

STATE OF WYOMING
GAME AND FISH COMMISSION

IBLA 86-132

Decided April 24, 1986

Appeal from a decision of the Pinedale Resource Area Manager, Bureau of Land Management, to proceed with a proposed timber sale. WY-041-TS85-04.

Set aside and remanded.

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

Where an environmental assessment fails to consider a clearly relevant alternative to a proposal to clearcut timber, a decision rejecting a protest of the proposed sale must be set aside and the case files remanded for supplementation of the EA to consider the alternative which it failed to study.

APPEARANCES: Marion Yoder, Esq., Assistant Attorney General, State of Wyoming, and Phil Tabor, Esq., Assistant Attorney General, State of Wyoming, Cheyenne, Wyoming, for appellant; Marla E. Mansfield, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; William R. Peck, Forester, Afton, Wyoming, for Long Tree Timber.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By notice of appeal, dated November 9, 1985, the State of Wyoming, Game and Fish Commission (Commission), appealed from a decision of the Pinedale, Wyoming, Resource Area Manager, Bureau of Land Management (BLM), to proceed with a sale of timber to Longtree Timber Company (Longtree) on Deadline Ridge, approximately 22 miles southwest of Big Piney, Wyoming. The timber sale contract (WY-041-TS85-04) called for the removal of approximately 1095 MBF of merchantable timber (primarily lodgepole pine) from 80 acres of land spread over six parcels. The contract provided that the timber would be harvested by clearcutting.

On December 10, 1985, appellant filed its statement of reasons in support of its appeal and also requested that the Board stay the decision below since, under 43 CFR 5300.1, the effectiveness of the decision was not automatically suspended. On February 5, 1986, BLM filed its response. In this response, BLM noted that it had voluntarily ceased processing the contract pending notification of the outcome of appellant's request for a stay. In the process of adjudicating the stay request, however, it was determined that a disposition of the merits of the appeal would be more appropriate than an interim decision on the question of granting a stay.

The Commission raises various grounds for objecting to the decision of the Pinedale Resource Area Manager to authorize clearcutting of the parcels in question. These grounds relate primarily to perceived inadequacies in the Environmental Assessment (EA) prepared for the sale relating to wildlife, particularly to problems of decreased thermal and hiding cover for elk. The Commission noted that the sale areas are adjacent to critical elk winter range and serve as a staging area for elk in fall and winter. The effect of the clearcut, the Commission argued, will be to "grossly reduce thermal and hiding cover for elk beyond the present fragile cover:forage ratio" (Statement of Reasons at 4).

The problems associated with the timber sale are exacerbated, according to the State, both by the presence of a total of 321 acres of clearcut timberlands on which timber of sufficient height to provide elk hiding cover has not been reestablished and by the fact Deadline Ridge is in the center of "intense hydrocarbon production activity" associated with the Riley Ridge gas processing plant owned by Exxon. These activities have already resulted in the drilling of two wells in the area and, the State averred, three more are contemplated in the near future. Construction of the well pads and associated roads and pipeline rights-of-way have further diminished available cover, a fact not reflected in the relevant Management Framework Plan adopted in 1973 (Statement of Reasons at 5-7). Moreover, appellant pointed out that three of the clearcut parcels (Nos. 4, 5, and 6) are each in excess of 13 acres, the maximum acreage allowed to be clearcut at any one site under Wyoming BLM's own guidelines. Appellant suggested that, rather than providing adequate protection to the elk, BLM's decisionmaking process was motivated solely by a desire to harvest sufficient amounts of timber to meet prescribed timber sale quotas. Appellant requested the sale of timber be delayed until full wellfield development was completed and existing clearcuts were sufficiently reestablished to provide adequate cover for the elk.

In its response, BLM disputed the Commission's contention that the only factor motivating its decision was a desire to meet a preordained harvesting level. Rather, BLM pointed out that the area was largely comprised of older trees which had, in the words of the EA, "surpassed their pathological rotation age" (EA at 1). Moreover, BLM contended that, in addition to losses in productivity, the advancing age of the stands made them more susceptible to insect infestation and disease. BLM declared that these factors, rather than a simple desire to meet a pre-set quota, were the major considerations which led to the authorization of the sale.

BLM strongly disagreed with the assertion that it had ignored impacts on the elk in preparing the EA and in choosing to adopt the preferred alternative (alternative 2) rather than the no-action alternative. BLM noted that it had rejected alternative 1 precisely because it involved harvesting within the critical elk winter range, and, in devising alternative 2, had provided for various measures to mitigate adverse impacts on the elk. Thus, 200-foot buffer strips were left between existing harvest areas and the contract harvest areas to preserve some elk cover. Operations under the contract were limited to the period between May 1 and October 14, and all roads would be closed during the winter months of nonoperation.

BLM also disputed the Commission's assertions in reference to the impact that the sale would have on the cover:forage ratio. Thus, appellant had argued that the existing cover:forage ratio was 11:89 as opposed to an optimum ratio of 60:40. It argued that the sale would significantly reduce this already low level. BLM countered this assertion by noting that while the cover:forage ratio was, indeed, 11:89 for the winter elk range, no harvesting was scheduled for that critical area. But, BLM noted, the cover:forage ratio for the herd area that contained the sites being harvested has a computed ratio of 33:67, and the proposed sale would only mildly impact upon this figure (EA at 17-18).

In its answer, BLM admitted that the Management Framework Plan stated that clearcuts should be between 7 and 13 acres in size but argued this was merely a recommendation which appears to have been arbitrarily arrived at in 1974. On appeal, BLM also asserted:

Although it was not specifically discussed (documented) in the EA process, delaying the sale was considered and was dismissed because, as stated previously, we feel that the best time to harvest this sale is while the elk are already somewhat displaced by the hydrocarbon development and before additional losses occur in the timber stands.

(Memorandum from Pinedale Area Manager to Wyoming State Director, undated, at 8, Attachment to BLM Answer).

On March 14, 1986, Longtree filed its response to the Commission's statement of reasons for appeal. In this document, it generally reiterated the points made in the BLM answer.

Before considering the specific issues raised in this appeal, it is helpful to note that while this Board has had occasion to rule on numerous questions arising out of determinations to let timber contracts, the vast majority of those cases have involved decisions to harvest timber from the Oregon and California Revested Lands (O&C) in Oregon. It is important to recognize that, unlike the vast majority of land administered by BLM, O&C land is not general multiple use land but is expressly committed by the Act of August 28, 1937, 43 U.S.C. § 1181a (1982), to dominant use management for commercial forestry. See, e.g., Elaine Mikels, 44 IBLA 51 (1979). Thus, the commercial values associated with the harvesting of timber in the instant appeal, while clearly a relevant concern for BLM, cannot be treated as the determinative factor in deciding whether or not to proceed with the sale. ^{1/}

^{1/} Of course, even with respect to O&C lands, which are managed under a dominant use concept, such management must be carried out "consistent with the goals not only of providing a permanent source of timber, but also so as to maximize protection of watersheds, regulation of streamflow, and to provide recreational facilities, all in such a manner so as to contribute to the economic stability of local communities." In re Lick Gulch Timber Sale, 72 IBLA 261, 267, 90 I.D. 189, 192 (1983).

Second, while the land involved is subject to multiple use management, this does not mean that the mere fact that one use of the land may be preclusive of another establishes that allowance of that use violates multiple use principles. Thus, it has been noted, "If all the competing demands reflected in FLPMA were focused on one particular piece of public land, in many instances only one set of demands could be satisfied." Utah v. Andrus 486 F. Supp. 995, 1003 (D. Utah 1979); see also Bruce W. Crawford, 86 IBLA 350, 92 I.D. 208 (1985). In other words, although harvesting the timber may reduce cover for the elk, or, conversely, refraining from cutting the timber might result in a permanent loss of the timber resource, the option of choosing one or the other remains available.

Finally, we wish to emphasize a point made by BLM in its answer. The National Environmental Policy Act (NEPA) is essentially procedural rather than substantive. See Strycker's Bay Neighborhood Council v. Karlin, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); In re Otter Slide Timber Sale, 75 IBLA 380 (1983). NEPA proceeds from a recognition that it is inevitable that Government actions will sometimes occur which may have significant negative impacts on certain environmental values. What is critical is that the Government officials determining whether those actions should go forward have a full and complete grasp of the possible consequences of the activity in order that they may take steps to ameliorate adverse impacts to the extent possible, and, if certain impacts cannot be avoided, decide the advisability of proceeding and thereby accepting such impacts.

The fact that NEPA is essentially procedural, however, does not lessen the obligations it imposes to develop a record which fully discloses the rationale and basis for the decision, adequately explores the reasonably foreseeable impacts, and fairly analyzes alternatives to the proposed activity. Indeed, the opposite is true. Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA.

We recognize that the instant case does not involve a full-fledged environmental impact statement (EIS) but rather entails an EA. Under the Departmental Manual, an EA must be prepared for all actions undertaken by the Department, unless the proposed action is subject to a categorical exclusion, has been sufficiently covered by a previous environmental document, or where a decision has already been made to prepare an EIS. See 516 DM 3.2(A). Inasmuch as no categorical exclusion covers clearcutting timber (see 516 DM 6, Appendix 5 at 5.4(G)), and there has apparently been no prior environmental document covering the land in question, an EA was required in the instant case.

With respect to the contents of an EA, the Departmental Manual provides general guidelines. Thus, it states "[a]t a minimum, an EA will include brief discussions of the need for the proposal, of alternatives as required by Section 102(2)(E) of NEPA, of the environmental impacts of the proposed action and such alternatives, and a listing of agencies and persons consulted. ([40 CFR] 1508.9(b))." See 516 DM 3.4(A). The regulations promulgated by the Council on Environmental Quality, referred to in the Departmental Manual,

further note that an EA serves two discrete purposes. First, it provides sufficient analysis to determine whether an EIS is required and then facilitates its preparation if one is deemed necessary. 40 CFR 1508.9(a)(1) and (3). Second, it serves as an aid to the agency's compliance with NEPA where no EIS is needed. 40 CFR 1508.9(a)(2).

While our review of the instant EA discloses that the responsible officials have generally done an admirable job in delineating the environmental consequences of the proposed action and providing for mitigating measures to lessen those impacts, two specific areas give us pause. The first of these relates to the admitted fact that the sale, as proposed, violates the operative Management Framework Plan for the Pinedale Resource Area. The Management Framework Plan had noted that selective cutting should be practiced whenever silviculturally feasible. It had further expressly provided: "When clearcuts are made, they should be in the range of 7 to 13 acres with as irregular edges as logging practices will permit." See EA at 7. In discussing this prescription, the EA noted the precatory term "should" rather than the directory "must" was utilized, thus implying a certain amount of leeway was permitted. BLM further pointed out that the statewide limit for clearcutting of 25 acres was not being exceeded. *Id.* As noted earlier, after the appeal was filed it was also argued that BLM could ascertain no basis for the original determination to limit clearcuts in the Pinedale Resource Area to between 7 and 13 acres.

We recognize that a management framework plan is not comparable to a resource management plan prepared pursuant to 43 CFR 1601.0-5(k). Indeed, were it a resource management plan, any nonconforming action would be prohibited until the plan was amended. See 43 CFR 1610.5-3(a). Nevertheless, we are unwilling to accept the bald proposition presented on appeal that, simply because present administrators can no longer ascertain the basis for some of the management framework plan constrictions, they are free to ignore them. On the other hand, we think the EA correctly noted that the plan did not, by its own terms, absolutely require that all clearcuts be within the range of 7 to 13 acres. Moreover, the EA supported the larger acreage of its proposed cuts with a cogent rationale. ^{2/} For these reasons, the fact that the sale is not in conformity with the Pinedale Resource Area Management Framework Plan would not justify reversal of the decision below.

[1] A more decisive concern, however, is the question whether the EA considered a proper range of alternatives. What we have particular advertence to is the failure of the EA to directly address the possibility of and the ramifications flowing from delaying the timber harvesting as the Commission now suggests, and as was apparently suggested by the BLM wildlife specialist.

The EA expressly considered three alternatives. Alternative 1 considered a proposal to harvest 100 acres including one 25-acre parcel

^{2/} Thus, the EA noted: "The larger units would require fewer new roads and thus less acreage loss, they would allow larger areas of insect and disease concentrations to be treated with a single entry, and they would confine the amount of wildlife hiding and travel land cover affected to a smaller general area" (EA at 7).

within the critical elk winter range. Alternative 2, the preferred alternative, was the proposal which is the subject of this appeal. Alternative 3 was a no-action alternative. These alternatives were supplemented in the Finding of No Significant Impact (FONSI) by reference to the fact that "the EA discusses and dismisses an alternative to accomplish the proposal through an altered harvesting intensity, i.e., partial or selective clearcutting." FONSI at 1. However, neither the EA nor the FONSI directly addressed the utility or possibility of delaying the harvesting activities until completion of the on-going oil and gas exploration program in the area.

On appeal, it is admitted that this alternative not discussed in the EA. It is argued, however, that delaying the sale was considered but was rejected because it was believed that it was best to harvest the timber at a time when the elk were already somewhat displaced by the oil and gas development, and that delay might cause additional loss to the timber stands. The problem, however, is that, since the consideration of this alternative was not documented, there is no factual basis in the report supporting the implicit conclusion that greater short term disruption of the elk is preferable to more moderate disruption carried out for longer periods. Nor is there any quantification of the extent of the timber mortality which would occur because of a delay rather than a cancellation of the timber harvest.

NEPA requires, independent of the necessity to file formal EIS's, that every agency "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." Section 102(2)(E), 42 U.S.C. § 4332(2)(E) (1982). The requirement that appropriate alternatives be studied applies to the preparation of EA's which serve as a basis for a FONSI. See Kelly v. Butz, 404 F. Supp. 925, 934-35 (W.D. Mich. 1975). Under this requirement all reasonable alternatives must be considered (North Slope Borough v. Andrus, 486 F. Supp. 326, 330 (D.D.C. 1979)) and obvious alternatives may not be ignored (California v. Bergland, 483 F. Supp. 465, 488 (E.D. Cal. 1980)). It seems clear that the failure to expressly examine and document the alternative of delaying the Deadline Ridge sale (an alternative suggested by the BLM wildlife specialist) fatally compromised the EA. Accordingly, we have no choice but to set aside the instant decision and remand the case file for supplementation of the EA on this issue.

Accordingly, 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 set aside and the case files are remanded for further action consistent herewith.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier R. W. Mullen
Administrative Judge

Administrative Judge

