

SIERRA CLUB, GRAND CANYON CHAPTER,
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY

IBLA 96-514

Decided October 28, 1996

Appeal from actions taken by the Vermillion Resource Area Manager, Arizona Strip District, Bureau of Land Management, regarding Environmental Assessment AZ-010-96-06 and the Trick Tank timber sale, No. 96-2.

Motion to dismiss granted; petitions for stay denied as moot.

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

An advertised timber sale notice is a "decision document," within the meaning of 43 CFR 5003.2(b). Protests of such a notice may be filed within 15 days of the publication of the notice in a newspaper of general circulation. A protest filed after that 15-day period is untimely, regardless of whether it is styled as an appeal. To appeal a timber sale notice, a person must first timely protest that notice to BLM. A BLM decision on the protest is then appealable to this Board.

2. Administrative Procedure: Administrative Review-- Appeals--Environmental Policy Act--Environmental Quality: Environmental Statements

Approval of an environmental assessment is not an appealable decision under 43 CFR 4.410 and an appeal of such an approval will be dismissed as premature. An environmental assessment merely analyzes a proposed action and an alternative or alternatives. Until BLM decides to proceed with some action based on the environmental assessment, which would be evidenced by a decision record, there is no appealable decision.

APPEARANCES: David J. Armacost, Esq., Phoenix, Arizona, for appellants; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Sierra Club, Grand Canyon Chapter, and the Southwest Center for Biological Diversity have appealed two actions taken by the Vermillion Resource Area, Arizona Strip District, Bureau of Land Management (BLM), in July 1996. As described in their notice of appeal, those actions are a "July 16, 1996, Notice of Decision for EA [Environmental Assessment]-AZ-010-96-06" and a "July 16, 1996, Notice of Decision in Timber Sale Advertisement in Arizona Strip District * * * Sale 96-2" (Notice of Appeal at 7, 31).

BLM prepared EA! AZ! 010! 96! 06, dated July 16, 1996, and approved by the Vermillion Resource Area Manager on July 17, 1996, pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994). That EA analyzed the effects of a project known as the Mount Trumbull Resource Conservation Area (RCA) "Ponderosa Pine Ecosystem Restoration." In that EA (hereinafter, the Restoration EA), BLM considered two alternatives, the proposed action of implementing a restoration prescription, involving tree marking and timber harvesting, on certain acreage within the Mount Trumbull RCA in northwestern Arizona and taking no action. 1/ It listed eight restoration units, noting that two of them, Nos. 96-1 and 96-2, had been analyzed in a previous NEPA document, EA-AZ-010-95-015 (EA at 7, Table 2).

Also, in July 1996, in accordance with 43 CFR 5003.2(a), the Vermillion Resource Area Manager had notice of the Trick Tank timber sale (No. 96-2) published in several newspapers of general circulation in the area where the timber to be offered for sale was located. 2/ The last date of publication was July 21, 1996. The notice stated that BLM would be receiving sealed bids at the Arizona Strip District Office until August 20, 1996, for a sale that would authorize the removal of 604 thousand board feet of timber from designated public lands in secs. 7 and 8, T. 34 N., R. 8 W., Gila and Salt River Meridian, Mohave County, Arizona, within the

1/ As described in the Restoration EA, the objective of the proposed action is:

"Restore presettlement ponderosa pine forest structure (using pre! 1870 stand conditions as the model), recreating as far as possible the density, spatial distribution, and variability of trees at the time of disruption of this ecosystem["']s frequent fire regime. Overstory structural restoration is one component of an integrated ecosystem restoration plan, which also includes forest floor fuel treatments and prescribed fire treatments and potential seeding for the purpose of revegetation of herbaceous understory."
(Restoration EA at 2! 3).

2/ There is evidence that a copy of the sale notice was also mailed to one of the appellants (Southwest Center for Biological Diversity), at or around the time of publication. See Exh. C attached to Motion to Dismiss.

Mount Trumbull RCA. ^{3/} It further stated: "This sale notice, first published on July 16, 1996 constitutes the decision document for purposes of protests and appeals, under 43 CFR subpart 5003! Administrative Remedies. Protests of the sale * * * must be filed within 15 days after publication of this notice." ^{4/} The record indicates that BLM has not yet entered into a contract for the sale of the timber.

Appellants filed their notice of appeal on August 17, 1996. Included in that notice were petitions to stay each of the appealed actions. Appellants assert that BLM is proposing in the Restoration EA to cut timber on public lands using a "novel, experimental, and highly controversial silvicultural treatment" (Notice of Appeal at 1). They contend that BLM failed properly to address the environmental ramifications of this action and justify its decision not to prepare an environmental impact statement, thus violating section 102(2)(C) of NEPA, and its implementing regulations. They further argue that BLM failed to consider a full range of alternatives to the proposed action.

Appellants charge that BLM's offering of the Trick Tank timber sale (No. 96-2) violates section 102(2)(C) of NEPA, the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1701! 1784 (1994), and the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531! 1544 (1994).

On September 3, 1996, BLM moved the Board to dismiss appellants' dual "appeal." BLM argues that, to the extent the appeal challenges the July 1996 notice of the Trick Tank timber sale, it is an untimely protest under 43 CFR 5003.3. To the extent that it challenges the Area Manager's July 1996 approval of the Restoration EA, BLM argues, the appeal is premature because BLM has yet to issue a final decision regarding the action proposed and analyzed in the Restoration EA.

[1] We will first address the appeal of the timber sale notice. The regulations provide at 43 CFR 5003.2(a):

The authorized [BLM] officer shall, when the public interest requires, specify when a decision governing or relating to forest management shall be implemented through the publication of a notice of decision in a newspaper of general circulation in the area where the lands affected by the decision are located, establishing the effective date of the decision. The notice in

^{3/} The case file contains only one bid form, which was submitted by James D. Petersen Logging Inc. While the form is dated Aug. 20, 1996, it bears a BLM Arizona Strip District Office date stamp of Aug. 21, 1996.

^{4/} Clearly, when a notice is published more than once the 15! day protest period runs from the last date of publication. In this case, the last date of publication was July 21, 1996.

the newspaper shall reference 43 CFR subpart 5003! ! Administrative remedies.

The regulations then specify two types of decisions: (1) "a decision * * * to conduct an advertised timber sale," and (2) "all decisions relating to forest management except advertised timber sales." 43 CFR 5003.2(b) and (c). In the former case, 43 CFR 5003.2(b) states: "When a decision is made to conduct an advertised timber sale, the notice of such sale shall constitute the decision document." In the latter case, 43 CFR 5003.2(c) states: "For all decisions relating to forest management except advertised timber sales, the notice and decision document shall contain a concise statement of the circumstances requiring the action."

It is plain that the Trick Tank timber sale notice is a "decision document," within the meaning of 43 CFR 5003.2(b). Idaho Conservation League, 131 IBLA 11, 12 (1994). The regulations further provide that "[p]rotests of a forest management decision, including advertised timber sales, may be made within 15 days of the publication of a notice of decision or notice of sale in a newspaper of general circulation." 43 CFR 5003.3(a). Such protests shall be filed with the authorized officer and contain a written statement of reasons. 43 CFR 5003.3(b). However, the regulations also state that "[p]rotests 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." 43 CFR 5003.3(c) (emphasis added). This is a "strict" time limitation, admitting of no extensions of time or exceptions for late filing. Idaho Conservation League, 131 IBLA at 12; G. Jon Roush, 112 IBLA 293, 297 (1990). That regulation is designed, like 43 CFR 5003.1, providing that an appeal will not suspend the effect of a timber management decision, and 43 CFR 5003.3(f), allowing implementation of a decision following denial of a protest, to "expedite implementation of forest management decisions," especially sale notices. Idaho Conservation League, 131 IBLA at 12, citing 49 FR 28560 (July 13, 1984).

In this case, protestants had 15 days from final publication of the Trick Tank timber sale notice on July 21, 1996, to file a protest. That date was August 5, 1996. Appellants did not file a protest within that time period. They first objected to the sale notice in their notice of appeal filed August 17, 1996. The question presented is whether a sale notice may be appealed directly to this Board.

In Idaho Conservation League, 131 IBLA at 12, the Board considered a BLM decision rejecting a protest to a timber sale and held that a protest to a timber sale notice received by BLM after the 15-day protest period is properly rejected as untimely. We reached that conclusion despite the fact that the appellant in that case had styled its filing as an "appeal." 5/

5/ In this case, however, BLM did not reject appellants' Aug. 17, 1996, filing as an untimely protest, possibly because it related not only to the timber sale notice but also to the Restoration EA.

BLM urges that Idaho Conservation League controls the disposition of appellants' appeal of the Trick Tank timber sale.

It is clear from the regulations in 43 CFR Subpart 5003 that BLM sought to devise a process whereby objections to its forest management decisions were initially reviewable at the agency level, thus creating an exception to the rule that BLM decisions are appealable directly to this Board under 43 CFR 4.410. Such a system, as it relates to timber sales, allows the agency an opportunity to consider the objections and either cancel the sale, make any required adjustments, or, by decision, deny them. A decision denying a timber sale protest is appealable to this Board under 43 CFR 4.410. E.g., Oregon Natural Resources Council, 120 IBLA 261 (1991). However, in accordance with 43 CFR 5003.3(f), upon denial of a sale protest, BLM may proceed to implement the sale. The decision to proceed with the sale is effective, and the provisions of 43 CFR 4.21, relating to petitions for stay are not applicable. In Re Eastside Salvage Timber Sale, 128 IBLA 114, 115 (1993).

By filing an appeal to this Board from BLM's sale notice, appellants have attempted to circumvent the regulatory scheme set out in 43 CFR Subpart 5003. Appellants complain of the cryptic nature of the sale notice and refer to the "covert decision" contained therein, "the un-noticed underlying decision to cut trees in this sale using the novel, experimental, and intensive tree-marking prescription that is proposed in the Mount Trumbull RCA Ponderosa Pine Ecosystem Restoration Environmental Assessment (Restoration EA)" (Notice of Appeal at 3). By addressing these complaints to BLM during the protest period, appellants would have forced BLM to address their objections directly and, thereby, focused the issues for any subsequent appeal. However, appellants failed to do so.

Appellants' appeal of the Trick Tank timber sale is, in fact, an untimely protest, which must be dismissed. 6/ To appeal a timber sale notice, a person must first protest that notice to BLM. 7/ BLM's decision

6/ To rule otherwise could result in one person filing a protest of a timber sale notice with BLM within the 15-day period and the same person or another person filing an appeal to this Board. We have stated that the filing of an appeal to the Board removes the case from the jurisdiction of BLM pending disposition of the appeal and that BLM is without authority to take further action in the case pending action by the Board. Petrol Resources Corp., 65 IBLA 104, 108 (1982). In such a case, BLM would be without authority to act on the protest.

7/ We note that while the Board's decision in Idaho Conservation League recites good law, the law may not have been applicable to the facts in that case. The decision states only that the Idaho Conservation League filed a "protest titled 'Appeal of Decision Notice and FONSI [finding of no significant impact] on Big Deer Creek Salvage Timber Sale' * * * on July 11, 1994, that was directed against a timber sale advertised on June 22, 1994" (131 IBLA at 11). If, in fact, there existed in that case a Decision Notice and FONSI separate from a published notice of the timber

on the protest is then appealable to this Board. BLM's motion to dismiss the appeal of the Trick Tank timber sale is granted. 8/

[2] Appellants' appeal also constitutes a challenge to the Area Manager's July 1996 approval of the EA. There is no evidence that BLM has yet issued a decision record in connection with this EA. BLM states that none has issued (Motion to Dismiss at 7).

Appellants admit that "the form, structure, and other appearances of the BLM document identified as EA! AZ! 010! 96! 06 * * * do not specifically identify it as a Notice of Decision" (Notice of Appeal at 8). However, they assert that an August 6, 1996, communication from BLM to a Sierra Club member stated that the EA itself was the notice of decision. The document cited by appellants is a "Fax Transmission Cover Sheet," dated August 6, 1996, which indicates that it was a response by a BLM employee, on behalf of the Area Manager, to an individual, stating, in relevant part: "All pertinent information on EA! AZ! 010! 96! 06 should be in the packet you currently have. There was no Decision Record on the EA dated April 2, 1996 as it was not the final. You rec[ei]ved a copy of the Decision notice for the final EA on July 22, 1996 according to our records" (Notice of Appeal, Exh. 9). Despite this characterization, we find nothing in the EA designated as a decision notice or decision record. Also, as noted above, BLM represents in its motion to dismiss that no decision record has issued. Therefore, even though the Area Manager has approved the EA, he has not yet decided whether or not to proceed with the proposed action. 9/

fn. 7 (continued)

sale, such a decision and FONSI may have been appealable directly to this Board.

8/ The timber sale notice stated that it constituted the decision "for purposes of protests and appeals, under 43 CFR subpart 5003 - Administrative Remedies" (emphasis added). Reference to the Subpart 5003 regulations indicates the inaccuracy of the underlined portion of that statement. The regulations provide only that notice of an advertised timber sale "shall constitute the decision document" (43 CFR 5003.3(b)). Appellants have made no claim that they relied on that language in filing their appeal. For that reason, we find the inclusion of such language in the sale notice to be harmless error.

9/ We note the EA contains a statement that is ordinarily found in a decision record, i.e., a FONSI. "Based on the analysis of potential environmental impacts contained in this environmental assessment, impacts are not expected to be significant and an environmental impact statement is not required" (EA at 55). Appellants challenge this finding, and even go so far as to state that it alone constitutes the "notice of decision," which they have appealed (Response to BLM's Motion to Dismiss at 3). See id. at 18; see also Additional Statement of Reasons at 2, 15. The fact remains that the Area Manager has yet to adopt a course of action, and thus has taken no action that is subject to appeal. See Animal Protection Institute

BLM has analyzed the environmental consequences of undertaking a proposed ecosystem management plan or no action at all. However, it has not yet decided on what action to take. Under 43 CFR 4.410, a party to a case who is adversely affected by a BLM decision has a right to appeal to this Board. Appellants are not adversely affected because there has been no decision. See Joe Trow, 119 IBLA 388, 391 (1991). Their appeal is premature and must be dismissed. 10/

To the extent that appellants appeal from the Area Manager's July 17, 1996, approval of the EA, that appeal is properly dismissed and BLM's motion to dismiss that appeal is granted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's motion to dismiss is granted and the petitions for stay are denied as moot.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

fn. 9 (continued)
of America, 79 IBLA 94, 101, 91 I.D. 115, 119 (1984), overruled on other grounds, Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267 (1991). We accept BLM's statement that it has not made a decision record based on the EA. If BLM issues a decision record based on the EA and it continues to believe a FONSI is appropriate, a FONSI should accompany the decision record. BLM should serve a copy on appellants and they may challenge the decision record and FONSI at that time. 10/ Prior to issuing a decision record based on the EA, BLM should review the documents filed on appeal by appellants in this case.

