

OREGON NATURAL RESOURCES COUNCIL

IBLA 94-652

Decided November 3, 1994

Appeal from a decision of the Klamath Falls Resource Area Manager, Bureau of Land Management, denying a protest and request for a stay of the Norcross Barnes Timber Sale. OR014-TS1-2.

Decision affirmed; request for stay denied as moot.

1. Rules of Practice: Appeals: Protests--Timber Sales and Disposal

A decision denying a protest of a timber sale which is not timely filed is properly affirmed under the relevant regulations. When a modification of a timber sale is announced after awarding the initial sale contract, a protest of the sale amendment may be timely filed.

2. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Res Judicata--Rules of Practice: Appeals: Generally--Timber Sales and Disposal

Under the doctrine of administrative finality, when a party has had an opportunity to obtain administrative review of a timber sale and the EA on which it is based and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in a later case except upon a showing of compelling legal reasons such as a violation of basic rights of the parties or the need to prevent an injustice. In the case of a modification or addition to a timber sale, reconsideration of the sale is ordinarily barred except to the extent of environmentally significant modifications or changed circumstances occurring between the time of the two sales.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

The general standard upon NEPA review of a BLM decision based on a FONSI for the proposed action is whether the record establishes that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; made a reasonable finding that the impacts studied are insignificant; and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impact to insignificance. When, as a consequence of new information, the action is the subject of a BLM biological evaluation and a FWS biological opinion subsequent to the EA, the appeal will be reviewed on the whole record including the reasonable and prudent measures incorporated by way of mitigation.

APPEARANCES: Wendell Wood, Klamath Falls, Oregon, for appellant; A. Barron Bail, Area Manager, Klamath Falls Resource Area, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

Oregon Natural Resources Council (ONRC) has appealed a decision of the Klamath Falls Resource Area Manager, Bureau of Land Management (BLM), dated June 22, 1994, denying its protest and request for a stay filed in connection with the Norcross Barnes Timber Sale (ORO14-TS1-2). The BLM decision further determined in accordance with 43 CFR 5003.3(f) to proceed with implementation of the sale.

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ONRC initially protested the Norcross Barnes Timber Sale by letter dated May 8, 1991. On April 20, 1992, the United States Fish and Wildlife Service (FWS) concurred with BLM's determination that the timber sale would have "no effect" on the Lost River and shortnose suckers, 2/ and bald eagles. On June 12, 1992, the Klamath Falls Resource Area Manager, issued a decision denying the ONRC protest and awarding the sale to the high bidder.

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1/ Under 43 CFR 5003.1, "[t]he filing of a notice of appeal under part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under subparts 5003.2 and 5003.3," and upon denial of a protest, the authorized officer may proceed with implementation of the decision. 43 CFR 5003.3(f). In this case, the authorized officer determined, upon denial of ONRC's protest, to proceed with the timber sale.

2/ The Lost River and shortnose suckers were Federally listed as endangered species on July 18, 1988 (53 FR 27130-27134).

The Area Manager stated in that decision that a copy of the revised environmental assessment (EA) was sent to ONRC for review and comments during the public comment period that ended April 5, 1992, but that no response was received from ONRC regarding the revised EA. That BLM decision also denied ONRC's request for a stay. ONRC did not appeal the Area Manager's decision.

In April 1993 BLM notified appellant of its intention to modify the timber sale to include a salvage sale of dead timber disclosed during an inventory of timber within the sale area. On June 15, 1993, BLM signed a decision to add salvage to the existing timber sale. Thereafter, by letter dated June 24, 1993, FWS informed BLM that it could "no longer concur that the Norcross Barnes Timber Sale will have 'no effect' on the \* \* \* endangered shortnose sucker and Lost River sucker." FWS withdrew its concurrence because of the recent acquisition of new biological information verifying the presence of the shortnose sucker in Gerber Reservoir and Barnes Valley Creek. FWS also noted that the proposal to add salvage was a change in the original action in which it had concurred. As a consequence of FWS withdrawing its concurrence, BLM suspended all operations on the sale by letter of July 9, 1993, acknowledged by the timber purchaser on July 13, 1993, until further consultation with FWS was completed and a determination made.

By letter dated June 29, 1993, ONRC protested BLM's "decision \* \* \* to sell for timber cutting, the Norcross Timber Sale (TS 1-2), the decision to implement the Environmental Assessment (ORO14-TS1-2), and the decision to declare a 'Finding of No Significant Impact' (FONSI), rather than prepare an EIS for this sale." ONRC described the sale as containing "110 MBF plus 3.4 MMBF from the original sale." ONRC also requested a stay of all further action on this timber sale. The grounds for the protest included the asserted inadequacy of the EA for the timber sale and the necessity of formal consultation with FWS regarding cumulative impacts of the timber sale and grazing in the Pitchlog and Horsefly allotments on the endangered shortnose sucker. The protest set forth concerns regarding forest health including the need to leave dead and dying timber in the forest and the need for adequate riparian buffers to protect water quality.

Subsequently, BLM prepared a biological evaluation for the Norcross Barnes Timber Sale which analyzed the potential impact of the timber sale including the salvage timber sale on endangered species including the bald eagle and the shortnose sucker. <sup>3/</sup> The biological evaluation discussed project design features including timber reserved from cutting, timber falling and yarding restrictions, and seasonal restrictions on operations. The BLM biological evaluation was forwarded to FWS by cover letter of January 14, 1994.

It appears from the record that on April 5, 1994, FWS issued a biological opinion for the impact of grazing in allotments including the Horsefly and Pitchlog Allotments in which it affirmed that the current

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<sup>3/</sup> The biological evaluation explained that surveys of the Gerber Reservoir area disclosed that the only sucker which inhabited the reservoir and its tributaries is the shortnose sucker (Biological Evaluation at unnumbered pages 2, 8).

grazing systems were "not likely to jeopardize the continued existence of the endangered shortnose sucker."<sup>4/</sup> Further, on April 21, 1994, FWS issued a biological opinion on the Norcross Barnes Timber Sale focusing on the anticipated adverse effects on the shortnose sucker. The report, which examined the impacts of the timber sale and mitigating measures in considerable detail concluded: "It is the Biological Opinion of [FWS] that the proposed timber harvest of the Norcross Barnes Timber Sale is not likely to jeopardize the continued existence of the endangered shortnose sucker" (Biological Opinion at 1).

The subsequent BLM decision dated June 22, 1994, denying the protest and the request for stay, noted that ONRC was apparently protesting the decision to implement the original Norcross Barnes Timber Sale as well as the decision to sell the additional salvage timber. The Area Manager found that ONRC's protest was not timely filed under the regulation at 43 CFR 5003.3(c) and, hence, would not support reconsideration of BLM's initial decision of April 29, 1991, to conduct the Norcross Barnes Timber Sale. The Area Manager concluded that ONRC's opportunity for seeking administrative review of the decision to hold the Norcross Barnes Timber Sale ended when it failed to appeal BLM's decision of June 12, 1992, denying its May 8, 1991, protest. The Area Manager found that the protest was timely filed with respect to BLM's decision of June 15, 1993, to sell approximately 100 MBF of salvage timber within the contract area of the Norcross Barnes Timber Sale.

The BLM decision responded to the protest in considerable detail. With regard to ONRC's contention that the timber sale should be suspended pending formal consultation with FWS, it was pointed out by BLM that the timber sale was suspended pending consultation and receipt of the April 21, 1994, biological opinion concluding that the timber sale "is not likely to jeopardize the continued existence of the endangered shortnose sucker." BLM noted in the decision that it will comply with the reasonable and prudent measures specified by the FWS by modifying the timber sale contract. With respect to concerns about cattle grazing concurrently with timber harvesting, the BLM decision notes that management practices in the riparian zones of the grazing allotments are focussed on preserving or restoring riparian areas. Further, BLM noted that it has completed formal consultation with FWS regarding the impacts of livestock grazing on the allotments resulting in a biological opinion that the grazing program is not likely to jeopardize the continued existence of the shortnose sucker. Additionally, BLM stated that measures had been taken to avoid the problem of trespassing cattle in riparian areas. In response to the ONRC assertion that the EA needs to be revised to further examine the impact of the timber sale on endangered species, BLM held that the EA, biological evaluation, and biological opinion adequately discuss the timber and grazing impacts on endangered species.

In its statement of reasons for appeal, ONRC asserts that it is appealing BLM's "decision of June 22, 1994 denying our June 29, 1993 protest to

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<sup>4/</sup> Although this biological opinion was omitted from the record transmitted by BLM to the Board, the conclusion of the report has been acknowledged by both BLM and appellant.

sell for timber cutting, the Norcross Barnes Timber Sale (TS1-2), and the decision to implement the Environmental Assessment (OR014-TS1-2), and the decision to declare a 'Finding of No Significant Impact' rather than prepare an EIS [environmental impact statement] for this Sale." Appellant contends that before proceeding with the Norcross Barnes Timber Sale, BLM needs to prepare an EIS that will consider such issues as the abundance of mature and older forest stands required to provide habitat for fish and wildlife. Further, ONRC argues that continuing trespasses by grazing cattle may limit the validity of the FWS biological opinion and require analysis of stream impacts in the EA. Appellant also asserts that the EA, prepared before the FWS biological opinion, does not adequately analyze the nature of the impact of the timber sale and grazing on the shortnose sucker. Indeed, appellant generally asserts that the EA is outdated by virtue of subsequent events and that the EA needs to be redone. ONRC further challenges the adequacy of the BLM finding regarding the number of snags to be left after the timber harvest.

Because such factors as likelihood of success on the merits and the impact of a stay on the public interest are key elements in considering a stay request, <sup>5/</sup> we have given careful review of this appeal as a preliminary matter and, hence, find it appropriate to decide this case on the merits rather than consider the stay question separately.

[1] As a threshold matter, we consider the question of the extent to which the appeal of the amended timber sale decision may invoke review of the initial timber sale decision with respect to which appellant's protest was denied and no appeal was taken. Forest management appeals regulations published at 43 CFR Part 5000 provide that in timber sale cases the decision document that initiates the protest and appeal procedures is the notice of sale itself. See 43 CFR 5003.2(b). The regulations require that objections to the sale are to be filed in the form of protests (see 43 CFR 5003.3(a)) that are to "contain a written statement of reasons for protesting the decision." 43 CFR 5003.3(b); In re Bare Nelson Timber Sale, 126 IBLA 93, 100 (1993). A strict 15-day time limitation is established for filing protests; the rule does not provide for extensions of time or exceptions for late filed protests. The rule provides, instead, that: "Protests received more than 15 days after the publication of the \* \* \* notice of sale are not timely filed and shall not be considered." 43 CFR 5003.3(c). A decision rejecting a protest of a timber sale which is untimely filed will be affirmed on appeal. Idaho Conservation League, 131 IBLA 11, 12 (1994). Accordingly, to the extent BLM rejected the protest of the initial timber sale decision, the decision must be affirmed.

[2] However, in this case BLM subsequently concluded that the timber sale should be amended to include an additional salvage sale. Thus, BLM properly adjudicated appellant's June 29, 1993, protest timely filed in response to the amended sale decision and the subsequent withdrawal by FWS of its concurrence in the BLM "no effect" determination. This BLM application of the protest regulation is consistent with the concept of administrative finality. Under the doctrine of administrative finality--the

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<sup>5/</sup> See Marathon Oil Co., 90 IBLA 236, 245-46, 93 I.D. 6, 11-12 (1986).

administrative counterpart of the doctrine of res judicata--when a party has had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, the decision may not be reconsidered in later proceedings except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice. Oregon Natural Resources Council, 120 IBLA 261 (1991); Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299, 308-09, 97 I.D. 109, 114 (1990); Lloyd D. Hayes, 108 IBLA 189, 192-93 (1989); Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 120-21 (1988). In Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842 (9th Cir. 1987), the court reviewed the application of this doctrine to a challenge of a reissued timber sale and held:

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.

834 F.2d at 847. Similarly, the Board has held in the context of a reissued timber sale that BLM 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 their resolution or sought review but was unsuccessful on the merits. Oregon Natural Resources Council, 120 IBLA at 265.

To the extent that appellant is challenging the EA and timber sale generally on the ground of a failure to adequately analyze the proper mix of mature and older forest stands required to maintain a healthy forest, the record supports a finding that this issue is unrelated to either changed circumstances since the EA was prepared or environmentally significant modifications of the original sale proposal resulting from the salvage sale. The same is true of appellant's contention that the BLM analysis of the number of snags to be left after timber harvest is inadequate. Accordingly, we hold ONRC is precluded from raising these issues in this case by reason of the doctrine of administrative finality.

Appellant also asserts that the EA does not adequately analyze the impacts of the timber sale in view of the subsequent events including the discovery of the endangered shortnose sucker in the area. ONRC contends

that the EA is now outdated and should be redone. Appellant's protest initially appeared compelling in view of the discovery of the endangered shortnose sucker in the area and the subsequent withdrawal of FWS concurrence in a no-effect determination. Indeed, BLM suspended operations on the original sale as well as the salvage sale modification pending further investigation and formal consultation with FWS. The subsequent biological evaluation prepared by BLM incorporated mitigating features which became the basis for formal consultation with FWS. Thereafter, FWS issued a biological opinion that the timber sale is not likely to jeopardize the continued existence of the shortnose sucker. The biological opinion incorporated reasonable and prudent measures to minimize any incidental take of the species.

[3] In preparing an EA, which assesses whether an EIS is required under section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (1988), an agency is required to take a "hard look" at the problems addressed, identifying relevant areas of environmental concern, and make a convincing case that the environmental impact is insignificant. Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Yuma Audubon Society, 91 IBLA 309, 312 (1986). As a general rule, the Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. Owen Severance, 118 IBLA 381, 392 (1991); G. Jon Roush, 112 IBLA 293 (1990); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 173-74 (1984). The record must establish that the FONSI was based on reasoned decisionmaking. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. G. Jon Roush, *supra* at 298; Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal. Red Thunder, Inc., 117 IBLA 167, 175, 97 I.D. 263, 267 (1990); G. Jon Roush, *supra* at 297-98. In reviewing the record in support of the BLM decision, the entire record must be considered including the BLM biological evaluation and the FWS biological opinion. See National Wildlife Federation, 126 IBLA 48, 56 (1993). <sup>6/</sup> Viewed in this context, we find that BLM has made a careful review of environmental impacts and reasonably concluded that, with the incorporation of the mitigating measures imposed, there is no significant impact requiring preparation of an EIS.

To the extent that ONRC has raised other challenges to this timber sale not expressly or impliedly addressed in this decision, those challenges have been reviewed and we have determined that ONRC has failed to establish any

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<sup>6/</sup> In this case the Board held that NEPA review of the reasonableness of the BLM action properly included consideration not only of the EA itself, but also of the analysis of comments responding to the EA and the mitigating stipulations imposed as a result.

error in BLM's decision. See Oregon Natural Resources Council, 116 IBLA 355, 373 (1990).

Since the Board has determined that BLM's decision denying ONRC's protest is properly affirmed, appellant's request for a stay pending review on appeal is denied as moot.

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 Klamath Falls Resource Area Manager is affirmed and appellant's request for a stay is denied.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

131 IBLA 187