199976/christo-puts-over-river-exhibition-hold](http://www.canoncitydailyrecord.com/specialsection/overtheriver/ci_21199976/christo-puts-over-river-exhibition-hold).

Adelstein, *Over the River Snagged*, Colorado Springs Independent, July 31, 2012, available at <http://www.csindy.com/IndyBlog/archives/2012/07/31/over-the-river-snagged>. Thus, it appears that OTR has chosen to abide by the Court's order that it "is expected to honor the stay and commence no action on the [ ] November 2011 construction authorization until the administrative appeals process has run its course . . ." Order Staying Civil Action With Conditions (July 5, 2012) (ECF No. 12). Despite this significant development, BLM persists with its view of the Court's Order that the agency should be free to issue a Notice to Proceed at any time and, thus, deprive Plaintiff, Rags Over the Arkansas River ("ROAR"), an opportunity for meaningful judicial review in this action.<sup>2</sup>

**B. BLM'S PROPOSED CONDITIONS PLACE AN UNFAIR BURDEN ON ROAR AND THE COURT.**

As ROAR asserted in its opening memorandum in support of its motion to amend (ECF No. 14), BLM's proposed conditions facially conflict with the Court's July 5, 2012 Order. The Court expressly stated that its intent was to preserve the status quo, and that it expected that no action would commence on the OTR project. Placing ROAR in the position of having to pursue a preliminary injunction on shortened time to preserve its right to judicial review is inconsistent with the Court's overall decision to further condition the stay to minimize prejudice to ROAR.

BLM's position is also inconsistent with the general precedent for issuing stays within this judicial district. In determining whether to issue a stay, courts have utilized 5 factors to guide their analysis:

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<sup>2</sup> ROAR has approached attorneys for OTR and asked if they would be willing to formalize for the Court OTR's stated intent not to proceed pending resolution of this action. OTR's attorneys reiterated that OTR "stands by the statements it made to the press." And while it appears OTR intends to formalize its position with the Court, it plans on doing so according to its own schedule. This is unfortunate, as it unnecessarily requires the use of judicial resources to decide the cross-Motions to Amend. A copy of the email exchange between counsel for ROAR and OTR is attached as Exhibit A.

(1) plaintiff's interest in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendant; (3) the convenience to the court; (4) the interest of persons not parties to the civil litigation; and (5) the public interest.

*String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 02-cv-0934, 2006 WL 894955, at \*2 (D. Colo. Mar. 30, 2006); *see also Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980).

Here, BLM's position is inconsistent with all of these factors. For reasons already set forth in ROAR's Motion to Amend, the effect of staying this action—with only the prospect of lifting the stay in order for ROAR to seek a preliminary injunction—places a significant burden on ROAR by depriving it of 8–10 months to prepare its case and pursue judicial review. Moreover, BLM seeks to place a significantly higher legal burden on ROAR—obtaining a preliminary injunction—to preserve its right to judicial review. BLM acknowledges both of these impacts on ROAR in its cross-motion (ECF. No. 15). Under BLM's proposed conditions, ROAR would be given as little as 2–3 weeks to prepare for, and obtain, a preliminary injunction before OTR could start construction of the project. *Id.* at 4. BLM further acknowledges that in order to obtain meaningful judicial review of BLM's permit, ROAR would first have to “demonstrate why a preliminary injunction is necessary.” *Id.* at 5. This is by far the greater burden on ROAR than existed when the Petition for Review was filed or, for that matter, on July 5, 2012.

BLM's position also places a potential inconvenience on the Court. In this judicial district, there is a specified set of rules and procedures for the handling of administrative review petitions under the Administrative Procedure Act, 5 U.S.C. § 706. D.C.Colo.LcivR, Section III (AP Rules). BLM, however, asks the Court to set aside its normal process and instead be ready to judge this case—with minimal notice and possibly without even having the administrative

record—through a preliminary injunction motion. While it is the Court’s prerogative to decide whether or not BLM’s proposal is inconvenient or not, facially at least, BLM’s proposed conditions place a greater burden on judicial resources.<sup>3</sup>

BLM’s position also ignores the stated interests of OTR, and does not take into account the broader public interest in having this case resolved before the Notice to Proceed is issued by the agency. As already explained, OTR has taken the position that it would be unwise to proceed with the ordering of equipment for the project until legal challenges are resolved. BLM has, for reasons that ROAR cannot remotely comprehend, taken a position inconsistent with OTR. **In essence, BLM, which by statute is supposed to provide regulatory oversight, has instead become the flag bearer for the project.** And for reasons similar to those expressed by OTR in its decision to delay the project, members of the public on both sides of the debate will not benefit from BLM’s proposed conditions. Members of the public, like OTR, are seeking some certainty regarding the legality of this project before making decisions to prepare for both the impacts and perceived benefits of the project going forward.

Finally, BLM can make no legitimate argument that ROAR’s proposed conditions burden the agency, or that BLM’s proposed conditions are necessary to reduce its burden. As an initial matter, the Court’s Order granting the stay relieves the agency of its primary asserted burden: having to litigate a decision that it believes could change as a result of the Smith appeal. Moreover, BLM has no direct stake as to whether or not the project proceeds under any given time frame, and, in fact the agency is relieved of the burden of defending the preliminary

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<sup>3</sup> BLM’s proposal that it should be allowed to issue the Notice to Proceed and that the stay should be then lifted to allow ROAR to seek a preliminary injunction is also bizarre given its position regarding the prudential ripeness of this action. Such terms, if adopted, would presumably allow for a challenge—through the injunction motion—of the very action that BLM argues should not be briefed at this time because it is subject to alteration by the Smith appeal.

injunction under ROAR's proposal (and the stated position of OTR). To be blunt, BLM's position, given OTR's stated intent and the cost of defending a preliminary injunction, is nothing short of bewildering.

