

HEADWATERS, INC.

IBLA 89-26

Decided September 21, 1990

Appeal from a decision of the District Manager, Medford District Office, Oregon, Bureau of Land Management, denying a protest and rejecting application for stay of proposed timber sale OR TR 88-21 (OR 110-TS-8-55).

Affirmed.

1. Administrative Procedure: Administrative Review--Appeals: Generally--Board of Land Appeals: Rules of Practice: Appeals: Jurisdiction--Timber Sales and Disposals

Provision of the Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774 (Sept. 27, 1988), restricting "judicial review" to "particular activities" does not affect the authority of the Board of Land Appeals to consider timber sale appeals.

2. Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction--Timber Sales and Disposals

An appeal from a decision denying a protest against a timber sale will not be dismissed as moot even though the protested action has occurred, where issues raised by the appeal are capable of repetition and where failure to decide the appeal would cause substantial issues to evade review.

3. Appeals: Jurisdiction--Federal Land Policy and Management Act of 1976: Land-Use Planning--Timber Sales and Disposals

The Copco timber sale is reviewable as a specific action proposed to implement part of the Jackson-Klamath Sustained Yield Units Ten Year Management Plan.

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

A decision to proceed with a timber sale will not be disturbed on appeal where it has not been established that there was a failure to consider relevant matters of environmental concern, such as impacts on soils, water quality, and wildlife, or that the decision was unsupported by the record or contrary to law or fact.

APPEARANCES: Charles G. Levin, Esq., Grants Pass, Oregon, for appellants Headwaters, Inc., and Friends of the Greensprings; David A. Jones, Medford Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Headwaters, Inc., and Friends of the Greensprings have appealed from a decision of the District Manager, Medford District Office, Oregon, Bureau of Land Management (BLM), dated December 12, 1988, denying their protest and application for stay of the Copco timber sale, OR TR 110-TS-8-55 (OR TR 88-21), located in the Klamath Resource Area, Jackson-Klamath Sustained Yield Units, in secs. 9, 27, and 35, T. 40 S., R. 4 E., Willamette Meridian. The Oregon and California Railroad and Reconveyed Coos Bay Grant Land Act of 1937 (O&C Act), 43 U.S.C. §§ 1181(a)-1181(f) (1982), was the source of BLM's authority to conduct the proposed sale. The Copco contract, awarded to Croman Corporation on July 28, 1988, contemplated removal of an estimated 1.5 million board feet of timber from 283 acres of Federal land.

On July 14, 1988, appellants protested the proposed timber sale, asserting that BLM had failed to follow procedures mandated by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332-4361 (1982), and regulations promulgated pursuant thereto by the Council on Environmental Quality (CEQ) at 40 CFR 1500-1508. More specifically, appellants challenged the adequacy of the existing environmental impact statement (EIS) prepared by BLM pursuant to 40 CFR 1501.3 for the Jackson-Klamath Sustained Yield Units Ten Year Management Plan (Jackson-Klamath), on grounds that the EIS failed to include a reasonable range of alternatives to the proposed action, including the "no action" alternative, lacked essential factual information required by NEPA, and failed to consider the cumulative impacts of the sale in a site-specific manner.

On September 12, 1988, BLM denied appellants' protest. Observing that a finding of no significant impact (FONSI) issued on May 17, 1988, subsequent to the preparation of a site-specific environmental assessment (EA) for the Copco timber sale, BLM took the position that the FONSI made unnecessary further supplementation of the November 1978 Jackson-Klamath plan. Citing prior Board of Land Appeals (IBLA) decisions in support of the adequacy of the alternatives considered in the Jackson-Klamath plan and the record of decision set forth in the EA, BLM approved the finding of no significant cumulative or site-specific impact. BLM also found that 43 CFR 5003.3 permitted immediate execution of the proposed timber sale contract. For this reason, BLM denied the stay of logging operations sought by appellants.

