

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 MOTION TO AMEND**

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**INTRODUCTION AND SUMMARY OF ARGUMENT**

In its Order of July 5, 2012 staying this action, the Court acknowledged that without additional conditions, a stay “would prejudice [the plaintiff] substantially in that the OTR would theoretically be free to act on the existing permit at any time during the pendency of the Smith appeal because the current permit is not subject to any stay at the administrative level.” (Order Staying Civil Action With Conditions, Doc. No. 12, at 2). Accordingly, the Court directed the parties to confer “as to the nature and content of any additional conditions on the current stay and to move for an amended or modified stay upon conditions as either or both deem necessary to effect the Court’s stated intent.” (*Id.* at 3). More specifically, the Court’s “intent” was that the parties come up with conditions that would maintain the status quo and ensure that the plaintiff is

given sufficient opportunity to preserve its right to judicial review of the Bureau of Land Management's ("BLM") issuance of a land use authorization to the Over the River Corporation ("OTR"). (*Id.* at 2-3).

The parties have conferred as directed by the Court, but are unable to agree upon additional conditions of the stay. Notably, it is the government's position that the Court's Order only requires BLM to give some notice to the Plaintiff, Rags Over The Arkansas River ("ROAR"), that the agency intends to issue the Notice to Proceed to OTR so as to allow ROAR to move the Court for a preliminary injunction. As an initial matter, the government's proposal conflicts with the terms of the Court's Order on its face. The Order states, "OTR is expected to honor the Stay and commence no action on the agency's November 2011 construction authorizations until the administrative appeals process has run its course," and further that Defendants are responsible for preserving the status quo by monitoring and effectuating" OTR. (*Id.* at 2). Thus, allowing OTR to request a Notice to Proceed may violate that term, and certainly issuing a Notice to Proceed would contradict the Court's prescription that the Government "preserve the status quo."

Moreover, the government's proposal substantially prejudices ROAR. Absent the stay, ROAR would not be in the position of having to immediately move for a preliminary injunction. To the contrary, ROAR's intent in filing the suit more than a year before actual construction would begin on the OTR project was to ensure an opportunity to obtain the administrative record, and hopefully get the case briefed, before having to consider whether to move for a preliminary injunction. Indeed, absent the stay, ROAR may have been in the position to move for expedited review as opposed to an injunction, which is a substantially lower legal burden and is far less costly. Regardless, however, without first having the administrative record and time to

prepare its case, ROAR is in a far different position if a preliminary injunction motion is necessary.

Thus, for reasons to be argued below, in order to effectuate the Court's intent, and to preserve the status quo, ROAR requests that the Court amend its order granting the stay to require that BLM be prohibited from issuing the Notice to Proceed to OTR before 180 days after a final decision is issued on the administrative appeal and/or the stay is lifted.

### **ARGUMENT**

The Supreme Court has stated, “[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants[, but] [h]ow this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. American Co.*, 299 U.S. 248, 254–55 (1936); *see also String Cheese Incident, LLC v. Stylus Shows, Inc.*, 05-cv-01934, 2006 WL 894955, at \*2 (D. Colo. Mar. 30, 2006) (recognizing the importance of considering whether a stay would prejudice the plaintiff). Similarly, the Tenth Circuit has recognized a party requesting a stay must demonstrate “a clear case of hardship or inequity” in being required to go forward if “even a fair possibility” exists that the stay would damage another party. *Span-Eng Assocs. v. Weidner*, 771 F.2d 464, 468 (10th Cir. 1985). Accordingly, the stay should neither affect established legal rights of the parties nor harm another person or the public. *Landis*, 299 U.S. at 255; *Ohio Env'tl. Council v. District Court*, 565 F.2d 393, 396 (6th Cir. 1977).

Here, requiring ROAR to pursue a preliminary injunction in order to preserve its rights to judicial review does not maintain “an even balance,” but instead harms ROAR's overall position in this litigation. ROAR filed this timely action with the intent of seeking judicial review of the

decision without necessarily needing to seek a preliminary injunction. In this regard, BLM has acknowledged that OTR does not plan on seeking the Notice to Proceed until later this year, and more importantly that staging of the project is not intended until at least December 2012, with no real construction occurring until February 2013. (Defendants' Memorandum in Support of Its Motion to Dismiss, or in the Alternative, for Stay of Proceedings, Doc. 8-1, at 3). Absent the government's decision to move to stay this litigation, ROAR would have had between 8-10 months to litigate this case before needing to seek an injunction. Under the government's proposed conditions to the stay, ROAR may effectively have no additional time. This will impose a greater legal burden on ROAR. Obviously, the legal standard is high for a preliminary injunction, and the government is asking that ROAR meet this standard without any opportunity to review the administrative record and prepare its case. More importantly, the cost of preparing a motion for a preliminary injunction at the beginning of a case is higher than doing so after the record has been lodged and the case is fully or partially briefed.

A more equitable set of conditions to this stay would be to fashion limitations on BLM to maintain an 8–10 month period of time for ROAR to pursue its case, and then if necessary, seek either expedited resolution or a preliminary injunction. These conditions should include: (1) a prohibition on BLM's issuance of the Notice to Proceed to OTR before 180 days after a final decision is issued on the administrative appeal and/or the stay is lifted; and (2) a directive that BLM begin preparing the administrative record to support its decision, which can be supplemented if any changes to the decision are required by the final resolution of the Smith appeal.

The additional 180 days after the Notice to Proceed is necessary to restore the original time that ROAR would have had to pursue judicial review before the government moved for the

stay. Absent the stay, the government would have been required to produce the administrative record 90 days after the case was filed, or about May 1, 2012. This additional time was calculated based upon the filing date of the Petition (February 1, 2012) (Petition for Review of Agency Action, Doc. No. 2), the allowance of time given the under the Federal Rules of Civil Procedure for the government to respond to the Petition (60 days) (Fed. R. Civ. P. 4), and the time for preparation of the administrative record under the local rules (30 days) (D.C.COLO.LAPR, App. F.4). In other words, this case could have been ready to set a briefing schedule for June or July 2012. Given the anticipated start date of construction by OTR (February, 1, 2013), this would have given ROAR and the Court approximately 6-8 months before there would possibly be the need for a preliminary injunction motion.

Admittedly, hoping to litigate this case in such a 6-8 month period is optimistic. However, this amount of time would have given ROAR the opportunity to at least pursue an expedited determination of all or part of its case. For example, the First Cause of Action, which would be dispositive of the whole case, presents a rather straightforward question under administrative law as to whether BLM improperly classified the nature of the OTR project as recreation. (Petition for Review of Agency Action, Doc. 2). Regardless, absent a stay ROAR would have had other options to pursue this case other than having to immediately move for a preliminary injunction before the administrative record is even produced.

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**CONCLUSION**

For the foregoing reasons, ROAR respectfully requests that the Court, pursuant to its Order of July 5, 2012, incorporate the additional conditions set forth above. In the alternative, the Court should immediately lift the stay and order preparation of the administrative record.

Dated: July 27, 2012

Respectfully submitted,

/s/ Michael Ray Harris  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 27, 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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