C. **ADDITIONAL INFORMATION REGARDING ROAR'S PROPOSED CONDITION THAT BLM LODGE A PRELIMINARY ADMINISTRATIVE RECORD AT THIS TIME.**

Through OTR's attorneys, it has come to ROAR's attention that BLM lodged with the Interior's Board of Land Appeals ("IBLA") a record in support of its permitting decision as part of the agency's defense of the Smith appeal. It would seem highly likely that the record before the IBLA is substantially similar to the one BLM would have lodged in this action if the Court had not granted the stay. Thus, BLM's opposition to ROAR's proposal that it provide access to the record—even if it is only a preliminary record—during the stay, further puzzles ROAR.<sup>4</sup>

Dated: August 6, 2012

Respectfully submitted,

/s/ Michael Ray Harris  
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<sup>4</sup> ROAR believes that the IBLA does not make records of pending cases before it available to the public. ROAR may be able to obtain the record from BLM through a Freedom of Information Act, 5 U.S.C. § 553 *et seq.*, request. But under FOIA, ROAR could be subject to the upfront expense associated with responding to the request, including production of the record.

**CERTIFICATE OF SERVICE**

I hereby certify that on August 6, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such to all parties.

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*Attorney for Defendants*

/s/ Michael Ray Harris

# **Exhibit A**

From: Michael Harris <mharris@law.du.edu>  
Subject: Fwd: ROAR v. BLM  
Date: August 6, 2012 9:36:45 AM MDT



**From:** Michael Harris <mharris@law.du.edu>  
**Subject:** Re: ROAR v. BLM  
**Date:** August 5, 2012 7:48:07 PM MDT  
**To:** John Putnam <jputnam@kaplankirsch.com>  
**Cc:** Lori Potter <lpotter@kaplankirsch.com>

Hi John,

Thank you for your response. Let me first address your concern about the administrative record. While I am aware that BLM has provided the IBLA material in support of its decision in the Smith appeal, that material does not appear to be readily available to ROAR. On July 24, I sent an e-mail to the DOJ attorney representing BLM requesting that the agency make the record available to us and informed him that if BLM did not we were inclined to include the request you are concerned about in our motion to amend. His response was that they do not consider the record complete until the appeal is decided and refused to provide us the record at this time. This leaves us only with the option of submitting a FOIA request, which could be costly. It is my understanding that the IBLA does not have online access to these materials; please let me know if I am wrong. I hope that answers that concern.

With regard to OTR's recent press release, I appreciate the information you provided. I am puzzled, however, regarding your client's decision to hold off on formalizing its position for the court. It could come across as unnecessarily wasting judicial resources where BLM and RAOR are asking the court to invest its time in deciding these cross-motions to amend the stay order. I realize that BLM could make OTR's position known to the court, and, thus possibly reach some sort of agreement with ROAR. It appears however that BLM is not exactly sure of how to interpret the OTR release, at least according to its attorney. I am more than happy to extend OTR and BLM a reasonable amount of additional time to formalize its position if necessary. Otherwise, ROAR intends to raise the OTR press release, and its request for formalization, in its filing tomorrow.

Thank you and I hope to hear from you soon. Also, I'm sorry I didn't respond sooner, but was away from e-mail this weekend.

Mike

On Aug 3, 2012, at 3:46 PM, John Putnam wrote:

Mike--

Thank you for your note. OTR does plan to formalize its position regarding schedule and process, but it will not have done so by Monday. There is not yet a timetable for issuing such a formal position or statement. However, OTR certainly stands by the statements it made to the press earlier this week.

On a related issue, we were puzzled by the arguments made in your motion to amend the stay relating to ROAR's lack of access to the administrative record. Given that BLM provided to IBLA a record of the NEPA and substantive proceedings for purposes of the administrative appeal, it is unclear why ROAR could not begin to prepare for any future preliminary injunction proceedings until the government certifies an administrative record in the District Court matter. Is it fair to the Court to suggest that ROAR has been and will be unable to access the record when the vast majority of that record is and has been available?

Thank you and have a great weekend.

John E. Putnam  
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-----Original Message-----

From: Harris, Mike [mailto:mharris@law.du.edu]  
Sent: Thursday, August 02, 2012 11:32 AM  
To: John Putnam  
Cc: Lori Potter  
Subject: Re: ROAR v. BLM

Hi John,

As I'm sure you know, 2 days ago Christo and his spokesman informed the press that the OTR project would be delayed until after the litigation in federal and state courts was resolved. We are currently briefing the scope of the stay, and what impact it should have on BLM's ability to issue OTR a notice to proceed, before Judge Kane. I am wondering if Christo is willing to make his position known directly to Judge Kane and/or is willing to formalize the temporary delay with BLM, ROAR, or the court. Our next filing is due on Monday, so if you could let me know before then that would be very helpful.

Thank you,

Mike

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