On October 7, 1988, appellants filed an appeal to this Board. On November 14, 1988, appellants filed a statement of reasons (SOR) and requested an immediate stay of the Copco timber sale. Appellants' SOR repeated the arguments set forth in the protest and also argued that BLM had abused the tiering mechanism set forth in 40 CFR 1502.20, failed to give serious consideration to the "no action" alternative, failed to consider sufficient alternatives and their impacts, failed to discuss the effects of logging within 2.1 miles of a spotted owl habitat area, and failed to consider the effect of logging on visual resources. Further, appellants contended that BLM should either gather more information about species inventories and the effect of logging on wildlife, or prepare a "worst case analysis" consistent with CEQ regulations because the agency lacked essential information necessary to make a reasoned choice among alternatives and the information was either unavailable or available only at prohibitive cost.

In an order issued January 23, 1989, we inquired concerning the effect of an order issued June 14, 1988, in Portland Audobon Society v. Hodel, No. 88-3787 (9th Cir.) (subsequently decided as Portland Audobon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989)), prohibiting the award of 29 timber sale contracts. BLM was ordered to file a copy of the Spotted Owl EA with the Board and the parties were ordered to inform the Board by February 20, 1989, whether the Copco sale was affected by the order and to file a copy of the Court of Appeals order with the Board. Our order concluded that "appellants' motion for stay of the timber sale pending decision is taken under advisement."

BLM filed a response to the Board's order on February 17, 1989, which included comments by the Resource Area and a copy of the Spotted Owl EA, the Decision Record for the Spotted Owl EA, a preliminary injunction issued May 18, 1988, and a copy of a January 24, 1989, court of appeals decision vacating the preliminary injunction and remanding the case to the district court.

On February 22, 1989, appellants filed a statement declaring that they would apply to Oregon U.S. District Court to enjoin further cutting of old fir in the Copco sale. On March 14, 1989, in deference to the Federal court litigation concerning this sale, we suspended action on the appeal before the Board and requested that the parties report when the matter became ripe for further administrative adjudication.

On January 24, 1990, BLM reported that "subsequent to the vacation of the injunction by the Ninth Circuit in September 1989, the Copco sale was logged prior to the seasonal restriction beginning on November 1st as required under Section 41(B) (8) of the contract. The cutting right on the Copco contract expired January 16, 1990." Because the Copco timber was cut in 1989, BLM moved that this appeal should be dismissed for mootness in light of Headwaters, Inc. v. Bureau of Land Management, CA No. 88-3825 (9th Cir. Oct. 3, 1989). That case was dismissed because timber which was the subject of suit had been cut before action could be taken to prevent cutting. In an order issued January 31, 1990, appellants and BLM

were directed, "not later than February 15, 1990, to comment upon whether decision of this appeal is affected by any other pending litigation or legislation and that the Board be informed what, if anything, prevents immediate disposition of this case."

Headwaters filed a response on February 20, 1990, asserting that because the United States District Court decision in Portland Audubon Society v. Lujan, Civ. 87-1160-FR (D. Or. Dec. 21, 1989), preserved the right to challenge individual timber sales under provision of P.L. 100-446, 102 Stat. 1825 (1989), the district court decision does not affect the Board's disposition of the appeal at bar. Appellants further contend that the district court held squarely in favor of appellants on their NEPA claim, concluding that because BLM's spotted owl EA does not address critical issues of adequate population size and the effects of habitat fragmentation on the long-range survival of the spotted owl, BLM's decision not to supplement the EIS was arbitrary and capricious.

While acknowledging that the Portland Audubon Society case was dismissed for lack of jurisdiction, appellants argue that P.L. 100-446 does not preempt the filing of administrative appeals, and that this Board's jurisdiction is not affected by the ruling in Portland Audubon Society v. Lujan, *supra*. Appellants argue that if the issues on appeal are not resolved by this Board they will likely not be resolved.

[1] The Department of the Interior and Related Agencies Appropriations Act, 1989, 102 Stat. 1774, 1825 (Sept. 27, 1988) (to be codified at 16 U.S.C. § 1604), barring "judicial review" of actions brought "solely on the basis that the plan does not incorporate information subsequent to the completion of the existing plan," does not limit this Board's authority to review timber sales appeals. This Board does not conduct "judicial review." "Judicial review" is a term that describes review by the judicial branch of government under Article III of the U.S. Constitution, rather than review by administrative review boards located in agencies of the executive branch. The source of this Board's review authority is 43 CFR Part 4, whereby the Secretary of the Interior delegated authority to this Board to decide appeals concerning use and disposition of public land.

