

OREGON NATURAL RESOURCES COUNCIL

IBLA 91-259, et al.

Decided August 21, 1991

Appeals from decisions of the South Valley, South Umpqua, and North Umpqua Resource Areas, Bureau of Land Management, denying protests of timber sales. OR-100-TS91-38 through OR-100-TS91-40, and Tract No. E-90-305 (TS 91-323).

Reversed.

1. Res Judicata--Rules of Practice: Generally--Rules of Practice: Appeals: Effect of--Rules of Practice: Protests--Timber Sales and Disposals

A re-offering of a timber sale is a discretionary action and is a decision subject to protest pursuant to 43 CFR 5003.3. However, the doctrine of administrative finality precludes review of issues which could have been reviewed at the time of the first offering but were not, and of issues on which a final decision was made at the time of the first offering.

APPEARANCES: Robert Habas and Doug Heiken, Eugene, Oregon, for Oregon Natural Resources Council; Terry Hueth, Eugene, Oregon, and Alan R. Wood and David R. Baker, Roseburg, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Oregon Natural Resources Council (ONRC) filed protests of the Field Creek Timber Sale (OR-100-TS91-38), the Lower Jim Creek Timber Sale (OR-100-TS91-39), the Remnant Timber Sale (OR-100-TS91-40), and the Deberry Road Timber Sale (Tract No. E-90-305; TS 91-323) with three Oregon Bureau of Land Management (BLM) offices pursuant to 43 CFR 5003.3. The protests of the Field Creek and Lower Jim Creek Timber Sales were denied by the North Umpqua Resource Area Manager, BLM, in decisions dated March 7, 1991. The South Umpqua Resource Area Manager, BLM, denied ONRC's protest of the Remnant Timber Sale by decision dated March 7, 1991. By decision dated May 9, 1991, the Acting South Valley Resource Area Manager, BLM, denied ONRC's protest of the Deberry Road Timber Sale.

ONRC appeals the denials of its protests 1/ and requests stays of implementation of the sales. Our initial review of the records in response to the requests for stays reveals a common problem with the BLM decisions. We have therefore consolidated these appeals for a decision at this time.

These timber sales were initially offered in 1990. However, consultations with the U.S. Fish and Wildlife Service concerning potential impacts of the sales on Northern Spotted Owls caused award of the contracts to be delayed more than 90 days. The delay gave the high bidders options to decline award of the contracts, and those options were exercised. The sales were re-offered in 1991.

The language utilized in the four decisions of March 7 and May 9 is very similar. We quote the Field Creek Timber Sale decision as representative:

The sale notice for the Field Creek Timber Sale was initially advertised on July 31, 1990. That notice constituted the decision document for the purpose of protests and appeals under 43 CFR, Subpart 5003 and the Fiscal Year 1990 Appropriations Act for Interior and Related Agencies, Public Law 101-121, Section 318g(1). No protests of this sale may now be filed since any protest was required to have been filed within 15 days after the initial date of advertisement of the sale. It is my decision that your protest and request for stay of the Field Creek Timber Sale is not timely and is denied.

(Mar. 7, 1991, Decision at 1). The April 3, 1991, timber sale legal advertisement for the Deberry Road Sale contains language almost identical to that found in the decisions. 2/

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1/ The denial of the protest of the Field Creek Timber Sale was docketed as IBLA 91-259, the Lower Jim Creek Sale was docketed as IBLA 91-260, the Remnant Timber Sale was docketed as IBLA 91-261, and the Deberry Road Timber Sale was docketed as IBLA 91-343.

2/ The files for IBLA 91-259 through IBLA 91-261 do not contain copies of the legal advertisements and it is not possible for us to conclude from the records when these sale notices were published. These three files also do not contain date-stamped copies of appellant's protests. The dates of publication of the notices and the dates the protests were received by BLM are essential to determine if the protests were timely. In dismissing the appeal of the Clayton Hill Neighbors Association from the denial of its protest of the original Deberry Road Timber Sale in June 1990, we said:

"The sale notice that includes the Deberry Road Timber Sale states:

"This sale notice first published on May 30, 1990 constitutes the decision document for purposes of protests and appeals, under 43 CFR subpart 5003-- Administrative Remedies. Protests of any sale listed below must be filed within 15 days after first publication of this notice.'

"\* \* \* A timely protest of the sale was therefore required to be filed on or before Thursday, June 14, 1990. The Association's protest is dated

[1] The issue presented by these appeals is whether a re-offer of a previously advertised timber sale constitutes a new decision subject to protest pursuant to 43 CFR 5003.3. The relevant regulation provides: "When a decision is made to conduct an advertised timber sale, the notice of such sale shall constitute the decision document." 43 CFR 5003.2(b).

BLM has filed answers stating that "BLM's position that the initial advertisement of this sale constitutes the decision date for the purpose of protest and appeal is supported by the U.S. District Court decision in Portland Audubon Society, et al. v. Lujan, No. 87-1160-FR (D. Or., October 30, 1990)." In that case the U.S. District Court decided that section 318(g)(1) of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 701, 749 (Oct. 23, 1989), which provides that "any challenge to a timber sale must be filed in Federal District Court within fifteen days of the date of initial advertisement of the challenged timber sale," precluded the court's having jurisdiction over plaintiffs' September 1990 appeal of four timber sales that were initially advertised in June, July, and August 1990, and then re-advertised in September.

As to two sales that were re-advertised after no bids were received at the auction announced by the initial advertisement, the District Court noted that the sales were neither withdrawn nor changed before the re-advertisement and concluded that considering the re-advertisements to be initial advertisements would be "contrary to the clear intent of Congress to limit challenges to those filed within fifteen days of the initial advertisement of the sale." Portland Audubon Society, supra, slip op. at 9.

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fn. 2 (continued)

June 14, 1990, and was apparently written after its representative met with BLM that afternoon. \* \* \* The Association's protest bears a stamp indicating receipt by BLM on June 18, 1990.

"Although certain Departmental regulations provide for waiver of untimely filing if a document is filed no later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the appropriate office prior to the deadline, see 43 CFR 4.422(a) and 30 CFR 290.5(b), no such provision is made in the regulations pertaining to filing of timber sale protests. 43 CFR Subpart 5003. Thus, even if there were an indication that the Association transmitted its protest on June 14, 1990, the date of receipt by BLM would preclude a finding that the filing was timely. The Association's protest is therefore properly dismissed. In Re Fire Fly Timber Sale, 114 IBLA 94 (1990); see Han-San, Inc., 113 IBLA 361 (1990); McPeck Mining v. Office of Surface Mining Reclamation and Enforcement, 101 IBLA 389 (1988)."

In Re Deberry Road Timber Sale, IBLA 91-240, Order of June 21, 1991.

However, we will not dismiss an appeal without evidence in the record that establishes it was untimely filed. Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173, 174-75 (1986). Similarly, we will not assume that appellant's protests were untimely.

As to the two sales that were withdrawn before the scheduled auction, the District Court noted that these cases were "factually different from the Oregon Natural Resources [v. U.S. Forest Service, 834 F.2d 842 (9th Cir. 1987)] case":

In the Oregon Natural Resources case, the timber sale was made; years passed; and the sale was returned, modified and reoffered. However, the point of that case is well taken. This court must decide whether the advertisements of September 13, 1990 constitute an "initial advertisement of the challenged sale," Section 318(g)(1), after the sales were withdrawn from the auction set for August 31, 1990.

Portland Audubon Society, supra at 10. Noting that "[t]he sales set for August 31, 1990 were never modified in any way and were never canceled or suspended," the District Court concluded that "under these facts, \* \* \* the advertisement of July 26, 1990 was the initial advertisement, and the advertisement of September 13, 1990 was not an initial advertisement." Id. at 11.

In Oregon Natural Resources Council v. U.S. Forest Service, supra, a timber sale was originally sold in 1981, was not harvested, and was returned to the U.S. Forest Service by the buyer in accordance with the Federal Timber Contract Payment Modification Act of 1984. The Forest Service modified the sale and re-offered it in 1985. See 834 F.2d at 844. The U. S. Court of Appeals for the Ninth Circuit found that a re-offer required the exercise of discretionary judgment, because the agency could modify the terms of the sale, and was therefore a "decision" subject to appeal as provided in 36 CFR 211.18(a)(1) of the Forest Service regulations. 834 F.2d at 846.

We consider the Circuit Court of Appeals decision in Oregon Natural Resources Council the better authority for these appeals. It concerns the application of a regulation governing administrative review, rather than of a statutory provision governing judicial review, as in Portland Audubon Society, supra. In addition, in these cases, as in Oregon Natural Resources Council, BLM could modify the terms of the sales when they were re-offered, and indeed it did so by adding a seasonal restriction on timber felling in the Field Creek and Lower Jim Creek timber sales and by requiring landings on both sides of the stream in Unit 2 and designating three wildlife trees in Unit 3 of the Deberry Road Timber Sale. Although a decision was made to conduct these sales in 1990, in 1991 a decision was made to readvertise. We conclude that the decision to readvertise was a discretionary act subject to protest pursuant to 43 CFR 5003.3. 3/

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3/ Although the wording of the regulation interpreted by the Ninth Circuit is not identical to the wording found at 43 CFR 5003.2(b), in both cases the critical word is "decision."

The doctrine of administrative finality, however, precludes reconsideration of a decision if a party had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed. Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299, 308-9, 97 I.D. 109, 114 (1990). In Oregon Natural Resources Council, supra at 847, the Circuit Court of Appeals stated:

Insofar as plaintiffs challenged the EA [Environmental Assessment] without referring to changed circumstances which may have occurred during [the period between the first and second advertisements] or without alleging environmentally significant modifications [when the sale was re-offered], the defendants' position [that plaintiffs are barred from challenging the EA] is legitimate. Plaintiffs should not be allowed a second chance at administrative and judicial review when they failed timely to appeal the original EA.

As stated above, however, plaintiffs are entitled to the administrative appeals set forth in the regulations. If the USFS finds that the EA was not previously challenged and that plaintiffs are time-barred from challenging it because they fail to allege changed circumstances or environmentally significant modifications not addressed earlier, the USFS may so rule in rejecting plaintiffs[] claims.

Similarly, although BLM may not properly deny these protests as untimely filed, it may find review of certain issues is precluded by the doctrine of administrative finality if appellant failed to exercise an opportunity to obtain review of them or sought review of them but was unsuccessful on the merits.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decisions of March 7 and May 9, 1991, are reversed.

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Will A. Irwin  
Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge