

NOTE: This disposition is nonprecedential.



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Interior Board of Land Appeals
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August 16, 2016

IBLA 2016-224)	DOI-BLM-ORWA-R050-2013-0003-EA
)	
CASCADIA WILDLANDS AND)	Timber Sale
OREGON WILD)	
)	Decision Affirmed;
)	Stay Denied as Moot

ORDER

Cascadia Wildlands and Oregon Wild (Appellants) appeal and petition to stay the effect of a June 2, 2016, decision of the Acting Field Manager, Roseburg District Office, Bureau of Land Management (BLM). In the decision, BLM denied Appellants' protest of BLM's April 18, 2016, revised decision document (RDD) that authorized the Wiley Turtle Timber Sale.

A party challenging a BLM decision to approve an action that was analyzed in an environmental assessment (EA) 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. If the appealed decision is the denial of a protest, the appellant must establish error in the protest decision. In this case, BLM's protest decision fully addressed the issues raised by Appellants in their protest of BLM's RDD, and Appellants do not provide an affirmative showing that BLM failed to consider a substantial environmental question of material significance or error in the protest decision. Appellants simply reiterate the arguments contained in their original protest to BLM. Under these circumstances, we summarily affirm BLM's denial of Appellants' protest and deny their petition to stay as moot.

The Wiley Turtle Timber Sale

The Wiley Turtle Timber Sale is a portion of the larger Myrtle Creek Harvest Plan.¹ BLM released the original Myrtle Creek Harvest Plan EA and draft Finding of

¹ Protest Decision at 2 (June 2, 2016); RDD at 1 (Apr. 18, 2016).

No Significant Impact (FONSI) for public review and comment in June 2014.² After BLM released the 2014 EA and draft FONSI, it completed surveys for red tree voles and incorporated those surveys in a revised EA released in August 2015.³ Based upon the EA, BLM issued a FONSI and Decision Document (DD) approving the Wiley Turtle Timber Sale on August 27, 2015.⁴ The DD included authorization of approximately 1,014 acres of variable density thinning, 614 acres of commercial thinning, 209 acres of variable retention harvest, and 209 acres of reforestation and stand maintenance.⁵ The DD also authorized forest management treatments, road management, fuels management, and subsoiling actions.⁶ Cascadia Wildlands protested BLM's decision to authorize the sale, and BLM denied the protest.⁷ Cascadia Wildlands did not appeal BLM's 2015 protest decision.⁸

As a part of its ongoing survey program for northern spotted owls and before holding the timber sale, BLM identified new northern spotted owl sites in the Myrtle Creek Harvest Plan area.⁹ Because northern spotted owls are listed as threatened under the Endangered Species Act,¹⁰ this information triggered re-initiation of consultation on the timber sale between BLM and the U.S. Fish and Wildlife Service and release in February 2016 of another revised EA (REA) to incorporate the new sites.¹¹ Two of the new owl sites would be affected by the Wiley Turtle Timber Sale.¹² The 2014 EA had not addressed the new owl sites because they were not being used by owls when BLM prepared the 2014 EA; however, the effects of the timber sale on the owls using the new sites were analyzed in the 2014 EA because those same owls were using other sites within the sale area at the time.¹³

On April 18, 2016, the Acting South River Field Manager issued the RDD and authorized the Wiley Turtle Timber Sale.¹⁴ In the RDD, the Acting Field Manager determined that the new information gathered in the northern spotted owl surveys

² RDD at 1.

³ *Id.*

⁴ Wiley Turtle Decision Document (DD) (Aug. 27, 2015); FONSI (Aug. 26, 2015).

⁵ DD at 2; *see also* RDD at 2.

⁶ *Id.*

⁷ Cascadia Wildlands Protest (Sept. 18, 2015); BLM Protest Denial (Dec. 4, 2015).

⁸ BLM Response to Stay Request and Statement of Reasons (Answer) at 3.

⁹ RDD at 2.

¹⁰ 16 U.S.C. §§ 1531-1544 (2012).

¹¹ RDD at 2.

¹² *Id.*

¹³ *Id.*

¹⁴ *See* RDD.

did not substantially change the analysis with respect to the northern spotted owls in the Wiley Turtle Timber Sale area.¹⁵ The owls that would be affected had already been analyzed in the original 2014 EA, and the nature and magnitude of the effects on those owls are “essentially similar” to those described in the 2014 EA and the 2016 REA.¹⁶ The Acting Field Manager concluded that “[t]hese owls, analyzed in the original EA, simply moved short distances (less than 0.3 mile) to new alternate nest locations[,] and I find changes to the original Wiley Turtle Timber Sale Decision are not warranted.”¹⁷

For the members of the public who disagreed with the RDD, BLM explained the protest procedures. Specifically, BLM explained that any protest would be limited to the new aspects of its decision:

The principle of administrative finality precludes any further protest of the original September 3, 2015 Wiley Turtle Timber Sale Decision and the findings contained therein. Consequently, any further protest is specifically limited to the revised portion of the Revised Wiley Turtle Timber Sale Decision pertaining to northern spotted owls^[18]

Appellants’ Protest and Appeal

On May 2, 2016, Appellants submitted a protest of the RDD.¹⁹ In their protest, Appellants argued, among other things, that BLM’s RDD will negatively impact owl habitat, BLM should have considered more alternatives in the REA, the cumulative impact analysis in the REA is incomplete, BLM’s analysis of the carbon impact from the sale is insufficient, thinning in mature stands is inappropriate, and BLM should have completed an environmental impact statement (EIS).²⁰

On June 2, 2016, BLM denied Appellants’ protest. In the protest decision, BLM first explained that it was applying the doctrine of administrative finality to limit the protest to the portions of the RDD that pertained to the updated locations of the northern spotted owl sites.²¹ Accordingly, BLM determined that only two of Appellants’ arguments in their protest were appropriate for further consideration:

¹⁵ RDD at 2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 18.

¹⁹ *See generally* Cascadia Protest (Protest) (May 2, 2016).

²⁰ *Id.* at 2-11.

²¹ Protest Decision at 1.

(1) that the cumulative effects analysis in the REA is incomplete and (2) that an EIS is needed.²² After considering these issues, BLM concluded that Appellants' protest did not identify any legal error in the RDD or provide other information or reasons to change its decision.²³

Appellants timely appealed the protest decision to the Board, filing a combined Notice of Appeal, Statement of Reasons (SOR), and Request for Stay that, in large part, repeats their protest verbatim. BLM filed a response to the stay request and SOR. In its filing, BLM argued that the doctrine of administrative finality limits the appeal to the only two issues that concern the new locations for the two northern spotted owl sites.²⁴ BLM also argued that, because Appellants' appeal merely restates its protest, they have failed to affirmatively demonstrate error in BLM's protest decision, and so BLM's protest decision should be affirmed.²⁵

Appellants Have Not Established Error in the Protest Decision

A party challenging a BLM decision to approve an action that was analyzed in an EA and for which BLM issued a FONSI 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.²⁶ If the appealed decision is the denial of a protest, the appellant must establish error in the actual protest decision.²⁷ Mere differences of opinion do not provide a basis for reversal.²⁸

In this appeal, Appellants submitted an SOR that, in large part, repeats its protest verbatim. As noted earlier, BLM deemed several of Appellants' arguments in its protest barred by the doctrine of administrative finality, yet those arguments appear again in this appeal with no acknowledgment of or argument against BLM's application of the doctrine.²⁹ For the two arguments that BLM considered in detail

²² *Id* at 2.

²³ *Id.*

²⁴ Answer at 5-6.

²⁵ *Id.* at 14-15.

²⁶ *In re North Trail Timber Sale*, 169 IBLA 258, 261 (2006); *see also Bark (In re Rusty Saw Timber Sale)*, 167 IBLA 48, 76 (2005); *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004).

²⁷ *In re North Trail Timber Sale*, 169 IBLA at 262; *Bark (In re Rusty Saw Timber Sale)*, 167 IBLA at 76-77.

²⁸ *In re North Trail Timber Sale*, 169 IBLA at 261.

²⁹ *See, e.g., SOR* at 8-14, 15-22.

in its protest decision, Appellants mention BLM's response in the protest decision but otherwise add nothing that changes the substance of their objections. For example, in the section of the SOR addressing cumulative effects, Appellants added the following to the same language that appeared in their protest:

The protest response is incorrect in stating that “both parties had all the current information necessary to make an informed decision.” The protest response does not address this failure to disclose the status of the species, nor the mischaracterization of the EA itself. Rather the response merely takes the EA analysis at face value, repeating the BLM's incomplete assessment.^[30]

While this language acknowledges BLM's denial of the protest, it amounts only to disagreement with BLM's denial, adds nothing to the substance of Appellants' arguments, and does not provide evidence of error in BLM's protest response.

Similarly, in the section of the SOR arguing that BLM should have prepared an EIS, Appellants reprised the argument in its protest on the same topic, adding a few sentences referencing the protest response but again adding no substance. For example, the argument in the SOR concludes with this new sentence: “The protest response mischaracterizes our concerns raised herein, and in our protest, as mere preference for a different outcome—however, our concerns highlight the inadequacy of the EA analysis and a consistent failure to fully consider the effects of this sale.”³¹ Although Appellants mention the protest decision and attempt to construct their arguments as responses to it, they ultimately fail to show error in BLM's protest decision.

In reviewing BLM decisions denying protests of timber sales, the Board has summarily affirmed a denial when the appellant's SOR merely repeats the matters raised in the protest to the sale and fails to address the decision issued in response to the protest.³² The Board has also summarily dismissed appeals under the same circumstances, essentially finding that an appellant's failure to submit an SOR raising anything different from its protest is tantamount to not filing an SOR at all.³³ In this

³⁰ *Id.* at 14-15.

³¹ *Id.* at 25.

³² See *Klamath-Siskiyou Wildlands Center*, 187 IBLA 287, 288-89 (2016); *In re Mill Creek Salvage Timber Sale*, 121 IBLA 360, 362 (1991).

³³ See *In re North Trail Timber Sale*, 169 IBLA at 262-63; see also *Burton A. & Mary H. McGregor*, 119 IBLA 95, 97-98 (1991) (citing 43 C.F.R. 4.402(a) (an appeal will be subject to summary dismissal if a statement of reasons is not filed)).

case, where “BLM has provided a comprehensive decision fully addressing each of the allegations contained in the protest” and Appellants have not “attempted to show any error in the decision,” we find it appropriate to summarily affirm BLM’s decision.³⁴

The ultimate burden of proof is on Appellants to establish error in the protest decision.³⁵ An appellant cannot satisfy the requirement to affirmatively demonstrate error in the decision on appeal when it merely reiterates the arguments considered by the decisionmaker below as if there were no decision addressing those arguments.³⁶ “[W]hen appellants have filed a protest based on alleged NEPA violations, but BLM thoroughly discussed and answered the protest, and the appeal to the Board does not analyze how BLM erred in its response to the protest, the Board will summarily affirm the decision being appealed.”³⁷

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,³⁸ the Board affirms BLM’s decision and denies Appellants’ petition for stay as moot.

_____/s/
Silvia M. Riechel
Administrative Judge

I concur:

_____/s/
James F. Roberts
Deputy Chief Administrative Judge

³⁴ *In re Mill Creek Salvage Timber Sale*, 121 IBLA at 362.

³⁵ *In re North Trail Timber Sale*, 169 IBLA at 261-262.

³⁶ *See Klamath-Siskiyou Wildlands Center*, 187 IBLA at 288; *In re Mill Creek Salvage Timber Sale*, 121 IBLA at 362.

³⁷ *Klamath-Siskiyou Wildlands Center*, 187 IBLA at 288-89.

³⁸ 43 C.F.R. § 4.1.