[2] Nonetheless, where events occurring after an appeal is filed with this Board operate to deprive the Board of any effective power to give effective relief to the appellant, we have found that the appeal should be dismissed as moot. In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (1990); Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365, 93 I.D. 285 (1986). This is not such a case, however, for the timber at issue had not been cut when appellants filed their appeal to this Board, nor had it been cut when, at the request of both BLM and appellants, we suspended further proceedings in deference to the judicial review of the sale which was then in progress in the Federal courts. We did not provide, in our order suspending this appeal and taking the application for stay under advisement, that the timber should be cut in the event judicial review should be interrupted by legislative action, or that failure to succeed in the Federal

court action would permit an immediate cut of the Copco timber. Instead we required that we be notified when the litigation was ended if there were any issues remaining to be decided administratively. Nonetheless, BLM takes the position that the removal of the timber following the lifting of the court-ordered injunction which occurred before this Board was notified of the fact that the harvest had taken place now makes the matter "moot." Appellants, however, contend that the Board should review the case on appeal because

it raises issues capable of repetition which would otherwise evade review, especially in view of the fact that there is now no further review available because of the legislative limitation placed on judicial review by the Appropriations Acts discussed above.

[3] Even where an activity has already occurred, it does not necessarily follow that administrative review is not warranted. Southern Utah Wilderness Alliance, 111 IBLA 207 (1989); Colorado Environmental Coalition, 108 IBLA 10 (1989). In somewhat similar circumstances to those here, where an action had been implemented by BLM and it was argued no further relief could be obtained because the protested action had become an accomplished fact, this Board observed that BLM could not avoid review by premature allowance of a protested activity, explaining that:

When BLM unilaterally determines to exclude certain categories of decisions from appellate review, BLM's implementation of one such decision provides no basis for dismissal therefrom as moot. On the contrary, the Board can only look upon such a circumstance as raising an issue capable of repetition that will evade review unless expeditious consideration is granted.

Southern Utah Wilderness Alliance, 114 IBLA 326, 330 (1990). We were unable to grant expedited consideration in the instant case because the sale was cut before we were notified that the matter had once again become ripe for administrative review. Nonetheless, it is concluded that this case also is one which will, as appellants argue, be capable of repetition yet evade review unless we consider their appeal.

It may be that discussion of timber management plans and the effect of failure to challenge "particular activities" appearing in Portland Audubon Society v. Lujan, 884 F.2d 1233, 1238-39 (9th Cir. 1989), led BLM to believe that the NEPA issues raised by appellants in their appeal before the Board were decided by the Federal litigation and that this appeal was controlled by the findings in the Portland Audubon Society decisions.

While the Copco timber sale concerned a management plan, in the sense that the Copco sale was within the contemplation of the Jackson-Klamath plan, the Copco sale represents the implementation of only a part of the Jackson-Klamath plan. It is true that the timber plan establishes a management policy, and that consequently the plan is only subject to final review by the Director, BLM. 43 CFR 1610.5-2; California Association of Four Wheel Drive Clubs, Inc., 108 IBLA 140 (1989); Harold E. Carrasco, 90 IBLA 39 (1985). Nonetheless, the Board does have authority to review a specific action proposed to implement part of a general management plan. Id.

The Copco sale is such a specific action for purposes of determining this Board's authority to review an action, although the sale may not be a "particular activity" within the meaning of the 1988 Appropriations Act which bars judicial review of such actions.

The distinction between these two similar concepts lies in the expressed legislative intention to limit judicial review of timber sales appearing in the 1988 Appropriations Act. The distinction was explained in the second Portland Audubon Society decision, which observed that timber management plans promulgated by BLM in Oregon were "made with the knowledge that [northern spotted] owl habitat would be sacrificed in the clear cuts and conversion to second-growth forest." Id. at 844 F.2d 1240. The court then held that the 1988 Appropriations Act precluded judicial review of such cases as this, and explained:

There is a presumption in favor of judicial review of administrative actions. \* \* \* It was that presumption which, in [Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989)], required us to remand in order for the district court to apply the specific language of section 314 [of the 1988 Appropriations Act] to plaintiffs' claims, to determine if, in fact, plaintiffs claims rely solely on "new information" and whether they challenge the plans or "particular activities." The presumption in favor of review is overcome, however, where there is "pervasive reason to believe" that Congress intended to preclude judicial review. \* \* \* Here, there exists not only pervasive evidence of congressional interest, but an explicit statutory command precluding review. [Citations omitted.]

Id. The finding of the court was, therefore, that the 1988 statute precluded judicial review because plaintiffs had challenged a management plan on grounds that the agency elected a "trade-off of owls for economic gain." What BLM overlooked when it allowed the timber to be cut thereafter, without prior notice to this Board, was the fact that Congress did not bar the Secretary or his delegate, this Board, from revisiting the same land use decision in the context of a specific timber sale should that be necessary to meet the requirements of NEPA. We therefore consider the merits of the appeal, consistent with prior decisions of this Board.

[4] Appellants' protest alleged that the existing EIS prepared by BLM for the Jackson-Klamath plan was inadequate. The protest claimed that the February 12, 1988, EA prepared by BLM pursuant to 40 CFR 1501.3 did not include a reasonable range of alternatives to the proposed action, lacked essential information required by NEPA, and did not consider the cumulative impacts of the sale in a site-specific manner. The SOR also argued, as previously stated, that the "tiering" mechanism was abused and that a worst-case analysis for effects of the sale on wildlife was not prepared, though it should have been.

These general arguments have been previously raised by appellant Headwaters, Inc., in protest against other timber sales in the Medford

District. Headwaters, Inc., 101 IBLA 234 (1988); In re Blackeye Again Timber Sale, 98 IBLA 108 (1987); In re Upper Floras Timber Sale, 86 IBLA 296 (1985). While prior Board decisions and orders have generally found similar arguments to be insufficient to reverse the District Manager's decision to proceed with a sale, the Board will review the record to determine whether there is error in fact or law in the District Manager's decision. In re Blackeye Again Timber Sale, *supra*.

Appellants' argument that the existing EIS is premised on incorrect assumptions has been previously addressed by this Board. In Headwaters, Inc., *supra*, citing 43 CFR 1610.5-2(a)(1) (1983), this Board found that it does not have jurisdiction to review the adequacy of an underlying EIS. *Id.* at 238. *See also* 43 CFR 1610.5-2(b). The Board further held in that case that "it is without jurisdiction to address appellants' argument that because the original EIS' are inadequate, BLM's subsequent 'findings of no significant impact' with respect to individual timber sales which tier to the EIS' are likewise flawed." 101 IBLA at 239. Appellants have not presented the Board with an analysis which would justify a reversal of Headwaters on this point.

Likewise, appellants have presented the Board with no analysis which would justify a reconsideration of its rulings relating to the adequacy of the range of alternatives considered by BLM in an EA. In re Blackeye Again Timber Sale, *supra*; In re Upper Floras Timber Sale, *supra*. The EA for the Copco sale considers the environmental impact of the proposed action, as well as the delay or no action alternative. The EA lists alternatives considered and rejected and states reasons for their elimination. *Id.* at 1-7. The Board finds that the EA includes a description of "appropriate alternatives" required by section 102(2)(E) of NEPA. As we stated in In re Blackeye Again Timber Sale, *supra* at 111:

[I]t [is] not necessary for BLM to discuss the myriad of alternatives which could be devised, each resulting in an incremental change in the overall impact of the sale. It is sufficient that BLM set forth the many implications of either its proposed action or the no action alternative, which are at either end of the spectrum.

Appellants argue that "the Environmental Impacts section [of the EA] violates NEPA because it lacks essential information" (Protest at 4). More specifically, in their SOR they allege that the EA ignores the cumulative effects of timber removal on wildlife such as deer, elk, and spotted owls, and that it uses inaccurate standards of measurement in assessing environmental impacts. In support of their position, appellants have submitted an affidavit by Richard Brock, a practicing resource analyst with training and experience in habitat assessment for threatened and endangered species.

In support of their assertion that the EA lacks information, appellants refer the Board to 40 CFR 1500.1(b) and 1500.2(b). These regulations are broad "purpose and policy" statements that do not refer to specific

information required to be included in an environmental assessment. <sup>1/</sup> This argument confuses the requirement of an "environmental impacts" section in the EA with the "environmental impact statement required for certain federal actions."

Preliminary to the preparation of an EIS or supplemental EIS, a finding of significant environmental impact must be made. The environmental assessment is the vehicle by which an agency makes this threshold determination. 40 CFR 1508.9(a)(1). An EA shall include "brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 CFR 1508.9(b). A supplemental EIS will be required if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR 1502.9(c)(1)(ii) (Emphasis supplied).

Brock states that appellants requested him to review BLM's environmental assessment for the Copco sale "regarding two points: 1) effects of the proposed sale on wildlife in light of the cumulative effects of nearby private cutting and past BLM cutting, and 2) the range of alternatives provided" (SOR, Attachment 4, at 1). For purposes of analysis, Brock divided the sale into northern and southern units, with sec. 9 comprising the northern segment. According to Brock,

I have \* \* \* completed an analysis using the Habitat Effectiveness Index model developed cooperatively by the BLM, Forest Service and Oregon Department of Fish and Wildlife (Wisdom et al 1986). \* \* \* The results of this assessment indicate that due to high impacts

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<sup>1/</sup> Set out at 40 CFR 1500, entitled "purpose, policy and mandate," are broad policy regulatory guidelines established by the Council on Environmental Quality. Thus, 40 CFR 1500.1(b) provides that:

"NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail."

40 CFR 1500.2(b) provides that Federal agencies shall to the fullest extent possible:

"Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses."

While these regulations are guidelines, appellants have not shown that, where they apply, BLM has not followed them.

incurred on surrounding private lands and past actions on BLM lands, the timber sale area is highly sensitive to further habitat alteration. In particular:

1. In the northern portion, overall habitat effectiveness currently is on the low side of what is considered viable. \* \* \* Habitat effectiveness after the proposed action would be reduced to the threshold between "viable" and "marginal" \* \* \*. Crossing these threshold values is extremely important and should not be done lightly.

The weakest variable is thermal cover. As the EA states, it is somewhat scattered in the BLM sale area. (Emphasis supplied).

(SOR, Attachment 4, at 1, 2).

Brock concludes that logging sec. 9 would reduce the area to "nonviability" due to lack of thermal cover. Using the same analysis, he likewise concludes that the southern portion of the sale needs improvement rather than further removal of cover. He lists four alternatives to the removal plan set out in the EA which he considers appropriate. Id.

At the outset, BLM's EA states that it is not intended to be a comprehensive statement, but rather is developed to "assist in planning and decisionmaking," and to "allow the responsible decisionmaker to determine whether to prepare a \* \* \* SEIS." According to BLM, the original EIS and two supplemental EIS' provide for the timber cut. The EA does not enlarge or significantly alter timber management plans for the Jackson-Klamath sustained yield units; it defines specific cuts to be made and outlines environmental precautions to be taken. The FONSI indicates, at page 1, that "[t]he proposed action or alternatives are common elements considered in implementing the [record of decision], as amended. They are not considered to be precedent setting. The alternatives are not similar to actions which normally require a supplemental EIS under agency procedures."

The EA describes the sale area as "generally flat terrain with a few small hills. A few streams dissect the area. Vegetation consists of timber stands, rocky/grassy meadows, shrubs and forbs." Id. at 10. Soils are described as well-drained, with moderate amounts of clay. Erosion is slight. Id. at 9. The EA includes references to existing wildlife, including large game, wild turkeys, northern spotted owls, small mammals, and further describes the existing site with respect to fisheries, recreation, visual resources, cultural resources, threatened or endangered plants, vegetation, and minerals. Id. at 9-10.

General assumptions are then defined which apply to all environmental analysis in the EA. The anticipated site-specific impacts of the proposed action alternative on air, noise, watersheds, wildlife, including northern spotted owls, fisheries, threatened and endangered plants, vegetation, minerals, and social uses are discussed. Id. at 11-14. Anticipated

cumulative effects of the proposed action alternative are discussed, with specific attention to cumulative impacts on the Jenny Creek watershed, wildlife, and visual resources. Id. at 14-15. That BLM's choice to proceed with the proposed alternative differs from the proposals advanced by Brock is undisputed. Brock, however, acknowledges that BLM voices concerns about thermal cover and wildlife habitat in the EA (SOR, Attachment 4, at 2).

In In re Blackeye Again Timber Sale, supra, this Board stated at page 110:

A determination that a proposed action will not have a significant impact on the quality of the human environment, based on an EA, will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable in light of the environmental analysis. Glacier-Two Medicine Alliance, 88 IBLA 133 (1985). The party challenging the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Id. The burden of proof is on [the challenging] party. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732, 747 (3d Cir. 1982).

A mere disagreement or difference of opinion will not suffice to show error. In re Trailhead Timber Sale, 97 IBLA 8 (1987); Robert C. Salisbury, 79 IBLA 370 (1984). Having considered Brock's opinion in its most favorable light, the record taken as whole leads us to conclude that appellants' proof in this case amounts to a disagreement or difference of opinion, and therefore does not show error in the finding that the Copco timber sale will have no significant environmental impact.

Citing 40 CFR 1502.20, appellants allege that BLM has tiered excessively to the 10-year plan (SOR, Attachment 1, at 1, 2). Our review reveals that while tiering does exist, appellant has failed to establish that the EA is tiered in a manner inconsistent with requirements of that section or with requirements of 40 CFR 1508.28. Indeed, section 1502.20 provides:

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review ([section]) 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference

and shall concentrate on the issues specific to the subsequent action. [Emphasis supplied.]

Concerning environmental impacts of the sale or alternative measures, BLM observes:

[Where] the following subheadings--short-term use versus long term productivity, and irreversible and irretrievable commitment of resources--do not appear, site-specific impacts were considered to be minimal or non-existent, or the cumulative impacts described in the timber EIS and SEIS were considered adequate, and therefore, no discussion was necessary.

(EA at 11). Appellants have not proven that BLM's efforts at compliance with section 1502.20 constituted error in fact or in law.

Finally, appellants argue that BLM should have provided a "worst case analysis" for impacts to wildlife (SOR at 4). A worst-case analysis is required where there has been a determination by an agency that there is incomplete or unavailable information during the course of its preparation of an EIS. 40 CFR 1502.22. Pertinently, 40 CFR 1502.22 provides that: "[w]hen an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." (Emphasis supplied.) The regulation continues by specifying how the agency is to proceed in either of two events: (1) when overall costs of obtaining relevant information are not exorbitant, and (2) when such overall costs are exorbitant, or the information is otherwise not obtainable. The requirement to provide information under this regulation is limited to environmental impact statements. A threshold finding that BLM should have prepared a supplemental EIS is required in order for this argument to have merit. Since appellant has not shown that BLM erred in law or fact in finding no significant impact, and consequently a supplemental EIS was not prepared, we do not reach 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 to proceed with the Copco timber sale is affirmed.

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Franklin D. Arness  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE HORTON DISSENTING:

I am constrained to dissent. In my view, the appeal should be declared moot. Accordingly, any discussion of the merits should occur as dicta, rather than as formal rulings on substantive issues raised by the appeal.

The mootness question, in the context of timber sale appeals, was recently examined in the Board's decision in In Re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (1990). That opinion may be cited for the proposition that where a timber sale appeal raises site-specific issues, the Bureau of Land Management (BLM) has placed its decision in full force and effect, no court or Board order has issued staying the decision appealed from, and the cutting allowed by BLM has been effectuated, an appeal from BLM's decision may properly be dismissed as moot. Each of these elements pertains here.

In granting BLM's request for dismissal in the Jamison Cove case, following a review of pertinent Board and court cases concerning mootness, the Board said:

The arguments raised by Headwaters, while charging violations of statutes and guidelines, are all fact specific to the Jamison Cove Fire Salvage Timber Sale, and BLM rebutted each one in its answer. However, even if such issues could be considered as recurring, they are clearly not evasive of review. Just as in this case, should BLM, in a future timber sale case, place its decision in full force and effect, a person challenging that decision may request that the decision be stayed, and if that person satisfies the standards adopted by the Board in Marathon Oil Co., 90 IBLA 236, 245, 93 I.D. 6, 11-12 (1986), a stay will be granted. In this case, Headwaters did not satisfy those standards. [Footnote omitted.]

114 IBLA at 54-55.

As in the above appeal by Headwaters from a specific timber sale, it is also true here that while relief cannot be given that would protect the sale area in question from adverse effects alleged by appellants to be a consequence of logging, any future sale to which objection is made may provide the basis for airing similar objections. The only difference between this appeal and the Jamison Cove case is that the Board ruled on appellant's stay request in the latter, an action that was not accomplished here. Nonetheless, the Board's consideration and action on appellant's stay request in the Jamison Cove matter was cited as one of the reasons for approving of dismissal:

Thus, two reasons militate for dismissal of this appeal: (1) Headwaters' objections to the timber sale received a preliminary, but careful, review leading to our order of November 21,

1988, and (2) to the extent any of Headwaters' arguments may be considered as recurring, they are not evasive of review.

114 IBLA at 55.

While the decision in the Jamison Cove case does not characterize the Board's consideration of the stay request as a precondition for allowing dismissal on grounds of mootness, it was obviously a matter of some importance to the panel. Here, in the absence of action by the Board on the stay request filed by appellants, it is not inappropriate for the Board to discuss appellants' objections to the sale notwithstanding that the matter is moot. However, as a matter of law no such discussion is required, and Board comment on the merits should be regarded as dicta.

The majority opinion refers to BLM's allowance of logging activity following the Ninth Circuit Court of Appeals September 6, 1989, decision in Portland Audubon Society v. Lujan, 884 F.2d 1233, as "premature" and that the Board's order of March 14, 1989, suspending the appeal "did not provide that the timber should be cut in the event judicial review should be interrupted by legislative action, or that failure to succeed in the Federal court action would permit an immediate cut of the Copco timber" (Decision at 132-33). It is the case, however, and the only point of immediate significance, that the Board's order did not preclude logging activities. The implication of the majority opinion is that the Board, in some fashion, had issued a stay of the effectiveness of the decision appealed from and that BLM disregarded the Board's order. That is not the case and BLM has not acted in contravention of any Board orders.

We must look in the first instance to the legal status of a BLM decision denying a protest to a proposed timber sale. At one time, such decisions were not deemed effective pending an appeal therefrom unless so ordered by the Board. Such decisionmaking fell within the ambit of 43 CFR 4.21(a), which provides in part:

(a) Effect of decision pending appeal. Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.

In 1984, a duly promulgated exception to the above "automatic stay" rule was published by BLM regarding forest management activities. Thus, the regulations controlling in this case provide:

§ 5003.1. Effect of decisions; general.

The filing of a notice of appeal under Part 4 of this title shall not automatically suspend the effect of a decision governing or relating to forest management as described under Subparts 5003.2 and 5003.3.

§ 5003.3 Protests.

(f) Upon denial of a protest filed under paragraph (a) of this section the authorized officer may proceed with implementation of the decision.

Citing to the above regulations, BLM's Answer, filed February 3, 1989, by the District Manager, Medford District, states:

The more recent provisions under 43 CFR 5003.3 supersede the automatic stay provision under Part 4 and allow the Authorized Officer to proceed with the full force and effect implementation of a timber sale decision.

As stated in my letter to Headwaters, dated September 12, 1988, the Copco Timber Sale has been awarded to Croman Corporation, the high bidder, in accordance with 43 CFR 5003.3(f).

(Answer at 4).

The only obstacle to the contractor undertaking immediate removal of timber from the Copco sale area following BLM's September 12, 1988, decision was the issuance of various injunctions by the Federal district court and the Court of Appeals in Portland Audubon Society, supra. Headwaters, one of the appellants in this case, was one of the plaintiffs in the above action. It was certainly aware of the Ninth Circuit's September 6, 1989, decision, which, among other things, vacated an injunction it had previously entered barring logging in the Copco sale area, inter alia, and which remanded for district court review "non-NEPA" claims raised by the plaintiffs, leaving for the district court to decide "whether these remaining claims would justify preliminary injunctive relief." 884 F.2d at 1233, 1242.

Yet, it was not until December 15, 1989, that the Board heard from appellants reporting upon the Ninth Circuit's September 6 decision, this following a Board order entered on November 20, 1989, noting the decision and asking the parties to advise "whether the order suspending this appeal should continue in effect or whether the decision of the Court of Appeals is dispositive of the issues before us." Appellants' December 15, 1989, response states in part:

Although the Ninth Circuit opinion disposed of the NEPA claims on jurisdictional grounds, as the Board has recognized, it remanded the case back to the district court to hear claims regarding the O&C Act, the Migratory Bird Treaty Act, and FLPMA. Because all of those issues pertain to our appeal of the Copco sale, the Board should defer its decision on the merits of our appeal until a final ruling on the issues by the District Court. [Emphasis in original.]

(Response at 1). Appellant's response made no mention of its stay request on file with the Board, which had been taken under advisement by Board order dated January 23, 1989.

BLM's response was received after appellants' and states:

In response to your order dated November 20, 1989, we are sending you the latest information on the Portland Audubon Society et. al. vs. Lujan. The Ninth Circuit Court rendered an opinion affirming the District Court decision to bar the NEPA claim. The Ninth Circuit, however, reversed and remanded plaintiffs' non-NEPA claims. Upon remand, the District Court granted the government's motion to dismiss on the basis that Section 318 of the Interior Department's FY 1990 Appropriations Act made the case moot. The plaintiffs' motion for an injunction pending appeal is on the District Court's docket for a decision without oral argument on February 12, 1990.

Subsequent to the vacation of the injunction by the Ninth Circuit in September, 1989, the Copco sale was logged prior to the seasonal restriction beginning on November 1st as required under Section 41(B)(8) of the contract. The cutting rights on the Copco contract expired January 16, 1990.

We request that this appeal be dismissed as moot in light of Headwaters Inc. v. Bureau of Land Management, etc., et al., 9th Cir. No. CA 88-3825, DC No. CV-87-1275[,] Memorandum dated September 28, 1989, \* \* \* in which the case was remanded with instructions to vacate the judgment and dismiss the appeal as moot because the disputed units had been logged. The same rationale should apply to this appeal.

(BLM Response at 1-2).

That cutting permitted by regulation, contract, and court order was effectuated is not a matter for which BLM must separately account. Nor did it fail to satisfy the request of the Board for status information on litigation. The pertinent language in our March 14, 1989, order suspending the appeal states:

[I]t is apparent that appellants have elected to pursue their claim that the Copco sale ought not to proceed with the Federal Courts. An economy of effort will be best achieved if this Board refrains from proceeding further until the judicial remedy will have been fully explored. It is requested that the parties inform this Board when proceedings in the Federal Courts concerning this matter are concluded. Until the parties inform the Board that they wish to proceed further with this matter, consideration of the appeal before us will be suspended. [Emphasis added.]

(Order at 1).

In the first place, the Ninth Circuit's September 6, 1989, decision did not fully conclude the litigation. Neither party reported on the decision to us until after we asked for their views about the case in our November 20, 1989, order. As previously noted, appellants' advice concerning the Ninth Circuit's decision was that "the Board should defer its decision on the merits of our appeal until a final ruling on the issues by the District Court." Assuming it was incumbent on BLM to report on the Ninth Circuit's opinion, it did so. That neither BLM nor appellants reported to the Board promptly after the court's decision seems merely to underscore that neither party was moved to proceed further with the administrative appeal while issues remained at the district court level.

This case is moot because the trees sought to be protected from removal have been removed and the issues raised by appellants, while capable of repetition, are not evasive of review.

Wm. Philip Horton  
Chief Administrative Judge

