

IN RE NORTH TRAIL TIMBER SALE

IBLA 2004-51

Decided July 13, 2006

Appeal from a decision by the Field Manager of the Butte Falls Resource Area, Medford District, Bureau of Land Management, dismissing the appellants' protest of the North Trail Timber Sale. EA OR 110-02-05.

Affirmed.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Rules of Practice: Appeals: Dismissal--Timber Sales and Disposals: Generally

A party challenging BLM's decision to approve a timber sale based on a finding of no significant impact has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Mere differences of opinion provide no basis for reversal. If the appealed decision is the denial of a protest, the appellant must affirmatively point out error in the protest decision.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Appeals: Dismissal--Timber Sales and Disposals: Generally

A party appealing the denial of a protest of a timber sale may raise an issue pertaining to the prospectus for the timber sale, dated subsequent to the environmental assessment (EA), the finding of no significant impact, and the decision record, when

there is no basis for concluding that the party should have been alerted to the issue by the scoping notice or EA.

APPEARANCES: Joseph Vaile, Ashland, Oregon, for the Klamath-Siskiyou Wildlands Center; Doug Heiken, Eugene, Oregon, for the Oregon Natural Resources Council; Lance E. Nimmo, Medford, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Klamath-Siskiyou Wildlands Center (KSWC) and the Oregon Natural Resources Council (ONRC) have appealed an October 8, 2003, decision of the Field Manager of the Butte Falls Resource Area, Medford District, Bureau of Land Management (BLM), dismissing their protest of the North Trail Timber Sale. The sale, along with a separate South Trail Timber Sale, was authorized by the Field Manager in a Decision Record (DR) dated August 5, 2003, based upon a Finding of No Significant Impact (FONSI) for both the North Trail and South Trail Timber Sales issued and dated the same day. (Administrative Record (AR) 11, 12.)^{1/} The DR states that the timber harvest will occur on 1,561 acres, apparently including both the North and South Trail Sales, and identifies five silvicultural methods and four logging systems. (AR 11 at 1.) The appellants' petition for a stay of the decision pending a review of their appeal was denied by order dated December 23, 2003.

The DR and FONSI were based upon an "Environmental Assessment for Trail Creek" (EA OR-110-02-05), dated June 21, 2002, which analyzes the environmental impacts of various forest management activities, including timber harvesting, reducing high stand densities, hazardous fuels reduction, related road projects,

^{1/} The AR submitted by BLM is a one-volume binder with documents at Tabs numbered 8 through 15. Missing from the record are the comments on the EA which BLM received from the appellants and other members of the public. If the record submitted by an agency is inadequate, the decision may be set aside and the matter remanded for compilation of a complete record. Despite its deficiencies, we have determined that the record as supplemented by appellants contains copies of documents necessary to our disposition of this appeal. See Great Western Onshore, Inc., 133 IBLA 386, 396-97 (1995); Save Our Cumberland Mountains, Inc., 96 I.D. 139, 147-48, 108 IBLA 70, 85-86 (1989); Dugan Production Corp., 103 IBLA 362, 364 (1988).

and replacing undersized culverts for fish passage. (AR 15 at 1.)^{2/} The document examines an area of 35,000 acres, which includes 14,681 acres of BLM-managed land, 10,160 acres of land managed by private industry, 4,360 acres of land managed by the U.S. Forest Service, 6,026 acres of private, non-industrial lands, and 79 acres managed by the State of Oregon. (AR 15 at 1.) Of these lands, 2,760 acres were proposed for treatment. (AR 15 at 3.) Timber harvesting, understory reduction, and road projects are to occur “within Matrix and Riparian Reserves as designated in the Record of Decision for the Northwest Forest Plan Environmental Impact Statement (SEIS/ROD) p. 7.” (AR 15 at 1.)^{3/}

Based upon the EA, on September 19, 2002, the Butte Falls Resource Area Field Manager issued an initial FONSI and a DR approving understory fuels reduction treatments and fuel treatments within riparian reserves, road projects, and culvert replacements as described in alternative two of the EA. (AR 13, AR 14.)^{4/} The vegetation management portions of alternative two were not adopted in order to allow BLM to re-assess its proposed timber harvests in light of a July 2002 fire in the Trail Creek Watershed. (AR 13 at 1.) BLM prepared an “Addendum to Trail Creek Environmental Assessment” (EA Addendum) dated November 21, 2002, which notes that only 3 of the 216 acres of BLM-managed land affected by the fire had been included in proposed timber harvest units, while an additional 20 acres were subject to salvage operations. As noted above, the Field Manager subsequently issued the additional FONSI and DR for the timber sale. (AR 11, 12.)

