

JULIE ADAMS ET AL.

IBLA 79-487

Decided February 4, 1980

Appeal from a notice issued by the Eugene District Office, Bureau of Land Management, offering the Windy Peak Timber Sale, Tract No. E-79-17, for bidding.

Protest denied, appeal dismissed.

1. Administrative Procedure: Administrative Review -- Administrative Procedure: Initial Decision -- Appeals -- Contests and Protests: Generally -- Rules of Practice: Protests

The right of appeal is limited to a party to a case adversely affected by a decision of the Bureau of Land Management, and an appeal from a timber sale notice will be for treatment as a protest. However, under the circumstances presented here, where the Bureau of Land Management has reviewed the protestant's reasons and, in effect, has made its decision communicating it to the protestant and this Board, no purpose would be served by remanding the case and the Board will consider the matter on its merits.

2. Environmental Policy Act -- Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

Where an administrative decision is made that a proposed action is not a major Federal action which will significantly affect the quality of the human environment, so that no environmental impact

statement need be filed, that decision will be affirmed on review if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of his study of such record.

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

Under section 701(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), wilderness review under section 603 of FLPMA is applicable to Oregon and California railroad (O & C) lands only to the extent that it is consistent with the Act of Aug. 28, 1937. The Act requires O & C lands to be managed for permanent forest production. No wilderness review is required where the O & C lands are being managed for commercial timber production.

APPEARANCES: Julie Adams for the Windy Peak Committee; Donald P. Lawton, Esq., Assistant Regional Solicitor, Portland, Oregon, for the Bureau of Land Management; Martin L. Deuere, Executive Assistant, Northwest Timber Association, Eugene, Oregon.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Julie Adams, on behalf of the Windy Peak Committee, has appealed from a notice issued by the Eugene District Office, Bureau of Land Management (BLM), on May 30, 1979, offering the Windy Peak Timber Sale (Tract No. E-79-17) for bidding June 28, 1979. The notice of appeal was filed June 26, 1979. The sale took place June 28, 1979; however the contract has not been awarded to the highest bidder, Rosboro Lumber Company, pending resolution of this appeal. The subject land is Oregon and California (O & C) revested land in Secs. 22 and 27, T. 16 S., R. 8 W., Willamette meridian, Lane County, Oregon.

[1] Appellant styled her objections to the sale as an appeal; however, the right of appeal is limited to a party to a case adversely affected by a decision of BLM. 43 CFR 4.410. This requirement is based on the assumption that BLM has had the benefit of the appellant's submissions prior to the original decision. Otherwise, the

Board is in the position of making the initial decision. See California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977).

Departmental regulations contemplate that the initial decision will be made by BLM. In the present case there was not a formal initial consideration by BLM of appellant's objections to the timber sale. BLM should have treated the "notice of appeal" as a protest pursuant to 43 CFR 4.450-2 and ruled on the points raised. Elaine Mikels, 41 IBLA 305 (1979); Duncan Miller, 39 IBLA 312 (1979); California Association of Four Wheel Drive Clubs, supra. An appeal would then lie from any adverse BLM decision.

Generally, in this situation, the Board would remand the case to BLM for an initial decision. However, counsel for BLM points out:

[B]ids have been received on the proposed sale, the appellants have set forth the basis for their appeal in a Statement of Reasons and the BLM District Manager has advised us that he has considered the objections raised by the appellants in their Statement of Reasons and is prepared to award the contract to the high bidder Roseboro Lumber Company. Since all of the issues and parties are joined and nothing would be gained by a dismissal other than the further possible delay of any award of this contract, it is urged that the Board proceed with its consideration of the merits of the case and issue its decision as soon as possible. It is felt that (within the specific context of this case) this procedure affords an appropriate framework by which the decision making of the Eugene District may be intelligently completed. See California Association of Four Wheel Drive Clubs, 30 IBLA 383.

BLM's positions on appellant's objections are discussed, infra. The regulation governing protests to BLM, 43 CFR 4.450-2, provides in part: "[S]uch action thereon will be taken as deemed to be appropriate in the circumstances." BLM has now taken the action it deems to be appropriate in the circumstances by communicating to this Board and appellant its ruling on her protest. In effect, BLM has now denied appellant's protest, which action is, in effect, a decision. To remand the case for a further decision by BLM would be an unreasonable administrative exercise in futility. This is not mandated here. We have BLM's determination on appellant's protest and its specific views on the matters raised therein. The Elaine Mikels case and other cases are simply not applicable here. Despite the implication in the dissent, those cases are distinguishable from this case. Service of BLM's comments was made on appellant. She has not responded; therefore, there is no reason to engage in a meaningless administrative

exercise when she has not availed herself of this opportunity to object to BLM's reasons for denying her protest.

In her statement of reasons for appeal, appellant contends that an Environmental Impact Statement (EIS), must be prepared pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1976), prior to the timber sale. Furthermore, appellant argues, BLM must undertake a wilderness review pursuant to section 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976), in order to determine the subject land's suitability for preservation as wilderness. Finally, appellant argues, BLM must give due consideration to the provisions of the Act of August 28, 1937, 43 U.S.C. § 1181(a) (1976), which require, among other matters, that O & C revested lands be managed so as to protect watersheds, regulate stream flow, and provide recreational facilities.

BLM, in response, contends that the area lacks any outstanding wilderness characteristics, that studies by BLM scientists indicate the land can be easily regenerated, and in any event, that the wilderness review provisions of section 603 of FLPMA, 43 U.S.C. § 1782, are not applicable to O & C lands. BLM states the sale will have so little impact on the area that an EIS is not required.

The North West Timber Association, an Oregon non-profit trade association, on behalf of itself, Rosboro Lumber Company, and Bohemia, Inc., requested permission to intervene in these proceedings on the basis that they have timber interests in the affected area which they wish to protect. Because of our disposition of this case, it is unnecessary for these parties' interest to be specifically represented, and the request is denied for this reason. 1/

Appellant's grounds for protesting the sale rest on section 603 of FLPMA and section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1976), under which she asserts the land should be reviewed for wilderness potential, and an environmental impact statement should be prepared. Section 603 of FLPMA requires the Secretary of the Interior to review roadless areas of 5,000 or more acres with wilderness potential and make recommendations as to their suitability for preservation as wilderness. During the review period the lands are to be managed in a manner which will not impair the wilderness values of the lands. NEPA mandates the preparation of an EIS for major Federal actions significantly affecting the quality of the human environment.

1/ This action is also taken in the interest of expediting this case. Generally we would find the declared purchaser to be a proper intervenor party in such a case, and the Timber Association would be allowed to participate as an amicus curiae.

The lands involved are included in the Programatic Environmental Analysis Record for Timber Management in Western Oregon (PEAR), prepared by BLM. On May 17, 1978, and August 18, 1978, BLM prepared supplemental environmental analysis reports (SEARs), specifically analyzing the environmental impacts of the subject timber sale. After extensive review by BLM personnel (including an Environmental Coordinator, Soils Specialist, Fisheries Biologist, Wildlife Specialist, Archaeologist, Landscape Architect, Noti Area Manager, Noti Silviculturist, and Forest Management Specialist) it was adjudged that "the adverse impacts have been mitigated to the point that the net residual impacts are not significant and public interest is such that the preparation of an environmental impact statement is not recommended." 2/

[2] When BLM determines that an EIS need not be filed, that decision will be affirmed on review if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient EAR compiled in accordance with established procedures, and is the reasonable result of his study of such record. Citizens Committee to Save Our Public Lands, 29 IBLA 48 (1977), aff'd, C.C.T.S.O.P.L. v. Andrus, Civ. No. C-77-633 SC (D. N.D. May 20, 1977) and cases cited therein.

The timber sale contract which Rosboro will be required to sign contains many special stipulations designed to minimize and prevent adverse environmental impact to the area. Appellant has offered no evidence to substantiate her claim that adverse impacts will flow from this sale. From our review of the contract and the SEARs we conclude that the sale will not significantly affect the quality of the human environment, and therefore no EIS is required. See Headwaters, 33 IBLA 91 (1977).

[3] Section 701(b) of FLPMA provides:

Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the [Act] of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181(a)-1181(j)), * * * insofar as [it] relate[s] to management of timber resources and disposition of revenues from lands and resources, the latter [Act] shall prevail.

The Act of August 28, 1937, relates to the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands. Section 1181(a) provides that these lands under the jurisdiction of the Department of the Interior which are classified as timberlands 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

2/ BLM has issued a Final Environmental Impact Statement on Timber Management for Federal lands.

yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow," and providing recreational opportunities. Since the enactment of FLPMA it has been the consistent position of this Department that the wilderness review provisions do not apply to the O & C lands that are managed for permanent forest production. Elaine Mikels, 44 IBLA 51 (1979), discusses several Solicitor's Opinions on this point. In Solicitor's Opinion, M-36910 (February 13, 1979), it is emphasized that section 603 of FLPMA does not apply to those areas of the O & C lands which are being managed for commercial timber production, but does apply to those areas which are not being managed for that purpose. This interpretation is set forth also in the "Interim Management Policy and Guidelines for Lands Under Wilderness Review" of the Bureau of Land Management published at 44 FR 72013 (Dec. 12, 1979). Appendix E of that statement indicates that wilderness review does not apply to the O & C lands that "are managed for commercial timber production." To the same effect, is the definition of "public lands" in Appendix F which excepts the O & C lands managed for commercial timber production. The lands here contain merchantable timber and are being managed for commercial timber production and, therefore, are not subject to the mandatory wilderness review process of FLPMA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the protest has been denied and the appeal is dismissed.

Joan B. Thompson
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

Appellant's protest (captioned "appeal") was filed on June 27, 1979; and her statement of reasons on July 31. There has been no Bureau of Land Management decision thereon, other than an answer filed by counsel for BLM on September 10. If the latter were to be considered as the decision, there has been no appeal whatsoever.

In Elaine Mikels, 41 IBLA 305 (1979), the Board ruled that it had no jurisdiction until after decision by BLM and subsequent appeal therefrom. The Board stated at 307:

[A]ppellants were not parties to the timber sale decision until the time they filed their protest stating their objections to the sale and BLM ruled on the protests. Thus, the case was not ripe for appeal until BLM dismissed the protest by letter decision of March 12, 1979. See California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1979). * * * BLM properly treated the submission of February 20, 1979, which purported to be a "notice of appeal," as another protest. See Duncan Miller (On Reconsideration), 39 IBLA 312 (1979). [Emphasis added.]

The decision herein seems intended to overrule this portion of Mikels. I submit that the Board should make clear to the Bureau and to interested parties whether Mikels is overruled.

The approach followed in Mikels was correct. Section 4.450-2 was not intended to confer jurisdiction upon the Board until after there is a decision on the protest by BLM; otherwise there would be authority to interfere in the conduct of BLM business. The Board has been delegated but limited jurisdiction. Under 43 CFR 4.1, 4.410, and 4.411, it is contemplated that the Board act in Bureau of Land Management matters only upon appeal by a party adversely affected by a decision. The applicable Department regulations provide:

§ 4.1 Scope of Authority; applicable regulations.

* * * * *

(3) Board of Land Appeals. The Board decides finally for the Department appeals to the head of the Department from decisions rendered by Departmental officials relating to the use and disposition of public lands and their resources and the use and disposition of mineral resources in certain acquired lands of the United States and in the submerged lands of the Outer Continental Shelf. * * *

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§ 4.410 Who may appeal.

Except as otherwise provided in Group 2400 of Chapter II of this title, except to the extent that decisions of Bureau of Land Management officers must first be appealed to an administrative law judge under § 4.470 and Part 4110 of this title, and except where a decision has been approved by the Secretary, any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or of an administr[a]tive law judge, shall have a right to appeal to the Board.

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§ 4.411 Appeal; how taken, mandatory time limit.

(a) A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. [Emphasis added.]

Bureau of Land Management decisions are most helpful, and during the appellate process the parties and Board should have the benefit of the BLM reasoning.

Herein, the parties have attempted to confer jurisdiction upon the Board, but obviously only the Secretary may delegate such authority. The case should be remanded for initial BLM decision.

