

**Editor's note: Reconsideration and request for hearing denied by Order dated Aug. 21, 1987**

IN RE TRAILHEAD TIMBER SALE ET AL.

IBLA 85-647

Decided April 20, 1987

Appeal from decisions of the Medford District Office, Bureau of Land Management, denying a timber sale protest. 5409 (110.31).

Affirmed.

1. Timber Sales -- Timber Sales and Disposals

A party seeking to establish that BLM has violated applicable policies regarding clear-cutting on Federal leases has the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not establish such error.

APPEARANCES: Paula Downing and Christopher Bratt, Grants Pass, Oregon, for Headwaters.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Headwaters, Inc., has appealed from three decisions of the Medford District Office, Bureau of Land Management (BLM), dismissing its protests against proposed timber sales. The sales at issue are the Pickett Over (85-25), Democrat Tartar (85-23), and the Trailhead (85-4). 1/ All lands in the Pickett Over and Democrat Tartar sales are within the Josephine Sustained Yield Unit; all lands in the Trailhead sale are within the Jackson-Klamath Sustained Yield Unit.

Prior to BLM's advertising of the three sales on appeal, it issued in October 1978 a Final Timber Management Environmental Statement for the Josephine Sustained Yield Unit (Josephine ES) analyzing its 10-year timber management plan for the 425,720 acres of public land in that unit. Thereafter, in November 1979, it issued a Final Timber Management Environmental Statement for the Jackson-Klamath Sustained Yield Unit (Jackson-Klamath ES). This document examined BLM's 10-year timber management plan

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1/ BLM's decisions regarding the Pickett Over and Trailhead sales are each dated Apr. 16, 1985. Its decision regarding the Democrat Tartar sale is dated Apr. 17, 1985.

for the 488,258 acres of public land in these two units. Finally, in May 1985, a supplemental environmental impact statement (EIS) was issued by BLM to examine, inter alia, the impacts of a proposed increase in clear-cutting acreage and an associated decrease in shelterwood harvest acreage in both units.

Issuance of this supplemental EIS caused the Board to conclude that the instant appeal was moot insofar as it challenged BLM's plans to clearcut acreage in excess of that contemplated in the Josephine ES and Jackson-Klamath ES. This conclusion was reached in an order, dated January 16, 1986, denying appellant's petition to stay the effect of the decisions on appeal. Therein, however, we acknowledged that appellant raised other arguments in its protest and appeal, and although we found such arguments to be unlikely to prevail on the merits, we refrained from dismissing the present appeal altogether. Instead, appellant was granted 30 days to "set forth specifically why the facts involved in these cases call for a different result on the issues that have been addressed in previous Board decisions." Id. at 3. On February 20, 1986, Headwaters filed a supplement to its statement of reasons, and the arguments contained in this supplement have been considered by the Board insofar as they are within the scope of the Board's January 16 order.

As suggested by our order of January 16, 1986, previous Board decisions have addressed many of Headwaters' arguments. Where these arguments are repeated in the instant appeal, we will limit our discussion of these arguments and simply cite to earlier decisions where our views have been explained in some detail.

Appellant's first argument charges that BLM has offered for sale clearcut acreage in excess of that contemplated by the Josephine ES and Jackson-Klamath ES. This argument, as noted above, has been mooted by BLM's issuance of the supplemental EIS in May 1985. See also Headwaters, IBLA 85-352 (Order, Nov. 13, 1985).

Appellant's next arguments focus on the so-called Church guidelines. These guidelines are contained in a 1972 report entitled "Clearcutting on Federal Timberlands," prepared by the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, then under the chairmanship of Senator Frank Church of Idaho. Of relevance to us are the following policy guidelines:

2. Harvesting limitations

Clear-cutting should not be used as a cutting method on Federal land areas where:

- a. Soil, slope or other watershed conditions are fragile and subject to major injury.
- b. There is no assurance that the area can be adequately restocked within five years after harvest.

- c. Aesthetic values outweigh other considerations.
  - d. The method is preferred only because it will give the greatest dollar return or the greatest unit output.
3. Clear-cutting should be used only where:
- a. It is determined to be silviculturally essential to accomplish the relevant forest management objectives.
  - b. The size of clear-cut blocks, patches or strips are kept at the minimum necessary to accomplish silvicultural and other multiple-use forest management objectives.
  - c. A multidisciplinary review has first been made of the potential environmental, biological, aesthetic, engineering and economic impacts of each sale area.
  - d. Clear-cut blocks, patches or strips are, in all cases, shaped and blended as much as possible with the natural terrain.

Appellant contends that a violation of guideline 2b is present in the Pickett Over sale because unit 31-2 therein has soils that are skeletal (over 35 percent rock fragments by volume) and shallow. "It is doubtful," Headwaters states, "that these areas will be adequately restocked within five years of denudation."

BLM's site specific environmental analysis (EA) for the Pickett Over sale acknowledges that "[b]urning on these soils would have the potential of reducing future productivity on the site." Of major concern to BLM is the status of soil sulphur and the suppression of nitrogen-fixing species in the early stages of plant succession (EA at 5). In order to mitigate these effects, however, BLM intends to schedule the proposed broadcast burning in Unit 31-2b for the springtime in order to assure a cool burn. Such measure, BLM states, "could reduce adverse impacts or enhance the environment" (EA at 7).

[1] In challenging BLM's timber management policies, appellant bears the burden of showing error in BLM's actions. A mere disagreement or difference of opinion will not suffice in this respect. Robert C. Salisbury, 79 IBLA 370, 379 (1984). Moreover, appellant must do more than simply allege BLM error or speculate as to the effects of its actions. The error alleged must be set forth with reasonable particularity and supported by cogent argument.

We discern no violation of Church guideline 2b in the Pickett Over sale because appellant has not demonstrated that BLM's mitigating measure will fail to check the limitations of the skeletal and shallow soils in unit 31-2. In Re Lick Gulch Timber Sale, 72 IBLA 261, 292; 90 I.D. 189, 206 (1983). Indeed, appellant has not indicated that it is aware of BLM's acceptance of

this mitigation measure. This measure is one of four that BLM has accepted to reduce impacts in the Pickett Over sale (EA at 7).

A violation of Church guideline 2a is the focus of appellant's next argument on appeal. This guideline states that clear-cutting should not be used where "[s]oil, slope, or other watershed conditions are fragile and subject to major injury." Appellant contends that this guideline is violated in the Democrat Tartar sale, but is unable to specify how because it finds that no soil or watershed information is available in the EA for that sale. Appellant predicts that impacts to this watershed will be significant and that many Class 2 and 3 streams will be degraded.

We similarly find lacking a description of soils or watershed in the EA, but cannot agree that guideline 2a is violated thereby. Despite this lack, the EA reveals that BLM clearly considered these factors. Thus, in setting forth the project design features for the Democrat Tartar, *i.e.*, those mitigating measures included in the design of a proposed timber sale to minimize adverse impacts, BLM has considered: directional felling to avoid Class 2, 3, and 4 streams; a prohibition of logging within wet areas in units 3-2 and 11-2E; a 50-foot wide horizontal riparian zone between a Class 2 stream and unit 11-1A; 30-foot buffers bordering Class 3 streams; 20-foot buffers bordering Class 4 streams; restriction of logging operations to the dry season in unit 11-2E; restriction of tractor activity to designated skid roads in all tractor units except unit 3-2; and prohibition of tractor-type logging equipment when soils contain excessive moisture (EA at 2-4).

In the Trailhead sale, appellant contends that the proposed burning and tractor yarding on slopes steeper than 35 percent and on soils having a moderate to severe regeneration and erosion hazard violate guideline 2a. Appellant's supplemental statement of reasons adds that BLM fails to address "restricted area soils, compaction and erosion hazards, and potential loss of productivity." Review of the EA reveals, however, that BLM is aware of these concerns and has set forth in the EA the following special unit considerations and mitigation measures: Unit 28A would be gross yarded to achieve a cool burn on sensitive soils and prevent a loss of site productivity; units 33C2 and 33D (each with slopes exceeding 35 percent) would be cable yarded to reduce erosion; units 33C1 and 28B1 would be tractor yarded, and all skid trails with slopes exceeding 35 percent would be water barred (EA at 5). BLM's project design features to mitigate impacts on actively eroding bare soil areas include mulching and seeding road shoulders, and blocking and seeding temporary unrocked spur roads.

Appellant's argument that guideline 2a has been violated fails to acknowledge the various mitigation measures that BLM has examined to address the problems posed by fragile or steeply sloped soils in the three sales at issue. In the absence of evidence demonstrating why such mitigation measures will not be effective in these sales, Headwaters has not met its burden of showing error in BLM's decision. Appellant's reference to BLM reports monitoring the effectiveness of mitigation efforts in past sales does not establish that BLM efforts in the instant sales will be unsuccessful. No attempt is made by Headwaters to show that the sale areas described in the monitoring

reports are comparable to the instant sales or that the parties performing past mitigation activities are involved at present. Moreover, the monitoring reports show that BLM's mitigation techniques, if capably performed, can achieve the desired results. See, e.g., the Walker Return sale (cool burning); Low Quotient sale (directional felling); East Chinquapin sale (riparian zone); Late Snow sale (cable yarding; seeding and fertilization of road cut banks). To be sure, the reports point also to EA inadequacies (Low Quotient sale); a failure to save wildlife trees (East Chinquapin sale); and deficient skid trails (Zelra Dissolve), inter alia. Such information is reported, however, to insure that comparable future sales will not repeat the errors of the past. To the extent that such reports are relevant to the three sales at issue, the reports should serve to improve BLM's performance. See In Re Lick Gulch Timber Sale, 72 IBLA at 282, 290-1, 90 I.D. at 201, 205-06.

Headwaters next contends that BLM has violated guideline 2c, which states: "Clear-cutting should not be used as a cutting method on Federal land areas where: \* \* \* c. Aesthetic values outweigh other considerations." Were it not for appellant's supplemental statement of reasons, filed on February 20, 1986, we would allow our discussion of this argument in In Re Upper Floras Timber Sale, 86 IBLA 296, 306 (1985), to suffice in the instant appeal. However, in its supplemental brief, appellant elaborates on its argument by asserting that BLM has violated its own Visual Resource Management (VRM) guidelines. These guidelines set forth standards by which BLM classifies lands according to the "interaction of scenery quality, visual zones, and sensitivity level" (Josephine ES, Appendix G).

Specifically, appellant states that BLM has violated VRM Class III and IV guidelines by scheduling for clear-cut 55 percent of a 640-acre area of the Democrat Tartar sale. Appellant points out that VRM Class III and Class IV lands limit visual background disturbances to "generally not more than 25%" of the viewshed (Attachment 4 to appellant's supplemental statement of reasons at 5). In addition, appellant contends, BLM has scheduled for clear-cutting in the Trailhead and Pickett Over sales "units or combinations of adjacent units larger than 40 acres," contrary to the 40-acre limit per viewshed set forth in Class III and Class IV guidelines.

The EA for each of the sales states that VRM guidelines have been satisfied for Class III and IV lands. BLM's response to appellant's argument is set forth in a pleading filed on March 31, 1986:

Guideline classifications have been developed for assisting management to meet VRM objectives that will insure acceptable impacts. \* \* \* Special situations may arise where guidelines may be more stringently or leniently applied while still meeting visual management objectives. Criteria have been developed as to when these special situations may exist. In addition, since so many variables can affect how impacts appear on any given piece of ground, the final determinant as to what will be considered acceptable or unacceptable has been and will continue to be the site specific analysis. (Emphasis added.)

Appellant has not identified those units of the Democrat Tartar, Trailhead, or Pickett Over sales that contain the violations charged. In the absence of such information and in light of BLM's emphasis on site specific analysis, we hold that appellant has failed to meet its burden of showing error in BLM's action. <sup>2/</sup> Moreover, as noted in the quotation above, special situations may arise that justify a more stringent or lenient application of the guidelines. See, e.g., attachment 4 to appellant's supplemental statement of reasons at 3. Thus what appears to be a violation of VRM guidelines may, in fact, be a special situation calling for a departure from the guidelines. Without greater detail, we are unable to determine whether a violation or a special situation is at hand.

Church guideline 2d is the subject of appellant's next argument. That guideline states: "Clear-cutting should not be used as a cutting method on Federal land areas where: \* \* \* d. The method is preferred only because it will give the greatest dollar return or the greatest unit output." As in appellant's prior argument, no facts are offered to support its view that a guideline has been violated. BLM's response to this argument is to state that an interdisciplinary team of resource specialists recommended clear-cutting as the preferred method of harvest independent of any logging cost constraints. In the absence of contrary evidence, BLM's decisions are affirmed in this respect.

Affirmance is also appropriate for BLM's decisions dismissing appellant's charge that guidelines 3a and 3b have been violated. Guideline 3a states that clear-cutting should be used only where it is determined to be silviculturally essential to accomplish the relevant forest management objectives; guideline 3b requires that the size of clear-cut blocks be kept to the minimum necessary to accomplish silvicultural and other multiple use forest management objectives. BLM responds to these contentions noting that the method of harvest and size of units is the product of site-specific field reviews. Identical arguments and virtually identical responses from BLM are set forth in In Re Upper Floras Timber Sale, supra at 307. There being no further argument from appellant in its supplemental statement of reasons, no reason appears to disturb that decision. BLM's decisions are affirmed in this regard.

Departing from the Church guidelines, appellant next argues that allowable cut <sup>3/</sup> is not sustainable in the instant sales, contrary to the requirements of the Act of August 28, 1937, 43 U.S.C. §§ 1181a-1181f (1982), commonly known as the O & C Act. Specifically, appellant points to BLM

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<sup>2/</sup> Because a viewshed is key to any VRM determination, the record on appeal provides only a starting point in determining whether BLM has violated its guidelines.

<sup>3/</sup> "Allowable cut" means "[t]he amount of forest products that may be harvested annually or periodically from a specified area over a stated period in accordance with the objectives of management" (Josephine ES at O-1).

correspondence <sup>4/</sup> stating that the loss of herbicide use in the Medford District would reduce the District's harvest by 38 MM board feet. BLM has not reduced the cut by that amount, Headwaters contends, and no explanation for this failure is offered.

In response to this argument, BLM acknowledges that its allowable cut plan did assume the use of herbicides and that herbicide use has been restricted for a few years. Restricted herbicide use, BLM notes, has caused it to make an annual reduction in allowable cut. To offset the reduction in cut caused by the loss of herbicides, BLM has used "[e]xpensive alternatives such as scalping, paper mulching, and hand slashing" (BLM response, filed Mar. 31, 1986, at 4).

BLM's response presents a plausible reason why its allowable cut has not been reduced by 38 MMBF. In reply, Headwaters states that "BLM must further rectify the allowable offering or furnish data for not doing so." <sup>5/</sup> Appellant's reply does not establish error in BLM's decisions, and such decisions are, accordingly, affirmed in this regard.

Headwaters' next argument focuses on the amount of basal area removed by a regeneration cut <sup>6/</sup> and charges that BLM proposes to remove more stand basal area than is contemplated in the Josephine ES and Jackson-Klamath ES. Citing In Re Bald Point Timber Sale, 80 IBLA 304, 311 (1984), appellant contends that BLM must evaluate the impacts of a change in basal area leave percentages in a revision of its environmental statements or in a site-specific EA.

BLM has chosen the former approach here. The supplemental EIS prepared by BLM in May 1985, supra, focused not only on an increase in clear-cut acreage, but also on a change in the method used to describe the percentage of basal area removed. As set forth in the supplemental EIS at 10, the Medford District has "shifted initial entry shelterwood harvest from 30 to 60 percent basal area removed to leaving approximately 8-12 trees per acre." An examination of the impacts of such shift appear at pages 5-10. BLM's analysis in the supplemental EIS of its new shelterwood harvest method moots this issue and makes unnecessary any discussion of appellant's arguments focusing on the Josephine ES and Jackson-Klamath ES.

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<sup>4/</sup> This correspondence is a letter to Christopher Bratt, dated Mar. 5, 1981, from the Acting District Manager, Medford, and is set forth as attachment 5 to appellant's supplemental statement of reasons, filed Feb. 20, 1986.

<sup>5/</sup> Headwaters' comments, filed Apr. 29, 1986, at 5.

<sup>6/</sup> "Basal area" means "the area of the cross section at breast height of a single tree or of all the trees in a stand, usually expressed in square feet" (Jackson-Klamath ES at G-2). "Regeneration cut" means "one of the phases of shelterwood cutting designed to open the canopy of a stand sufficiently to allow the establishment of regeneration, i.e., either the first stage of a two-stage shelterwood cutting or the second stage of a three-stage shelterwood cutting" (Josephine ES at O-8).

Headwaters next contends that harvesting from low intensity management lands <sup>7/</sup> violates the O & C Act, the Federal Land Policy and Management Act of 1976 (FLPMA), the National Environmental Protection Act (NEPA), the BLM Manual, and the Timber Management EIS's. Headwaters does not allege, however, that any low intensity lands are present in any of the three sales on appeal. BLM denies that any low intensity lands exist in either the Pickett Over or Democrat Tarter Sales, and our review of the Trailhead reaches a similar result for that sale. Appellant's argument is, accordingly, inapplicable to the sales at hand and is properly rejected.

Appellant's next argument asserts that the EA's of the proposed sales are inadequate and deficient because they rely on inflated estimates of mitigation effectiveness, ignore cumulative, site-specific impacts, fail to study "true alternatives" to the proposed action, and fail to analyze significant impacts to all elements of the human environment. This argument has been addressed and rejected by the Board on at least two prior occasions. See, e.g., In Re Upper Floras Timber Sale, *supra* at 310-11, and In Re Humpy Mountain Timber Sale, 88 IBLA 7, 9 (1985). Our holding in these cases is a sufficient response to appellant's general contentions.

In its supplemental statement of reasons, appellant claims that the EA's do not discuss the fate of a sensitive plant, spotted owls, or a goshawk in the Pickett Over sale. In response, BLM states that the sensitive plant is known as Sophora bachians. It is now located in a reserve area that has been deleted from the proposed cutting unit. As to spotted owls, the EA notes that the northeast portion of sec. 29, T. 35 S., R. 7 W., Willamette Meridian, has been identified as a Spotted Owl Management Area (S.O.M.A.). Although an owl has been known to use this area, its use is sporadic, and the S.O.M.A. is "in the process of being dropped and a more suitable S.O.M.A. will be designated" (EA at 6). BLM's failure to identify the relocation site does not render the EA inadequate. A goshawk's nest is acknowledged by BLM to be located in a reserve unit at the junction of a proposed road and an existing road in sec. 27, T. 35 S., R. 7 W. "Road construction or log hauling during the nesting season may disturb the goshawk," the EA states, "causing it to abandon the nest." *Id.* In an effort to avoid such disturbance, BLM has accepted a mitigation measure prohibiting road construction and log hauling between March 1 and August 30 if the goshawk is using the identified nest. BLM's analysis of the impacts of road construction and log hauling on the goshawk does not render the EA inadequate. <sup>8/</sup>

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<sup>7/</sup> "Low Intensity Management" lands are "[c]ommercial forest lands that are excluded from the timber production base since regeneration is expected to exceed five years after harvest. These lands comprise a portion of the trial harvest program" (Supplemental EIS at C-3).

<sup>8/</sup> Appellant correctly points out, however, that BLM's management framework plan (MFP) calls for BLM to maintain a 30-acre undisturbed buffer around all currently identified goshawk nests. Specifically rejected by the MFP was an alternative to allow logging except during the nesting and rearing period. Such alternative would cause displaced goshawks to establish new nests, which they may not be able to do. WL-9.2.

The next two arguments of appellant have been adequately discussed in In Re Upper Floras Timber Sale, *supra* at 311. Our responses are set forth below:

Headwaters next argues that BLM's harvest of surplus inventory violates the principle of "even flow." <sup>31/</sup> This contention received the following response from BLM: "Amendment #1, Jackson-Klamath Timber Management Plan Record of Decision, and Amendment #1, Josephine Timber Management Plan Record of Decision, both dated December 1, 1981, eliminated the harvest of surplus inventory which decreased the allowable harvest level. The decrease in harvest levels was made specifically to maintain even flow." No reply to the above response was contained in Headwaters' subsequently filed pleading of March 5, 1985. BLM's remarks above dispose of this issue.

Headwaters' penultimate argument is the contention that BLM's Management Framework Plan (MFP) does not comply with NEPA. This plan, appellant maintains, is not the land use EIS required by NEPA 15 years ago.

No citation to NEPA, the regulations, or any authority is provided by appellant in support of its argument. In the absence of such, appellant has failed to meet its burden of showing error in BLM's decision. Moreover, BLM's response correctly points out that the purpose of the [Jackson-Klamath ES] and [Josephine ES] is to analyze the impacts of decision and recommendations set forth in the MFP's.

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<sup>31/</sup> See Cascade Holistic Economic Consultants, [60 IBLA 293] at 294, for a brief discussion of even flow.

Appellant's final argument focuses upon regulations at 43 CFR Part 5000 requiring protests of forest management decisions to be filed within 15 days of the publication of a notice of decision or sale and eliminating the automatic stay provision upon the filing of a notice of appeal. Appellant claims that 15 days is not adequate to file a statement of reasons, that insufficient

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fn. 8 (continued)

As we noted in State of Wyoming, Game and Fish Commission, 91 IBLA 364, 368 (1986), BLM is not free to ignore its MFP. An MFP, however, is not comparable to a resource management plan (RMP) prepared pursuant to 43 CFR 1601.0-5(k). Were it so, any nonconforming action would be prohibited until the plan was amended. 43 CFR 1610.5-3. Because of the vague description in the EA as to the location of the goshawk nest, we are unable to determine whether proposed road construction will necessarily invade a 30-acre area around the goshawk nest. In the absence of such determination, we refrain from advising BLM in this instance.

notice is provided by BLM's publication of a notice of decision or sale, and that the lack of a stay provision makes a mockery of the public's opportunity to protest.

Appellant's statements, while appropriate for the comment period following proposed rulemaking, are not properly addressed to this Board. The Board of Land Appeals has no authority to declare duly promulgated regulations invalid. Such regulations have the force and effect of law, are binding on the Department, and may not be waived. Robert R. Perry, 87 IBLA 380 (1985).

To the extent appellant has raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Medford District Office are affirmed.

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John H. Kelly  
Administrative Judge

We concur:

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Wm. Philip Horton  
Chief Administrative Judge

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Will A. Irwin  
Administrative Judge