

Appeal from decision of the Medford District Office, Bureau of Land Management, dismissing protest as to the Coyote Creek Timber Sale (Track No. 79-38).

Affirmed.

1. National Environmental Policy Act of 1969: Generally -- Timber Sales and Disposals

BLM is obligated in preparing Environmental Analysis Records (EAR's) preliminary to a determination as to whether a full environmental impact statement for a proposed Federal action will be prepared pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1976), to develop a reviewable record reflecting a consideration of all relevant factors. In the case of a proposed Federal timber sale the purely speculative threat of erosion or threat to the watershed caused by the absence of forest regeneration or a proposed trails system where the sale area is deemed to be of negligible recreational value are properly considered in a decision denying a protest of the sale.

2. Federal Land Policy and Management Act of 1976: Generally -- Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Timber Sales and Disposals

A proposed Federal timber sale does not violate the principle of multiple use embodied in the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976), where it involves Oregon and California revested land committed by the Act of August 28, 1937, 43 U.S.C. § 1181a (1976), to dominant use management for commercial forestry.

APPEARANCES: Elaine Mikels, pro se; Donald P. Lawton, Esq., Office of the Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Elaine Mikels, Paula Miller, and others have appealed from a decision of the Medford District Office, Bureau of Land Management (BLM), dated March 12, 1979, dismissing their protest as to the Coyote Creek Timber Sale (Tract No. 79-38) and announcing the intention to award the sale contract to the high bidder pending resolution of any appeal from the decision. The sale involves Oregon and California (O & C) revested land situated in secs. 21-23, 26-28, T. 33 S., R. 5 W., Willamette meridian, Josephine County, Oregon.

In their statement of reasons for appeal, appellants contend that: (1) the Environmental Analysis Record (EAR) prepared in conjunction with the timber sale did not comply with provisions in BLM Manual section 1791 ^{1/} regarding the preparation of such records; (2) the Medford District Timber Sale Plan for fiscal year 1979 and incorporating the Coyote Creek tract was not developed over the 3-year period "legally required" by the settlement in NRDC v. Kleppe, Civil No. 75-1861 (D.D.C. 1976); and (3) the timber sale "violates the principle of multiple use, sacrificing watershed protection and recreation potential in favor of short-run timber production." In particular, appellants are concerned with the problems associated with water run-off, namely erosion of the land and lack of water in surrounding streams, caused by the absence of forest regeneration, as demonstrated in previously cut areas. They also are concerned that logging will threaten the proposed Wolf Creek Trails System designed to connect the Coastal and Pacific Crest Trail Systems and serve as the basis for an "alternative economic model for the area, based primarily on recreation rather than a sole dependence on logging."

In its decision BLM dealt with most of appellants' concerns:

As has been noted in the Environmental Assessment Report (EAR) for the sale, the area has already been intensively managed for timber production and is serviced by a complete net of logging roads. This prior development for timber management purposes is so well advanced that almost all of the sale involved the relogging of lands which have been previously subject to partial cutting. In addition, no new road construction will be necessary to complete harvesting under the sale.

^{1/} Appellants also make reference to Instruction Memorandum No. 72-135 in regard to the preparation of EAR's. This memorandum was superseded by BLM Manual section 1791 on June 17, 1974, prior to initiation of appellants' protest.

In an area such as that described above, any trail largely would be on cut-over land and would be interdicted at many points by the existing road net. For these reasons the potential for a significant recreation trail development does not appear to exist.

The proposed sale has been carefully studied by the specialists of BLM to insure that its design will not unreasonably impact the environment.

As noted in the EAR and the sales Prospectus, a number of mitigating measures have been taken to protect the environment. These include stream clearing, erosion controls, cultural resource protection, and restrictions on logging. Following the completion of any logging it is the Bureau's intention to insure regeneration by implementing site improvement and planting where necessary. Until such regeneration has been established, the remaining mature timber on the partial cut areas will not be harvested.

[1] The BLM EAR serves as the record of environmental analysis precedent to the threshold determination as to whether a full environmental impact statement (EIS) should be prepared for proposed Federal actions pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1976). Southern California Motorcycle Club, Inc., 42 IBLA 164, 172 (1979). Guidelines have been adopted for making the appropriate analysis. See BLM Manual section 1791.

We have reviewed the EAR prepared in conjunction with the Coyote Creek timber sale and are unable to see how it deviates to any significant extent from the BLM guidelines. It contains a detailed description of the proposed action and the existing environment and an analysis of environmental impacts along with recommendations for mitigating measures. Included with the EAR is a silvicultural prescription regarding the actual logging methods to be employed and plans for reforestation.

The EAR makes no mention of appellants' concern that the proposed effort at reforestation may fail and contribute to erosion and watershed problems. Appellants offered as the basis for their concern the experience of previously cut areas, adjacent to units 10 and 13 of the sale area. BLM disputes appellants' evidence, claiming that these areas have achieved adequate regeneration.

In view of appellants' meager evidence we are constrained to hold that no serious threat of erosion or serious threat to the watershed caused by the absence of forest regeneration has been presented. Cf. Headwaters, 33 IBLA 91 (1977) (no evidence logging will violate principle of sustained yield by encouraging infiltration of brush fields).

As regards the proposed trails system there is no discussion about this in the EAR. There is mention only that the area has "recreational value in the form of hunting and perhaps sightseeing," but the area is "primarily used for timber production." (EAR, p. 8.) This is supported by the affidavit of Ronald W. Rothschadl, the Medford District Outdoor Recreation Planner, dated August 16, 1979, in which he observes:

1. The lands in and around the Coyote Creek drainage were inventoried by me for recreation resource values during the Medford District's management framework plan development in 1976-77.
2. This land is so extensively occupied by areas of past timber harvest and by timber land roads that its potential for providing a backcountry recreation experience is largely negated.
3. Specifically, no potential has been found in the area for trail development which would attract or support a significant level of use.

BLM is obligated in preparing EAR's to develop a reviewable record reflecting consideration of "all relevant factors." Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir. 1972), cert. denied, 409 U.S. 990 (1972). BLM did not breach this obligation by not discussing a speculative threat of erosion or threat to the watershed caused by the absence of forest regeneration or a proposed trails system for an area considered to be of negligible recreational value. Moreover, we would note that the EAR is not the sole basis upon which BLM may act. In the decision of March 12, 1979, the Acting District Manager discussed both the proposed trails system and regeneration program. This discussion is as much a part of the administrative record as the EAR itself. In California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977), we adverted to the importance of the distinction between an "appeal" and a "protest." Therein we stated:

As we understand the intermeshings of the various regulations, the purpose of the requirement that an individual be a "party to a case" before a notice of appeal to this Board will lie is not to limit the rights of those who disagree with Bureau actions, but to afford a framework by which decision making at the Departmental and State Office level may be intelligently made.

If an individual has been a "party to a case" and seeks review of the Bureau's actions, it is presumed that the Bureau had the benefit of that individual's input when the original decision was made; thus the BLM was fully aware of the adverse consequences that might be visited

upon such an individual as a result of its actions. On the other hand, when an individual appears for the first time to object to proposed actions, treatment of this person's objections as an "appeal" effectively forecloses any consideration by the local authorized officer of the merits of the objection, since this Board has consistently held that upon the filing of a notice of appeal the State Office loses all jurisdiction over the matter being appealed. In this latter situation, the Board is, in effect, forced to make an initial decision, even though it is vested with appellate authority.

The above problem is vitiated if the objection of those who have not had prior input into a decision is treated as a protest under 43 CFR 4.450-2. The BLM State Office is provided with the opportunity to examine the merits of the submission and issue a decision thereon. Should the action taken by the State Office on the protest be perceived as adverse to the protestant's interests, he may then appeal that action to the Board under 43 CFR 4.410. See Crooks Creek Commune, 10 IBLA 243 (1973).

30 IBLA at 384-85.

Appellants apparently erroneously assume that the District Manager's decision on their protest is not part of the record before us. Such is not the case. Indeed, it would be difficult to understand the Board's repeated emphasis on the proper treatment of "protests" by BLM offices if the decisions which resulted did not constitute part of the administrative record. Thus, it is clear that BLM did consider the points raised by appellant prior to the denial of their protest.

Appellants have requested that the case be remanded to BLM for the preparation of an "adequate" EAR. In view of what we have said above this request is denied.

Regarding appellants' contention that the Medford District Timber Sale Plan for fiscal year 1979, incorporating the Coyote Creek tract, was not developed over the 3-year period required by the settlement in NRDC v. Kleppe, supra, nothing in the settlement sets out a timetable for the preparation of district timber sale plans. The settlement involves two settlement agreements approved by the district court March 1, 1976, and May 10, 1976. They deal only with the preparation of EIS's for sustained yield units in western Oregon and EAR's for sustained yield units elsewhere.

The document to which appellants refer, a letter from Roman H. Koenings, Assistant Director, Resources, BLM, dated December 29, 1975, well before the settlement in NRDC v. Kleppe, supra, indicates the

existence of a "3-year timber sale plan" but adds: "When the first year of this plan becomes the annual timber sale plan for the current fiscal year, an annual plan for the third year is developed." The letter indicates not a 3-year planning process but rather the preparation of annual plans 3 years in advance.

In any case, nothing in NRDC v. Kleppe, supra, mandates a 3-year preparation period for the Medford District Timber Sale Plan.

[2] Regarding appellants' contention that the timber sale "violates the principle of multiple use, sacrificing watershed protection and recreational potential in favor of short-run timber production," reference must be made to the appropriate statutory material. The concept of multiple use is embodied in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1976). The applicable provision, section 302(a), provides that: "The Secretary shall manage the public lands under principles of multiple use and sustained yield * * * except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." (Emphasis added.) 43 U.S.C. § 1732(a) (1976). The subject area is O & C land and as such it is governed by the provisions of the Act of August 28, 1937 (O & C Act), 43 U.S.C. § 1181a (1976). Section 1 of the O & C Act, 43 U.S.C. § 1181a (1976), provides that O & C lands

shall be managed * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities [sic] * * *.

The O & C Act has been construed as "mandat[ing] dominant use management of the O & C lands for commercial forestry" such that "[a]ny use conflicting with the dominant use is not allowed." Memorandum from Acting Deputy Solicitor, U.S. Department of the Interior to Director, Bureau of Land Management, June 1, 1977. See, e.g., Applicability of Mining Lands to Revested Oregon and California and Reconveyed Coos Bay Grant Lands, Assistant Secretary's Opinion, 57 I.D. 365 (1941). While the Associate Solicitor, Energy and Resources, has subsequently noted that the term "permanent forest production" should have been used in place of "commercial forestry" this fact did not change any of the conclusions of that opinion. See Memorandum of August 27, 1979, from Associate Solicitor, Energy and Resources, to Director, Bureau of Land Management. Permanent forest production as such is a "specific use" falling within the exception to the principle of multiple use as set out in FLPMA, supra. This is not

to say, as evidenced by the very wording of the O & C Act, that consideration will not be given in appropriate cases to protection of watersheds or development of the recreational potential of a timber area.

Finally, appellants have requested oral argument before the Board so that they may present additional evidence as to the "inadvisability" of the timber sale. This request is denied because the case involves questions of law which have been well briefed by the parties and no useful purpose would be served. Estate of Charles D. Ashley, 37 IBLA 367 (1978).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

