

THE FRIENDS AND RESIDENTS OF
LOG CREEK ET AL.

IBLA 98-250

Decided June 30, 1998

Appeal from and request for stay of a decision of the Eugene District Office, Bureau of Land Management, to proceed with timber sale E-98-201.

Decision set aside in part and remanded; appeal dismissed in part.

1. Timber Sales and Disposals

A decision to build a road through an area of old growth forest is set aside and remanded to allow BLM to comply with an established agency standard requiring BLM to avoid harvesting trees within a remnant large tree stand.

APPEARANCES: Pam Hewitt, Marcola, Oregon, for the Friends and Residents of Log Creek; Charlie Ogle, Eugene, Oregon, for the Sierra Club — Many Rivers Group; Carol Logan, Springfield, Oregon, for the Kalapooya Sacred Circle Alliance; Emily Rice and John Hackbarth, McKenzie Resource Area, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Friends and Residents of Log Creek, the Kalapooya Sacred Circle Alliance, and the Sierra Club — Many Rivers Group have appealed from, and request a stay of, a March 18, 1998, Decision of the Eugene District Office, Bureau of Land Management (BLM), rejecting their protests of the Log Creek Timber Sale, Tract No. E-98-201. A brief opposing issuance of a stay has been filed by BLM, together with a motion to dismiss this appeal as untimely filed. In addition to the stay request filed by Appellants with their notice of appeal, they have also filed a statement of reasons (SOR) in support of their appeal, which BLM has answered. We now deny BLM's motion to dismiss, and set aside so much of the BLM Decision as permitted construction of a 600-foot road through a stand of old growth timber in order to permit BLM to comply with standards established by prior planning.

The case file on appeal shows that Appellants filed their notice of appeal with BLM on April 17, 1998. The Decision from which appeal was taken issued on March 18, 1998. The date the Decision was received by

Appellants is not shown by the record before us, but the notice of appeal was of necessity filed timely, inasmuch as it was filed 30 days after the date of the Decision at issue. See 43 C.F.R. § 4.411(a), allowing 30 days following service of a BLM decision, in which to give notice of appeal. The motion to dismiss this appeal as untimely is therefore denied.

Appellants request that the effect of the Decision here on review be stayed pending review. A stay may issue in timber sale cases, although the general stay regulation at 43 C.F.R. § 4.21, which is relied upon by Appellants, does not directly apply here. See In re Eastside Salvage Timber Sale, 128 IBLA 114, 115 (1993), holding that, while 43 C.F.R. § 4.21 does not govern stays in timber sale appeals, nonetheless, the standards stated in § 4.21(b) are generally applied in all cases. The request for stay is denied as moot for the reasons stated below.

In the course of reviewing Appellants' stay request and SOR, it has become apparent that construction of a 600-foot long road through an area of old growth forest is not consistent with BLM planning standards and must be set aside. After reviewing the entire record and the arguments raised by Appellants and BLM, we conclude that this case must be remanded to permit BLM to comply with standards established for logging in the vicinity of old growth forest.

In their request for stay at pages 4 and 5, and again in their SOR at pages 6 through 22, Appellants identify eight areas of disagreement with BLM concerning the timber sale at issue. They argue that BLM has ignored the agency watershed analysis (WA) and resource management plan, that a consultation with the U.S. Fish and Wildlife Service included in BLM's planning for the sale is inadequate, that burning allowed under the sale is improper, that compliance with a protocol for projects implemented after 1997 has not been achieved, that concerns of the local indigenous community have been ignored and affected persons have not been consulted as they should have been, and that an Environmental Impact Statement should be prepared before the sale at issue can proceed. In presenting this list of complaints about BLM's planning for the sale, with but a single exception, Appellants ignore the Decision that is the subject of their appeal and fail to direct their arguments to the findings made by the Decision that is the subject of our review; this approach to their appeal fails to comply with regulations governing practice before the Department and subjects all but one of their arguments to summary rejection. See 43 C.F.R. § 4.412(a); In Re Mill Creek Timber Sale, 121 IBLA 360, 362 (1991). Except for their argument concerning the 600-foot road, Appellants have not alleged error in any finding made by BLM in the Decision rejecting their protest.

Consequently, the single question presented for review by their SOR is whether BLM's Decision erred in finding that road construction through a stand of old growth timber located between two stands of second-growth timber scheduled for harvest is consistent with BLM's Standards and Guidelines for Management of Habitat for Late-successional and Old Growth Forest Related Species (S&G). An answer to Appellants' SOR filed by BLM defends

the decision to allow a road to be cut through the old growth to reach part of the sale area as a matter of minimal importance that is susceptible to reclamation after construction. The Decision explains that:

Approximately 600 feet of temporary road will be constructed through a late-successional forest fragment between Units 1 and 2. This temporary road construction is consistent with all standards and guidelines, and the EA [environmental assessment] analyzed the effects of this road construction, as I explained to you in a letter, dated December 30, 1997, in response to your comments on the EA. The standard to retain late-successional forest patches does not specifically address road construction. The standard in the ROD [Record of Decision] does not prohibit temporary road construction in late-successional forest, only that late-successional forest patches be retained.

(Decision at 5, 6.)

Acknowledging that building the road will require removal of 20 to 30 trees from the patch of old growth, BLM nonetheless finds that the effect of the road would be minimal and would not adversely affect old growth species habitat. Id. On appeal, Appellants contend that road building through an area of old growth violates the WA and S&G and that it is illogical to conclude, as BLM does, that cutting a road through the patch is consistent with retention of this piece of old growth forest. They quote the following direction from the WA requiring that BLM:

Minimize the impacts to remaining large tree dominated stands within the watershed [and manage] large tree dominated stands to reduce edge effects. Minimize the microclimate effects of edge on remaining large tree stands, maximizing effective interior habitat. Avoid additional near-term harvest within or near remnant large tree stands, and manipulate adjacent stands to provide maximum protection from windthrow, increased light availability, and drying.

(SOR at 8 (footnote and emphasis omitted).) The word "edge," as used in the quoted standard, is defined by BLM to refer to that portion of old growth forest that is influenced by adjacent stands; BLM observes that the patch of forest between Sale Units 1 and 2 has no interior habitat benefiting such late-successional species as fungi, lichens, bryophytes, arthropods, and vascular plants, being so small as to be "all edge." (Decision at 5, 6, 12.)

Responding to Appellants' objection to the road, BLM reiterates that road building within old growth is not specifically prohibited, but that the applicable standard, that "late successional forest patches be retained where little remains," does not prohibit temporary road construction. (BLM Response at 4.) While BLM argues that removal of the timber on Sale

Unit 2 would not likely disturb the adjacent old growth remnant, this argument simply avoids the objection raised by Appellants to cutting trees from inside the old growth fragment itself.

[1] The standard to be applied is clear: Both Appellants and BLM agree that little remains of the successional forest patch between Sale Units 1 and 2 and that what remains should, under BLM's planning guidance, be "retained." Appellants, however, contend that the patch will not be retained if a road is built through it, while BLM seems to argue that, since the road will be temporary and short it does not matter, given the small amount of old growth that will be affected. This approach, as Appellants contend, ignores the fact that 20 to 30 trees of substantial age will be removed from the patch to make way for the road. According to BLM, the trees to be removed will be up to 2 feet in diameter, breast high. If 30 such trees are removed, it is clear the patch will not be "retained," but that it will have been partially cut.

On the record before us, it is not clear whether other approaches to enable the logging of Sale Unit 2 to proceed are feasible. However, it is apparent, as Appellants contend, that BLM did not follow a planning standard for protection of the old growth fragment when laying out the road to Sale Unit 2, since the planned road will remove, not retain, part of the patch. Because cutting a road through the fragment of old growth is not consistent with a plan to retain it, further planning for access to Sale Unit 2 is required to determine an appropriate access route to the planned logging area.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, so much of BLM's Decision as provides for a 600-foot road through a patch of old growth forest is set aside; the case file is remanded to permit BLM to proceed with the remainder of the sale and, if Sale Unit 2 is to be logged, to make appropriate provision for retention of the old growth fragment in planning for access to the unit. To the extent this appeal raises other issues, it is dismissed.

Franklin D. Amess
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