BLM apparently published a notice of the North Trail Creek Timber Sale on August 14, 2003, and on August 22, 2003, KSWC filed a protest on behalf of itself,

^{2/} The EA with Appendices A through K is at Tab 15. Page 34 was missing from the document and was obtained from BLM, along with the addendum for the EA, by facsimile transmission.

^{3/} The document referred to was not included in the AR submitted on appeal. The Board has on hand a copy of the “Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl” (February 1994) Volumes I, II, and Appendix J2. It also has the “Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl” which includes “Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl” (April 1994). These documents are the primary documents which are referred to generally as the “Northwest Forest Plan.” See In re North Murphy Timber Sale, 146 IBLA 305, 308 n.3 (1998).

^{4/} The decision was appealed to the Board and affirmed. See Frederic L. Fleetwood, 159 IBLA 375 (2003), in which the Board quotes extensively from the Trail Creek EA.

Headwaters, and ONRC.^{5/} (AR 10.) BLM then issued the October 8, 2003, decision responding to and dismissing appellants' protest, and on November 14, 2003, KSWC and ONRC filed this appeal.

In their statement of reasons (SOR) for appeal, appellants address six matters: (1) the EA's failure to address specific actions that will contribute to stream sedimentation and how mitigation measures would prevent adverse cumulative effects; (2) the EA's failure to address the cumulative impacts of other late-successional logging projects in the Trail Creek watershed and the need for an environmental impact statement (EIS) to do so; (3) the EA's failure to provide site-specific information on threatened and special status species or evaluate impacts, in particular that "[t]he Trail Creek timber sales will lead to a take situation for spotted owl pairs" in the watershed in violation of the Endangered Species Act; (4) the EA's reliance on a generic soils analysis and its failure to identify the location of unstable soils in violation of the Resource Management Plan (RMP);^{6/} (5) BLM's failure to consider the increased risk of wildfire resulting from logging and over-story removal in violation of the RMP; and (6) the EA's failure to recognize that the cutting of "leave trees" as allowed by the timber sale prospectus violates the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2000), and the Northwest Forest Plan.

[1] Although appellants raise what they clearly consider to be significant issues which they believe BLM has failed to adequately address, review of their SOR establishes that we need only discuss one of their issues because large portions of the document repeat verbatim portions of the protest which they filed with BLM. A party challenging BLM's decision has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. *E.g.*, *Bark*, 167 IBLA 48, 76 (2005), and cases cited; *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332-33 (2004). Mere differences of opinion provide no basis for reversal. *E.g.*, *Bark*, *supra*. It is not sufficient for an appellant to "pick apart a record with alleged errors and disagreements without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance."

^{5/} The sale notice is not part of the AR. Footnote one of the December 23, 2003, Order denying a stay erroneously identified the protest as also having been filed by the Siskiyou Project, rather than Headwaters, and stated that ONRC had signed the document.

^{6/} The appellants do not identify the appropriate RMP. The EA refers to the "Record of Decision and Resource Management Plan for the Medford District" (June 1995). (AR 15 at 3.) The Board has a copy of the document and its related EIS.

Id., quoting In re Stratton Hog Timber Sale, 160 IBLA at 332. Additionally, if the appealed decision is the denial of a protest, the appellant must establish error in the actual protest decision. Id.; see also In re Mill Creek Salvage Timber Sale, 121 IBLA 360, 362 (1991) (summary dismissal of the appeal is appropriate where BLM “provided a comprehensive decision fully addressing each of the allegations contained in the protest and appellant has not attempted to show any error in the decision”). The Board has dismissed appeals of timber sales when the SOR submitted on appeal reiterated the matters raised in the protest to the sale and failed to address the decision issued in response to the protest. E.g., The Friends and Residents of Log Creek, 145 IBLA 30, 31 (1998); In Re Eastside Salvage Timber Sale, 128 IBLA 114, 116 (1993); In Re Bare Nelson Timber Sale, 126 IBLA 93, 96 (1993); Oregon Natural Resources Council, 122 IBLA 65, 67 (1992); In Re Mill Creek Salvage Timber Sale, 121 IBLA at 362.

