

IN RE JAMISON COVE FIRE SALVAGE TIMBER SALE

IBLA 89-22          Decided April 6, 1990

Appeal from a decision of the Medford District Office, Bureau of Land Management, denying a protest to a timber sale and awarding the sale contract. OR TS-8-56.

Dismissed.

1. Appeals: Generally--Rules of Practice: Appeals: Dismissal--Timber Sales and Disposals

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place; we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed. Even assuming an issue involving a timber sale could be recurring, where it is not evasive of review, a motion to dismiss for mootness may be granted.

APPEARANCES: Charles G. Levin, Esq., Grants Pass, Oregon, for appellant; David A. Jones, District Manager, Medford District Office, Medford, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Headwaters has appealed from a September 12, 1988, decision of the Medford District Office, Bureau of Land Management (BLM), denying its protest of the Jamison Cove Fire Salvage Timber Sale and awarding the sale contract to Murphy Creek Lumber Company. BLM placed its decision into immediate effect in accordance with 43 CFR 5003.3(f). Headwaters requested a stay of implementation of the sale pending full review by this Board and BLM filed a response urging that the request for stay be denied.

The sale area is in parts of secs. 16, 17, 19, 20, and 21, T. 39 S., R. 4 W., Willamette Meridian, Oregon. A wildfire in August-September 1987

(Ninemile Fire) burned much of the sale area and parts of it were heavily damaged.

In support of its appeal and its request for stay, Headwaters alleged that BLM's decision to proceed with the sale violated various requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1982), the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O&C Act), 43 U.S.C. § 1181a-1181f (1982), the Management Framework Plan (MFP), and other guidelines. In considering the stay request, the Board reviewed the entire record, including Headwaters' statement of reasons and BLM's answer. We considered the arguments raised by Headwaters, and we concluded that Headwaters had not shown a substantial likelihood of success on the merits of any of its claims, if the stay were granted, and had failed to demonstrate that proceeding with the timber sale would cause irreparable injury to it or its members. Therefore, by order dated November 21, 1988, the Board denied the request for stay.

No further pleadings were filed by Headwaters or BLM until February 12, 1990, when the Medford District Manager, BLM, filed with the Board a motion to dismiss the appeal. He explained that all road construction and logging requirements under the terms of the timber sale contract were completed by September 1989. He stated that the relief sought by Headwaters was no longer available, and he requested that the appeal be dismissed as moot.

In support of that request, he submitted a copy of a decision of the Court of Appeals for the Ninth Circuit, Headwaters, Inc. v. Bureau of Land Management, CA No. 88-3825 (filed Sept. 28, 1989). In that decision the court reviewed a decision by the district court which had refused to grant Headwaters' request for an injunction to prevent logging of three units of the 16-unit Two T's timber sale. The court stated:

We do not reach the merits of Headwaters' claim. Because Janco [Logging Co.] had cut all the timber on the disputed units and had hauled 50 percent of the logs from the site as of August 11, 1988, we remand with instructions to vacate the judgment below and dismiss this appeal as moot.

(Decision at 2).

The question of mootness was raised before the court by BLM in a motion to dismiss. The court analyzed the question by first concluding that because the timber had been logged, Headwaters' injunctive claim was moot. <sup>1/</sup> The court then considered Headwaters' request for declaratory relief against BLM, and it concluded:

This case does not present a situation in which there is a colorable claim of injury based on a fixed policy of BLM. For

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<sup>1/</sup> The court quoted from Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978), "Where the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot."

future sales, BLM can choose to conduct revised, additional and/ or site-specific multiple use analyses. Cf. [Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 124 (1974)]. Therefore, Headwaters' claim for declaratory relief is also moot.

(Decision at 7).

Finally, the court stated that Headwaters's challenge would, nevertheless, still be reviewable if "BLM's alleged illegal practice is 'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)." The court, citing Weinstein v. Bradford, 423 U.S. 147, 149 (1975), explained that under that exception, Federal courts could exercise jurisdiction over a matter which was otherwise moot if (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same challenging party will be subject to the same action again. The court noted that the exception had only limited applicability.

The court stated that even assuming the challenged action was capable of repetition, the evasion prong of the test is not satisfied where prompt application for a stay pending appeal can preserve an issue for appeal. The court concluded:

Any further timber sales \* \* \* can be attacked in court and restrained if the court finds reason to restrain them. This case does not present the exceptional situation sufficient to avoid mootness.

(Decision at 8).

On February 26, 1990, Headwaters filed a response to the BLM motion to dismiss this appeal, arguing that the Board should deny BLM's motion on the ground that the Board has not reviewed the merits of the appeal. Headwaters characterizes BLM's motion as an attempt to "sidestep the appeals process" (Response at 1). It asserts that the "jurisdictional defect of the federal court litigation is inapplicable to appeal proceedings before administrative agencies" (Response at 1-2).

Headwaters' assertion that the appeal has received no review on the merits is incorrect. Clearly, anytime the Board is asked to address a request for a stay of a decision under appeal, it is necessary, in some fashion, to review the merits of the case. As noted in our order denying the request for stay in this case, one of the criteria for granting a stay is whether there is a substantial likelihood of success on the merits. In our November 21, 1988, order, we concluded that Headwaters had failed to show a substantial likelihood of success on the merits. Although we stated that our conclusion was based on a preliminary review of the record, we did, in fact, address the arguments raised by Headwaters.

[1] An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. The Hopi Tribe v. OSMRE, 109 IBLA 374, 381 (1989); The Sierra Club, 104 IBLA 17, 19 (1988); see

Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365, 93 I.D. 285 (1986). In Utah Wilderness Association, 91 IBLA 124, 130 (1986), the Board dismissed as moot an appeal of a BLM decision denying a protest challenging the issuance of permits to drill various oil and gas wells in a wilderness study area because all the authorized activities under the permits had taken place by the time the appeal was briefed before the Board. 2/

In a situation such as that presented in this case, where a decision has been put into effect by the authorized officer in accordance with 43 CFR 5003.3(f), and the Board denies a request that the action be stayed pending full review of the appeal, the possibility exists that the action will be completed prior to completion of such review and that BLM will move to dismiss the appeal on the grounds of mootness. Nevertheless, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place. We have recognized the exception highlighted by the Headwaters court, discussed above. Thus, in Southern Utah Wilderness Alliance, 100 IBLA 63, 67 (1987), we stated that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed. See also Sierra Club, 57 IBLA 79 (1981); Southern California Motorcycle Club, Inc., 42 IBLA 164 (1979).

In this case Headwaters alleges that (1) BLM violated NEPA by not preparing an environmental impact statement for the sale; (2) BLM violated the O&C Act by proceeding with the sale; (3) BLM violated NEPA by failing to analyze the impact of the sale on state water quality standards; (4) BLM violated NEPA by failing to include a "no action" alternative in the environmental assessment for the sale; (5) BLM violated NEPA and the MFP in modifying the yarding system for a particular unit in the sale; (6) BLM violated NEPA by failing to discuss mitigating measures for the sale; (7) BLM violated NEPA by failing to describe adequately the affected environment of the sale; (8) BLM violated the visual management guidelines of the MFP and the Church guidelines in proposing the clearcutting of certain units of the sale; (9) BLM violated the public participation provisions of NEPA by failing to respond adequately to public concerns regarding this sale; and (10) BLM violated NEPA by generically referring to its extrapolation of information from other sites and application to the sale without identifying which information.

The arguments raised by Headwaters, while charging violations of statutes and guidelines, are all fact specific to the Jamison Cove Fire Salvage Timber Sale, and BLM rebutted each one in its answer. However, even if such issues could be considered as recurring, they are clearly not evasive of review. Just as in this case, should BLM, in a future timber sale case, place its decision in full force and effect, a person

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2/ In addition, in Tennessee Consolidated Coal Co. v. OSMRE, 99 IBLA 274 (1987), the Board stated that it would decline to consider a question raised by an appeal where the appellant was, in essence, requesting an advisory opinion. Where the issue raised by an appeal is moot, any discussion of that issue might be considered an advisory opinion.

challenging that decision may request that the decision be stayed, and if that person satisfies the standards adopted by the Board in Marathon Oil Co., 90 IBLA 236, 245, 93 I.D. 6, 11-12 (1986), a stay will be granted. 3/ In this case, Headwaters did not satisfy those standards.

Thus, two reasons militate for dismissal of this appeal: (1) Headwaters' objections to the timber sale received a preliminary, but careful, review leading to our order of November 21, 1988, and (2) to the extent any of Headwaters' arguments may be considered as recurring, they are not evasive of review. BLM's motion is granted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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Bruce R. Harris  
Administrative Judge

I concur:

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Wm. Philip Horton  
Chief Administrative Judge

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3/ We note that where an agency decision is not stayed pending the out-come of administrative review, it is immediately subject to judicial review. See 5 U.S.C. § 704 (1982). There is no evidence in the record that Headwaters sought judicial review following the Board's denial of its request for a stay.