

IN RE FIRE FLY TIMBER SALE

IBLA 88-561

Decided April 12, 1990

Appeal from a decision of the Medford District Manager, Bureau of Land Management, denying a protest of timber sale OR110-TS8-42.

Affirmed.

1. Timber Sales and Disposals

A protest of a BLM timber sale received more than 15 days after publication of the notice of sale or the notice of decision is not timely filed and is properly denied per the terms of 43 CFR 5003.3(c).

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

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Headwaters, Inc., has appealed from a decision of the Medford District Manager, Bureau of Land Management (BLM), dated June 28, 1988, rejecting as untimely appellant's protest of the Fire Fly timber sale (OR110-TS8-42). The District Manager denied this protest because it had been filed beyond the 15-day filing period provided by legal advertisement. Even so, the BLM decision went on to address the merits of Headwaters' protest, which focused on the projected impacts to water quality and the adequacy of BLM's Environmental Assessment.

In its notice of appeal Headwaters did not challenge the basis for the BLM decision denying its appeal, but rather argued that the decision failed to resolve the concerns raised in the protest. In a letter to the Board dated August 10, 1988, counsel for Headwaters advised that appellant would not file an additional statement of reasons for this appeal, "but would rely, for purposes of this appeal, exclusively on its protest letter of June 13, 1988, and its notice of appeal of June 30, 1988."

By a pleading filed February 20, 1990, BLM moved this Board to dismiss the instant appeal as moot because "[t]he sale was awarded in accordance with 43 CFR 5003.3(f) and logging operations completed by August 1989." Accompanying BLM's motion was 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). ^{1/} This decision vacated as moot a

^{1/} This case states at footnote 1: "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3."

district court decision denying Headwaters' request to enjoin a BLM timber sale. The court of appeals took this approach because all the timber on the disputed area had been cut. In addressing Headwaters' argument that BLM's timber practice was capable of repetition and evading review and that, therefore, the appeal should be decided on the merits, the court held that "[w]here prompt application for a stay pending appeal can preserve an issue for appeal, the issue is not one that will evade review." 2/

[1] We do not decide the mootness issue raised by BLM because the record is plain that BLM took the appropriate action in dismissing Headwaters' protest as untimely. Regulation 43 CFR 5003.3(c) states: "Protests received more than 15 days after the publication of the notice of decision or the notice of sale are not timely filed and shall not be considered."

The record contains a copy of the Fire Fly legal notice, which states in part: "This sale notice, first published on May 26, 1988, constitutes the decision document for purposes of protests and appeals, under 43 CFR 5003 - Administrative Remedies. Protests of any sale listed below must be filed within 15 days after first publication of this notice." There follows a description of the Fire Fly sale.

An affidavit of publication appears in the record stating that first publication of the above-quoted notice did, in fact, occur on May 26, 1988 (followed on June 2, 1988, by a second publication). A timely protest of the Fire Fly sale was, therefore, required to be received by BLM on or before Friday, June 10, 1988. The protest, which bears the typewritten date June 13, 1988, was date-stamped ("Received") by BLM on that same date, Monday, June 13, 1988. The 15-day protest period having expired on June 10, the protest was properly dismissed as untimely.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Medford District Manager is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

2/ As support for this proposition, the court of appeals cited American Horse Protection Ass'n v. Watt, 679 F.2d 150, 151 (9th Cir. 1982) (per curiam). This case in turn relied upon Marshall v. Whittaker Corp., 610 F.2d 1141, 1146 (3d Cir. 1979).