Application of the standard is not mandatory, but we deem it appropriate in this case. See In Re Grizzly Knob Timber Sale, 122 IBLA 155, 157 (1992). For example, appellants define the first issue in the SOR in the following terms:

The late-successional/old growth logging and road construction described in the Trail Creek EA and currently marked and painted on the ground will increase sedimentation and peak flows in the Trail Creek Watershed causing short-term and site-specific damage to hydrological health in violation of the ACS [Aquatic Conservation Strategy] of the Northwest Forest Plan and Clean Water Act.

(SOR at 1.) The SOR goes on to state that, “[a]s pointed out in our Protest,”

additional sediment delivery from regeneration logging, tractor use and road construction, as well as ‘road-related activities’ like log hauling, renovation and culvert replacement would be cumulative. Timber harvest activities such as road building and use, skidding logs, maintenance of existing roads, clearcutting, and burning increase the amount of bare, compacted soil exposed to rainfall and runoff, resulting in higher rates of surface erosion. Upslope sediment can reach streams via roads, skid trails, and/or ditches, even when vegetative buffers are established.

(SOR at 1-2.)

Next, appellants argue that “Riparian Reserves don’t prevent sediment delivery to streams” and “are not properly functioning’ now due to extreme roading and logging effects.” (SOR at 3.) They conclude by stating: “In sum, you fail to address specific actions that will contribute sediment to Trail Creek, and you failed to justify

why Riparian Reserves or mitigation measures would prevent adverse cumulative effects.” Id. These assertions also appear verbatim in the appellants’ protest.

In its response, BLM points out that the issue of sedimentation had been raised in the protest and that it “was previously addressed in the Protest Response (Exhibit 9, Issue 1).” (Response at 2.) BLM explains that, as stated in its response, the matter of specific actions contributing to sedimentation is addressed at pages 34 and 35 of the EA, and quotes statements from the EA that “improvements and renovations to existing roads are expected to decrease the amount of sediment currently being transported to stream channels” and that “the amount of sediment produced from traffic is expected to be greatly reduced.” (Response at 2.) Further, BLM notes, as it did in its response to the protest, that the review of ACS objectives in the EA’s Appendix F acknowledges that “small amounts of sediment may be generated from road, fuels treatments, and harvest related activities” and that this “could cause localized, short-term increases to turbidity and fine sediment levels in streams,” but that “[i]mplementation of Best Management Practices and Project Design Features will reduce these expected increases to undetectable levels.” (Response at 2.)

Whether or not BLM’s response to appellants’ protest addressed every statement they had made, it is clear that BLM understood that appellants were concerned about sedimentation and responded to the issue. BLM pointed out that the EA acknowledges at page 1 that “roads are the single greatest source of management related delivered sediment in the watershed” and that roads left untreated “will continue to erode and contribute to sedimentation to the stream system.” (AR 9 at 1, quoting EA at 1.) These concerns, BLM explained, had been addressed “by upgrading stream crossings, decommissioning roads and managing the transportation system to minimize sediment delivery to streams.” (AR 9 at 1, citing EA at 2.) In regard to the assertion in the protest that BLM had “[o]verlooked specific actions that will contribute sediment to Trail Creek,” the response pointed out that page 34 of the EA “addresses specific actions and their contribution to sediment” and quoted from pages 34-35. (AR 9 at 1, quoting AR 10 at 2.)

By simply repeating assertions made in their protest, the appellants fail to acknowledge that BLM’s response provides the agency’s position on the issue. If the appellants believe that BLM’s response to their protest arguments is wrong or inadequate, and that BLM has not taken a “hard look” at the issue as required by NEPA, it is their responsibility to inform the Board. The ultimate burden of proof is on the challenging party. Friends of the Nestucca, 144 IBLA 341, 357 (1998); G. Jon and Katherine M. Roush, 112 IBLA 293, 298 (1990). Accordingly, the portions of the appellants’ SOR which reiterate portions of their protest without addressing BLM’s response will not be further addressed in this decision.

One matter discussed in the SOR which arose after BLM's issuance of the subject DR/FONSI is the appellants' final argument, *i.e.*, that "[t]he increasing use of red marked take trees by the BLM, and as outlined in the Prospectus[,] violates the RMP." (SOR at 4.) With its response, BLM provides a copy of the North Trail Timber Sale prospectus and explains that "red marked trees" refers to the use of red paint "to identify trees added to a timber sale contract through a timber sale modification" and that such trees are identified by the contractor during operations because they need "to be cut for operational feasibility or to meet state safety laws * * *." (Response at 4.) BLM explains that the trees are cut for specific purposes, "such as trees obstructing cable yarding corridors, trees hazardous to workers, trees needed as guyline trees for yarding equipment or severely damaged trees that are safety hazards." *Id.* BLM also points out that the prospectus for the North Trail Creek Timber Sale "identifies the specific requirements that allow the purchaser to cut and remove additional trees" and states that "[t]his applies specifically to skyline cable yarding units analyzed in the EA." *Id.*

[2] BLM objects to the Board's considering the issue of red marked trees because it was not raised during the scoping process or in the appellants' protest. (Response at 4.) While in some circumstances the failure of a party to raise an issue when allowed a clear opportunity to do so would be a valid reason for the Board to refuse to consider an argument on appeal, in this case, as BLM explains, the matter the appellants address arises from the North Trail Creek Timber Sale prospectus. It is dated August 28, 2003, subsequent to issuance of the EA and FONSI in 2002, the 2002 approval of the DR for fuels reduction treatments, road projects, and culvert replacements, and also the August 5, 2003, FONSI and DR for the North Trail and South Trail Timber Sales which led to the appellants' protest. (AR 11, 12.) The date is also 6 days after the appellants filed their protest. (AR 10.)

By its nature, a scoping process is too general to require parties to anticipate every issue which may arise about a proposed project. *See* 40 CFR 1501.7. In this case, the record provides little information about the scoping process. The EA states only that "[s]coping letters were sent to adjacent landowners and interested parties" and that one public meeting was held, and it lists eight "substantive issues/concerns that were received." (AR 15 at 4.) It also discusses five "issues identified through the initial scoping process and through the interdisciplinary team process" which were to be analyzed in the EA with suggested "[i]ndicators or measurements * * * to compare how the alternatives address the issues." (AR 15 at 4-5.) A copy of the scoping letter is not part of the record; nor is there a list of the parties to whom it was sent. The written comments BLM received are also not part of the record forwarded to the Board. Neither the location nor date of the meeting is identified and there is no record of what BLM personnel who were present might have said. The eight "substantive issues/concerns" are each described in fewer than ten words and each of the five issues is described in a paragraph. Thus, the record offers no basis to

ascertain whether or not any matter related to cutting trees for operational purposes was raised during the scoping process by BLM, the interdisciplinary team, the appellants, or anyone else. Nor is there any clear reference to operational logging in the EA. Accordingly, the Board will not dismiss the argument for lack of timeliness.

Rather, the failure of the appellants' argument is its lack of specificity. The SOR does not identify which portion of the RMP or what policy it establishes would be violated by cutting "red marked take trees" or why the practice would constitute a violation. More specifically, the appellants do not address the effects the practice may have on the environment. For example, retention of defined percentages of tree canopy, tree density, and other characteristics of the vegetation after harvesting seem to have been important in deciding to adopt alternative two. See AR 15 at 6-7, 29-30. In addition, the EA states that direct or indirect impacts on coho salmon habitat are not expected under alternative two because the timber removal treatments "would maintain characteristics of a mature stand and would provide sufficient tree canopies to provide the long term habitat elements necessary for healthy aquatic ecosystems." (AR 15 at 31-32.) Although cutting trees for operational purposes will contribute to reduced tree canopy and tree density, the SOR does not meet appellants' burden of demonstrating significant impact.

We conclude that appellants have not established that BLM failed to consider a substantial environmental concern of material significance or that BLM otherwise has failed to take a "hard look" at the environmental consequences of its action. See Bark, 167 IBLA at 76; In re Stratton Hog Timber Sale, 160 IBLA at 332; Native Ecosystems Council, 160 IBLA 288, 292 (2004); Lee and Jody Sprout, 160 IBLA 9, 12-13 (2003).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 8, 2003, decision of the Butte Falls Resource Area Field Manager is affirmed.

James F. Roberts
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge