

IN RE CHAPMAN-KEELER TIMBER SALE

IBLA 82-1353

Decided April 30, 1984

Appeal from decision of District Manager, Medford District, Oregon, Bureau of Land Management, denying protest to proposed timber sale. OR 110-TS2-108.

Affirmed.

1. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals

A decision by BLM denying a protest to a proposed timber sale will be affirmed where the appellant does not present sufficient evidence that the sale area was misclassified as high intensity land.

2. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals

Where BLM removes concentrated unplantable zones from the area of a proposed timber sale, that area is not misclassified as high intensity land even though small unplantable zones are interspersed throughout it.

APPEARANCES: Genevieve Windsor, vice president, Threatened and Endangered: Little Applegate Valley, for appellant; District Manager, Medford District, Oregon, Bureau of Land Management, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Threatened and Endangered: Little Applegate Valley (TELAV) has appealed from a decision of the District Manager, Medford District, Oregon, Bureau of Land Management (BLM), dated July 13, 1982, denying its protest of the proposed Chapman-Keeler timber sale, OR 110-TS2-108.

The proposed Chapman-Keeler timber sale involves 21 units, totaling 478 acres, which are to be partially cut, and a right-of-way, totaling 13 acres, which is to be clear-cut, situated in Jackson County, Oregon. ^{1/}

^{1/} The sale area, constituting tract 81-4, is described in the prospectus as follows:

"Lot 4 SE 1/4 SW 1/4 of Section 31; S 1/2 SW 1/4 of Section 32, T. 38 S., R. 3 W.; Lots 1 and 4, NE 1/4, NE 1/4 NW 1/4, S 1/2 NW 1/4, N 1/2

The sale area is within Oregon and California railroad revested grant lands, known as O & C lands, and, therefore, subject to forest management under the Act of August 28, 1937 (O & C Act), 43 U.S.C. §§ 1181a-1181f (1976). The projected volume of timber to be derived from the sale area is estimated to be 5,279 Mbf (thousand board feet).

Notice of the proposed timber sale was given on May 26, 1982. On June 23, 1982, appellant filed a protest to the sale, contending that the land, based on the success of regeneration in the "surrounding" area, was not properly classified as "high intensity" commercial forest land because it could not become "[s]tocked and [e]stablished" within 5 years, and, therefore, should not be offered for sale. The term "high intensity" had been defined in the November 1979 Jackson-Klamath Final Timber Management Environmental Statement (EIS). Appellant argued that to log the land was a "violation of the sustained yield requirement of the O & C Act."

The timber sale took place on June 24, 1982, with Medco Timber Company of Medford, Oregon, declared the high bidder with a bid of \$144,395.65. Prior to the sale, prospective bidders had been notified of and acknowledged appellant's protest and that no contract could be awarded until the protest had been adjudicated. See 43 CFR 4.21(a).

In his July 1982 decision, the District Manager, BLM, denied appellant's protest, concluding that the sale area was properly classified as high intensity commercial forest land, using certain TPCC (Timber Production Capability classification) criteria, because it was "capable of adequate reforestation within five years."

Because the sale area is within O & C lands, it is subject to section 1 of the O & C Act, 43 U.S.C. § 1181a (1976), which provides in relevant part that such land "shall be managed * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the [principle] of sustained yield." As defined by the Board, "sustained yield" means that "the level of harvesting established should be such that, considering present levels of silviculture techniques, a constant amount of timber will be annually available on an indefinite basis." In re Lick Gulch Timber Sale, 72 IBLA 261, 267, 90 I.D. 189, 193 (1983).

In conformance with the mandate of the O & C Act of "sustained yield," BLM partitioned all public land in western Oregon into various categories, using the TPCC system, "based upon the land's physical and biological capacity to produce timber" (EIS at 1-5; 1-8). Accordingly, BLM divided the land into forest and nonforest land, and further subdivided forest land into commercial and noncommercial forest land. Commercial forest land is that forest

fn. 1 (continued)

SW 1/4, NW 1/4 SE 1/4 of Section 35, T. 38 S., R. 4 W.; NW 1/4 of Section 5; Lots 3, 4, and 7, SE 1/4 SW 1/4 of Section 6, T. 39 S., R. 3 W.; Lots 1 and 2, W 1/2 NE 1/4, NW 1/4, N 1/2 SW 1/4 of Section 1; E 1/2 NE 1/4, SW 1/4 NE 1/4, SW 1/4 SW 1/4, NE 1/4 SE 1/4 of Section 2; E 1/2 SE 1/4 of Section 3; N 1/2 NE 1/4 of Section 11, T. 39 S., R. 4 W., Willamette Meridian." The sale area includes sustained yield units 1 through 21.

land "capable of yielding at least 20 cubic feet of wood per acre per year of commercial coniferous tree species" (BLM Manual 5250.05C2). Because of wide variations in the productive capacity of commercial forest land, such land was further subdivided into high intensity, low intensity, and limited forest management lands. Only high intensity lands are included in the permanent forest base for purposes of determining the allowable cut for maintenance of sustained yield. Such lands were described in the EIS at page 1-8 as follows:

These commercial forest lands are suitable for continuous timber production with reasonable assurance of successful results from the application of intensive timber management practices. Approximately 16 percent of the high intensity lands possess soil, topographic and climatic conditions suitable for clearcut harvest techniques. Regeneration can be accomplished within 5 years of harvest with standard artificial reforestation methods.

The remaining high intensity lands exhibit characteristics which would make regeneration within 5 years unlikely if they were clearcut. Two-stage shelterwood harvest technique is proposed for the majority of these areas. Establishment of a new stand could be accomplished within 5 years of the regeneration cut under this prescription, using artificial reforestation methods.

In its statement of reasons for appeal, appellant contends that the proposed timber sale violates the sustained yield principle of section 1 of the O & C Act, supra, because timber harvesting would be done on land not properly classified as "high intensity" land. Appellant argues that BLM's "reforestation records" for the "southern portion of the Jacksonville Resource Area," of which the sale area is "representative," 2/ indicate that only 1.4 percent of BLM's reforestation efforts met BLM's "'high intensity' standards." Appellant sets forth these results as follows:

Of the 4,606 acres, 919 acres do not have a five-year history. The reforestation results on the remaining 3,687 acres are as follows:

stocked/established in 5 years:	53 acres	(1.4%)
stocked/unestablished in 5 years:	2,349 "	(63.7%)
under/stocked in 5 years:	1,285 "	(34.9%) [<u>3/</u>]

Appellant also argues that BLM's intention to harvest timber on areas which are considered "unplantable" violates the principle of sustained yield management. Appellant refers to page 9 of the Environmental Assessment Record (EAR)

2/ Appellant states that the sale area lies within 5 miles of 34 percent of the comparable acreage and within 10 miles of 79 percent of that acreage (Statement of Reasons at 3).

3/ The standard by which appellant judges BLM's reforestation efforts is stocked and established. Appellant states that: "Stocking can be achieved as fast as seedlings can be planted. Whether those seedlings will survive is the issue here."

for the proposed timber sale 4/ which states that: "Harvesting the timber from the heavy gravel lag areas in units 16 and 23 would make regeneration very difficult as these areas are unplantable." 5/

In a response to appellant's statement of reasons filed November 9, 1982, BLM contends that "high intensity" lands are properly classified by whether, within 5 years, the lands are "stocked" by the minimum number of coniferous trees per acre. BLM states that the reference to the standard of "[e]stablishment" of a new stand of trees for high intensity lands set forth in the EIS at page 1-8, is to the "act of bringing into existence." 6/ Using this standard, BLM states that appellant's own figures indicate that 61.5 percent of the comparable acreage was established within 5 years, and that, after correcting for the errors in appellant's figures, the percentage was 91 percent. BLM supplies copies of its reforestation records. BLM also states that its TPCC classifications for the Medford District are being reexamined as a matter of course, with completion of the reexamination set for 1985.

With respect to unplantable areas, BLM states that it had identified "gravel troughs" within unit 16, containing 11 acres, and unit 23a and b, containing 65 acres, which partially support trees. BLM noted that two transects of these units revealed that 60 percent and 64 percent of the holes dug were "plantable." BLM concluded that: "Based on this data and the reasoning that numerous interspersed gravel troughs within the unit could not be reasonably mapped and tagged out of the proposed harvest units; therefore, they were included."

In a rebuttal to BLM's response filed January 17, 1983, appellant disputes BLM's interpretation of the meaning of the term "established," contending that it is not equivalent to the term "stocked," especially where there is an expected 80 percent seedling mortality rate. In effect, appellant

4/ The EAR is dated Sept. 22, 1980, and was apparently prepared for the Chapman-Keeler timber sale, OR 110-TS1-178, involving tract 81-14, which took place on Sept. 24, 1981. The conclusions of the EAR, however, were apparently carried over when tract 81-14 was again offered for sale.

5/ Appellant also argues that BLM proposed to engage in two improper practices, namely, overstory removal in areas where there was no history of reforestation and regeneration cutting which would effectively constitute clearcutting. However, in its rebuttal filed Jan. 17, 1983, appellant concedes these points, based on information supplied by BLM in its Nov. 9, 1982, response to appellant's statement of reasons. Therefore, we will not consider these matters in connection with the present appeal.

6/ BLM made reference to a letter to appellant, dated July 2, 1982, in which it distinguished between the way the word "established" is used in the BLM Reforestation Manual 5705 and the way it is used in the EIS. In the manual, the term "established" is used in the technical sense to describe "whether or not a tree or stand is past the time when considerable juvenile mortality occurs and the tree or stand is no longer in need of measures to insure survival." In the EIS, the term "established," however, is used "in the generic sense to describe the act of bringing something into existence." Thus, new trees which have been "planted and are, in fact, living and growing" would be considered "established." See Attachment 1 to the Nov. 9, 1982, response.

contends that the sale area cannot be considered high intensity land where BLM records merely indicate that comparable acreage has been stocked within 5 years of timber harvesting. Appellant states that stocking is "only the first step toward successful reforestation of a unit." Appellant argues that the term "established" ordinarily connotes a certain degree of permanence. Appellant also states that:

BLM claims 91% success in stocking. They neglect to mention how soon after planting or how long after logging this was achieved. Two thirds of all the reforestation units in the South Jacksonville Resource Area have experienced this kind of "success" more than once. Specifically, 65% of the reforestation units required more than one planting, and of these, 42% required three or more plantings.

Appellant provides corrected copies of BLM's reforestation records.

With respect to unplantable areas, appellant contends that either the EAR was incomplete in not disclosing that the gravel troughs were partially plantable or that BLM intends to violate the principle of sustained yield management.

In a response to appellant's rebuttal filed March 17, 1983, BLM states that the standard, by which a unit would be considered high intensity land if it could be stocked within 5 years, was taken from the policy guidelines for timber management set forth in the Senate Subcommittee on Public Lands Report of 1972 entitled "Clearcutting on Federal Timberlands," to the effect that: "Clearcutting should not be used where: * * * There is no assurance that the area can be adequately restocked within five years after harvest" (EIS at 1-4 (emphasis added)). BLM also contends that there are certain problems with appellant's use of data with respect to older units, i.e., pre-1970, taken from its reforestation records. First, BLM states that prior to the development of TPCC criteria (1976) and its incorporation in BLM's reforestation records (1981), there was no way to indicate that a unit was "stocked/established," under present criteria. ^{7/} This results in an understatement of acreage which satisfies present criteria. Second, BLM states that there was no procedure to accept less than "target" stocking, as is now done under a "minimum" stocking standard, in cases where lands are intentionally managed at a minimum level "due to management constraints." Third, BLM acknowledges reforestation problems with "many older units":

Our 1960-1970 reforestation techniques often involved poor site preparation or none at all, poor stock, stock from different sites and elevations, no vegetation control and other problems. [^{8/}]

^{7/} BLM states that under present criteria the success of reforestation within a unit is recorded as follows: "Once planted, a unit is recorded as stocked unestablished. Subsequent surveys maintain the stand as stocked or understocked according to target (available for thinning). Establishment is recorded when survival is believed assured." (Emphasis in original.)

^{8/} BLM also notes that past management practice relied on natural regeneration until 2 to 4 years following the timber harvest, whereas current policy is that "site preparation and planting will occur whenever possible within one year of harvest." (Emphasis in original.)

There is no comparison between the results on older units with those of later plantations where we have achieved a high level of stocking success. Current records for the South Jacksonville area (South of Interstate 5) show that of the 540 acres logged and planted since 1970, 96% of the acres meet or exceed the minimum stocking levels, while 84% meet or exceed target levels. Only 4% are understocked.

For the last (1978-82) 5 years (restocking within 5 years after harvest), BLM has logged and planted 369 acres. The acreage meeting or exceeding minimum stocking is 95%, and 88% meeting or exceeding target levels. Only 5% are understocked. [Emphasis in original.]

Finally, BLM contends that TPCC classification relies not only on historical reforestation records in determining the reproductive capacity of land. Other factors considered include site productivity, soil characteristics, precipitation zones, topography, indicator plant species, and reforestation conditions.

With respect to unplantable areas, BLM reiterates its conclusion that the interspersed gravel troughs were "too scattered to affect the total classification of the unit or its overall stocking potential." BLM noted that 21 acres in unit 23, containing a "concentration of unplantable area," were removed from the unit.

In a surrebuttal to BLM's second response filed May 2, 1983, appellant reiterates its contention that the term "stocked" is not the equivalent of the term "established." Appellant also states that it doubts the efficacy of BLM's new silvicultural techniques to achieve sustained yield management within the sale area. Furthermore, appellant states that it made "new calculations" based on BLM's reforestation records, focusing on 29 units, totaling 271 acres, cut between 1970 and 1978 in the south portion of the Jacksonville Resource Area, where there probably was a column for "stocked/established" in the records and the units are old enough to have had a 5-year survey. Appellant states that:

The status of these units, five years after denudation, is as follows:

44 acres	(16.2%)	Understocked
99 "	(36.5%)	Stocked/Unestablished
62 "	(22.9%)	Stocked/Established
66 "	(24.4%)	no 5-year status available

While conceding that the picture is not quite as grim as our previous figures (which included all the reforestation failures prior to 1970) would have indicated, a 77% failure to achieve establishment on "high intensity" land within five years of harvest, using all the most modern management techniques available, demonstrates to us again that this land is misclassified.

[1] As the foregoing recitation of the parties' arguments makes clear, the principal issue in this case is whether planting or stocking after harvest

constitutes "establishing" a new stand of trees within 5 years on certain areas, thus allowing those areas to be classified as high intensity forest lands suitable for continuous timber production. As a general proposition, we have already answered this question in the negative. In In re Lick Gulch Timber Sale, supra, we indicated that an "established" stand meant "suitable growing trees, having survived at least one growing season, * * * 'which are past the time when considerable juvenile mortality occurs.'" Id. at 285, 90 I.D. at 203. The final environmental statement stated at page 1-8 that on high intensity lands "regeneration can be accomplished within 5 years of harvest with standard artificial reforestation methods." Regeneration is defined as renewal of a tree crop. Id. at 269, 90 I.D. at 194. It is thus a matter of when a stand is established in the sense above, not simply planted. Id. at 288, 90 I.D. at 204. Any other definition would, in our view, subvert the sustained yield principle under which these lands are to be managed.

Whether appellant has demonstrated that the particular lands encompassed by the Chapman-Keeler Timber Sale are not properly classified as high intensity lands is another matter, however. In cases such as these, an appellant must show a BLM decision to proceed with a timber sale is not based on a consideration of all relevant factors or not based on the record and is, thus, clearly erroneous, or is contrary to statute or regulation. Robert C. Salisbury, 79 IBLA 370, 373 (1984); In re Otter Slide Timber Sale 75 IBLA 380, 382 (1983); In re Lick Gulch Timber Sale, supra at 273 n.6, 90 I.D. at 196 n.6; ACOTS, 60 IBLA 1, 5 (1981). Unlike In re Lick Gulch Timber Sale, supra, in this case we have too little data with which to measure the extent the proposed timber sale lands and reforestation techniques are comparable to those employed in the past, when BLM's success at regeneration was by its own admission less than "reasonably assured." In that case the record contained considerable information about regeneration rates, as well as other relevant factors such as soils, slopes, temperatures, rainfall, and silvicultural practices. Id. at 270-96, 90 I.D. at 194-209. In this case appellants state merely that the sale area is near an area where both reforestation practices and records differed significantly from current approaches. The records did not, for example, indicate whether an area had been established, as interpreted above, and are therefore of dubious relevance as predictors of the future. Even appellant's May 2, 1983, filing concerning data on 29 units harvested since 1970 does not establish a "77% failure to achieve establishment on 'high intensity' land within five years of harvest, using all the most modern management techniques available," it merely asserts it. The more modest argument that more than half of these units were not established might be adequate if it were demonstrated that the other factors included in the TPCC--site productivity, soil characteristics, precipitation zones, topography, indicator plant species--as well as the reforestation practices employed were comparable. In re Lick Gulch Timber Sale, supra at 282-83, 90 I.D. at 201. Without such a demonstration, appellant's arguments only raise doubts about the classification, they do not establish that it was erroneous.

[2] It is clear that some unplatable gravel zones were included within the proposed timber sale area. BLM acknowledged this and removed one such zone of concentrated acreage from the proposed sale. Where such action is taken, the validity of the high intensity classification of the remaining area cannot be overcome by the fact that small unplatable zones are interspersed throughout it.

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.

Will A. Irwin
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge

