

OREGON NATURAL RESOURCES COUNCIL

IBLA 90-253, et al.

Decided November 5, 1990

Appeals from decisions of Resource Area and District Offices, Oregon, Bureau of Land Management, denying protests of timber sales. OR-120-TS90-27, et al.

IBLA 90-393 dismissed; decisions in IBLA 90-328, 90-346, 90-367, 90-397, and 90-439 set aside and remanded; all other decisions affirmed.

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

BLM properly denies a protest to a proposed timber sale where it has, in the course of its entire pre-sale environmental review, fully considered all of the probable environmental impacts, both site-specific and cumulative, of the sale and concluded that no significant environmental impact will result which has not already been considered in an applicable environmental impact statement, and the appellant has failed to demonstrate otherwise.

2. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Timber Sales and Disposals

Where, following a BLM decision denying a protest to a proposed timber sale and an appeal thereof, the U.S. Fish and Wildlife Service lists the northern spotted owl as a threatened species and BLM suspends the sale contracts pending the outcome of consultations with the U.S. Fish and Wildlife Service, the Board will set aside the BLM decision and remand the case to BLM for further review of the effect of the listing.

3. Timber Sales and Disposals

A series of approved timber sales will not be considered to constitute a taking of a migratory bird prohibited by sec. 2 of the Act of July 3, 1918, as amended, 16 U.S.C.

§ 703 (1988), where there is no evidence that the cutting of old-growth timber so degrades the environment as to lead to the death of any migratory bird.

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

Allowing the harvesting of timber on O & C lands does not violate the broad principle of multiple use management governing BLM's actions under the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1701-1784 (1988), where such land is, instead, to be managed for permanent forest production pursuant to the Act of August 28, 1937, as amended, 43 U.S.C. §§ 1181a-1181f (1988).

APPEARANCES: Wendell Wood, Western Representative, Oregon Natural Resources Council, Eugene, Oregon, for Oregon Natural Resources Council; A. Troy Reinhart, Executive Director, Douglas Timber Operators, Inc., Roseburg, Oregon, for Douglas Timber Operators, Inc.; Ralph Saperstein, Vice President, Forest Policy, Western Forest Industries Association, Portland, Oregon, for Western Forest Industries Association; Mark Fleming, Chairman, Willamette Forestry Council, Creswell, Oregon, for Willamette Forestry Council; John Blodgett, Western Timber Co., Portland, Oregon, for Western Timber Co.; Roger W. Nesbit, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

#### OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Oregon Natural Resources Council (ONRC) has appealed from 33 decisions of Bureau of Land Management (BLM) district and resource area managers in western Oregon each denying the protest of a particular proposed fiscal year 1990 timber sale and deciding to proceed with the sale. These sales involve the removal of from 924 to 9,132 MBF (thousand board feet) of timber per sale from areas ranging from 14 to 289 acres of public land by means of partial and clearcutting and the concomitant construction and upgrading of the roads necessary for providing access to the harvest sites. <sup>1/</sup> Combined, the authorized timber sales will result in the removal of 164,646 MMBF of timber from 3,054 acres of public land. We have consolidated all of ONRC's appeals because they present similar legal and factual issues.

#### I. Procedural and Factual Background

In each case, BLM's decision to proceed with the proposed timber sale was preceded by preparation of an environmental assessment (EA), which was

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<sup>1/</sup> Appendices A and B list the various appeals and identify the decisions being appealed from and the corresponding timber sales.

tiered with a programmatic environmental impact statement (EIS), in which BLM analyzed the environmental consequences of the sale in order to determine whether the sale would result in a significant impact to the quality of the human environment. These steps were taken to comply with the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1988). <sup>2/</sup> These EA's, prepared by an inter-disciplinary team of BLM employees, assessed the environmental impact of the sales either in terms of each proposed sale or as part of all of the sales proposed during fiscal year 1990 for the particular district or resource area involved.

Based on each EA, the BLM district or resource area manager made a finding of no significant impact (FONSI) with respect to the relevant timber sales concluding that proceeding with the sales, with the adoption of the specific design features and mitigating measures proposed in the EA and the programmatic EIS, would not result in any significant environmental impact and, thus, a site-specific EIS was not required by section 102(2)(C) of NEPA.

In addition, in order to determine whether and to what extent each proposed timber sale would conflict with the northern spotted owl (Strix occidentalis caurina), which, prior to the appeals involved herein, was considered a proposed threatened species (see 54 FR 26666 (June 23, 1989)), BLM sought review of the sale by the U.S. Fish and Wildlife Service (FWS), pursuant to the informal conferencing process provided for at section 7(a)(4) of the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. § 1536(a)(4) (1988), and by the relevant timber sale advisory

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<sup>2/</sup> EA's prepared with respect to the proposed timber sales in the following BLM districts were tiered with the corresponding EIS's which analyzed the environmental impact of BLM's 10-year timber management plans in those districts: Coos Bay District - South Coast and Curry Sustained Yield Units Ten-Year Timber Management Plan Final EIS (March 1981); Salem District - Eastside Salem Sustained Yield Units Ten-Year Timber Management Plan Final EIS (May 1983) and Westside Salem Sustained Yield Units Ten-Year Timber Management Plan Final EIS (December 1981); Eugene District - Eugene Sustained Yield Units Ten-Year Timber Management Plan Final EIS (May 1983); Medford District - Josephine Sustained Yield Unit Ten-Year Timber Management Plan EIS (October 1978), Jackson and Klamath Sustained Yield Units Ten-Year Timber Management Plan EIS (November 1979), and Final Supplement to the Final EIS's for the Josephine and Jackson-Klamath Sustained Yield Units Ten-Year Timber Management Plans (May 1985); Roseburg District - Roseburg Sustained Yield Units Ten-Year Timber Management Plan EIS (May 1983).

BLM also relied on its February 1987 Spotted Owl EA. This EA was intended to determine whether BLM needed to prepare supplemental EIS's in connection with any of its seven 10-year timber management plans because of significant new information regarding the habitat requirements of the northern spotted owl and, thus, the effect of timber sales on the owl. In an Apr. 10, 1987, Record of Decision (ROD), the BLM State Director concluded that supplemental EIS's were not required because the new information regarding spotted owls did not significantly alter any of the conclusions of the 10-year timber management plan EIS's.

board, pursuant to section 318(c) of the Act of October 23, 1989, 103 Stat. 747 (1989).

In various records of decision (ROD), the BLM district and resource area managers decided to proceed with the proposed timber sales. ONRC filed protests challenging those decisions, primarily on the basis that BLM had failed to consider adequately the environmental impact of the sales and that the sales would result in significant adverse environmental impacts, thus necessitating preparation of a site-specific EIS. BLM denied those protests in the decisions under appeal herein. 3/ In these decisions, the BLM managers, after discussing at considerable length all of the arguments contained in ONRC's protests, stated that BLM would go ahead with the challenged timber sales, as provided in 43 CFR 5003.3(f). 4/ The record indicates that BLM has, in most cases, accepted the high bids and issued contracts, thus permitting roadbuilding and timber harvesting to go forward. See 43 CFR 5003.1; 43 CFR 5003.3. At present, we are not aware of the extent to which roads have been built or timber cut.

## II. Requests for Stay

As part of its notices of appeal and statements of reasons (SOR) for appeal, ONRC requests the Board to stay the subject timber sales, which would have the effect of precluding either the awarding of any unawarded timber sale contracts, or, in the case of awarded contracts, any subsequent roadbuilding or timber harvesting activity. ONRC contends that allowing the sales to go forward will result in irreversible environmental damage,

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3/ In one of the appeals (IBLA 90-393), BLM requested dismissal alleging that the notice of appeal was untimely. In that case, BLM issued its decision on Apr. 5, 1990, and ONRC received it on Apr. 6, 1990. The notice of appeal from that decision, dated May 6, 1990, was not filed with BLM until May 9, 1990, more than 30 days after service on ONRC of the BLM decision. Thus, ONRC failed to comply with 43 CFR 4.411(a). Further, ONRC cannot take advantage of the grace period provided for by 43 CFR 4.401(a), because the record shows that the notice of appeal, although filed within 10 days of the deadline for filing (May 7, 1990), was received in an envelope postmarked on May 8, 1990, and, thus, was not "transmitted or probably transmitted" to BLM before the deadline, as required by that regulation. Accordingly, ONRC's appeal was untimely and, for that reason, must be dismissed. See 43 CFR 4.411(c); Stewart L. Ashton, 107 IBLA 140, 141 (1989).

4/ Western Timber Company, the company awarded the contract in IBLA 90-439, has requested intervention. That request is granted. Various organizations have also requested that they be allowed to intervene in the present proceeding, asserting various interests in the proceedings. We are not persuaded, however, that they would have standing independently to maintain an appeal under 43 CFR 4.410(a). Therefore, we must deny their requests to intervene. See Sierra Club - Rocky Mountain Chapter, 75 IBLA 220, 221 n.2 (1983). Nevertheless, we will accord those organizations status as amici curiae: Douglas Timber Operators, Inc. (IBLA 90-253, 90-351, 90-353); Western Forest Industries Association (IBLA 90-254); and Willamette Forestry Council (IBLA 90-264, 90-316).

thus harming the interests of the general public and specifically those of its members, who use and enjoy the various forested areas. ONRC further argues that this damage is not outweighed by the purely financial harm that will befall the logging companies and the local communities supported by such companies as a result of staying the timber sales. BLM opposes all of ONRC's stay requests.

In view of the purported importance of the subject timber sales to the local timber industry and economy in western Oregon, on the one hand, and the possible adverse environmental impacts of the sales, on the other hand, and because time is of the essence, we have, *sua sponte*, chosen to expedite our consideration of the merits of the cases, thereby negating the necessity for ruling on the stay requests.

### III. Decision

After a careful review of the record in each case, we conclude that ONRC has failed to establish that BLM erred in any respect in denying ONRC's protests with respect to any of the sales under the circumstances existing at the time of BLM's decisions. Therefore, under ordinary circumstances we would affirm all of BLM's decisions.

However, since the filing of ONRC's appeals, FWS has listed the northern spotted owl as a threatened species, effective July 23, 1990, thereby affording it the protection envisioned by section 7(a)(2) of the ESA, as amended, 16 U.S.C. § 1536(a)(2) (1988). See 55 FR 26114 (June 26, 1990). That statutory section provides that, in authorizing any action, each Federal agency "shall, in consultation with and with the assistance of the Secretary, insure that [such] action \* \* \* is not likely to jeopardize the continued existence of any \* \* \* threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary \* \* \* to be critical." 16 U.S.C. § 1536(a)(2) (1988). For the reasons discussed infra at B., we conclude that the proper course of action for the Board in five of these timber sale cases is to remand them to BLM for further review of the effect of the listing of the northern spotted owl as a threatened species.

The following is our analysis of the arguments raised by ONRC in these appeals.

#### A.

[1] In general, ONRC argues that, in preparing its EA's, BLM failed to consider various environmental impacts of the subject timber sales, in terms of either the specific impacts of a particular sale or the cumulative impacts of a particular sale in conjunction with other past, present and reasonably foreseeable sales. In this connection, ONRC cites the anticipated adverse impacts resulting from the sales on mature (80- to 200-year-old) and "old-growth" (over 200-year-old) stands of timber, and on fish, wildlife, soil and water resources, forest productivity, and recreational and visual resources. ONRC argues that all of these resources are threatened by removal of the timber, with the result not only of loss of the trees, but also of loss of wildlife habitat, increased erosion of the soil, and scouring and sedimentation of adjacent streams.

ONRC bears the burden of supporting its challenges to the adequacy of BLM's environmental review with "objective proof." In re Crane Prairie Timber Sale, 109 IBLA 188, 195 (1989) (quoting from In re Upper Floras Timber Sale, 86 IBLA 296, 305 (1985)). Our review of the records in these cases, including all the EA's, EIS's, and the BLM staff reports, reveals that BLM did, in fact, consider all of the environmental impacts to which ONRC makes reference, and ONRC has failed to provide the necessary objective proof to establish otherwise. 5/

Specifically, ONRC argues that BLM failed to consider the cumulative impact of the subject timber sales on local watersheds. We agree that, in evaluating the environmental impact of a proposed action, BLM is required to assess the cumulative impact of the action in conjunction with other past, present and reasonably foreseeable actions. See Thomas v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985); G. Jon & Katherine M. Roush, 112 IBLA 293, 305 (1990). We do not agree, however, that BLM failed to do so here.

Included in or appended to each EA is an assessment of the potential cumulative impact of the sale, together with other sales (both BLM and private), on the local watershed. Also, each EA is tiered to an EIS, which likewise contains an analysis of the impact of timber harvesting on the watershed in the sale area. ONRC has not demonstrated any cumulative impact to the watersheds likely to occur as a result of any of the sales in conjunction with other sales, which has not already been considered by BLM. ONRC's bare assertion that all of the sales together will degrade the watersheds is not sufficient to establish error on the part of BLM. See G. Jon & Katherine M. Roush, supra.

ONRC asserts, in instances where BLM assessed the environmental impact of the timber sales on a district or resource area-wide basis, that BLM improperly failed to assess the site-specific environmental impacts of the sales. We disagree.

First, the record discloses that BLM discusses the particular timber sales either in the body of the EA's or in documents appended to the EA's, indicating that BLM was well aware of the existing environment in each of the sale areas and the impact on that environment of the sale. Second, the record reflects that BLM prescribed, with respect to each sale area, particular design features and mitigating measures, depending upon the character of the sale units. These features were clearly designed to minimize the adverse environmental consequences within each sale area to the point that BLM could accurately conclude in the case of all of the sale

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5/ The only exceptions were where BLM concluded that there was no realistic possibility that the asserted environmental impact would occur given the design of the sales and past experience. Thus, BLM did not analyze the effect of either an inability to reforest logged areas, blowdowns of remaining unprotected timber, release of dioxin as a result of slash burning, or wildfires stemming from prescribed burns. We conclude that BLM was correct not to analyze these matters where ONRC has failed to present any evidence that they are likely to occur.

areas that no consequences would exceed those which had already been analyzed in the EIS's. Third, ONRC has failed to demonstrate in what ways BLM did not assess the site-specific environmental impacts of the timber sales.

ONRC also contends that BLM failed to consider the environmental consequences of a "no action" alternative in the case of each of the subject timber sales. We note that, while the EA's prepared with respect to the individual sales did not address the impacts of not proceeding at all with the sales, except in the sense of deferring timber harvesting, the programmatic EIS's, which considered the impacts of all of the sales in the BLM districts, did contain such analysis. Where EA's are tiered to EIS's, this is sufficient. See Oregon Natural Resources Council, 115 IBLA 179, 186 (1990).

ONRC further disputes BLM's conclusions that no significant environmental impacts will result from the subject timber sales, contending that, considering the factors set forth at 40 CFR 1508.27, the sales will have significant adverse environmental impacts, thus requiring the preparation of site-specific EIS's pursuant to section 102(2)(C) of NEPA.

Section 102(2)(C) of NEPA requires preparation of an EIS in the case of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988). <sup>6/</sup> In order to assist a Federal agency in determining whether a proposed action will likely result in a significant environmental impact and, thus, necessitate preparation of an EIS, 40 CFR 1508.27 sets forth various factors for consideration by the agency.

ONRC argues first that the impacts of the sales will be significant because of the unique characteristics of the sale areas, stating that the mature and old-growth timber which comprises the sale areas is "on the verge of extinction" (SOR, Thomas Mountain Timber Sale, at 9). Under 40 CFR 1508.27(b)(3), significance may be determined in part on the basis of whether the geographic area of the proposed action has "[u]nique characteristics."

BLM reports that, in western Oregon alone, it has precluded timber harvesting in "143,000 acres of forest stands over 200 years old" (Answer,

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<sup>6/</sup> Section 102(2)(C) of NEPA is a procedural statute. It does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978); James River Flood Control Association v. Watt, 553 F. Supp. 1284, 1295 (D.S.D. 1982). It is clear that BLM has afforded the subject timber sales such consideration. That ONRC would take a different course of action, based on that same analysis, does not establish a violation of section 102(2)(C) of NEPA. See Oregon Natural Resources Council, supra at 186-87.

Thomas Mountain Timber Sale, at 8). The record indicates that this represents almost 6 percent of all of the BLM-administered lands in western Oregon and almost 30 percent of the old-growth forest found, as of April 1, 1987, on such lands. In addition, BLM reports that it anticipates having "around 400,000 acres of old-growth forest stands and a similar acreage of mature stands (totalling about 40 percent of BLM's commercial forest land) \* \* \* when we complete our land use plans for the 1990's." Id. As of June 1, 1990, there were 425,000 acres of mature forest and 433,000 acres of old-growth forest on BLM-administered lands in western Oregon. See Attachment H to BLM Brief, dated Aug. 17, 1990, at 8.

As noted in Portland Audubon Society v. Lujan, 884 F.2d 1233, 1235 (9th Cir. 1989), most old-growth timber in western Oregon is located on National Forest lands, with BLM land accounting "for approximately one-fifth of the remaining old-growth timber." In light of these statistics, we cannot conclude that ONRC has shown that the impacts of the sales will be significant.

ONRC next argues that the impacts of the sales will be significant because the sales have generated public controversy. BLM points out, however, that there was no objection to the sales until the filing of ONRC's protests. Under 40 CFR 1508.27(b)(4), the question regarding significance is whether the proposed action is likely to be "highly controversial." This does not mean whether the action is subject to public opposition, but, rather, whether it has generated any substantial dispute as to its size, nature or effect. See Sierra Club v. U.S. Forest Service, 843 F.2d 1190, 1193 (9th Cir. 1988); Glacier-Two Medicine Alliance, 88 IBLA 133, 143-44 (1985), and cases cited therein. ONRC's public controversy allegation does not support a conclusion that the environmental impacts of the sales will be significant.

ONRC further asserts that the sales will, in conjunction with other past, present and reasonably foreseeable sales, result in significant cumulative impacts. Under 40 CFR 1508.27(b)(7), a proposed action is significant "if it is reasonable to anticipate a cumulatively significant impact on the environment." See Glacier-Two Medicine Alliance, supra at 145. In the absence of any supporting evidence, we are not persuaded that it is reasonable to expect that the sales will, together with other sales, cumulatively affect the environment in any significant way. Compare Sierra Club v. U.S. Forest Service, supra at 1194.

In general, ONRC has not demonstrated that any of the environmental impacts of the subject timber sales to which it alludes are, given the design features and mitigating measures built into the sales, likely to significantly affect the quality of the human environment, so as to require preparation of a site-specific EIS. 7/ ONRC merely asserts that this will be the case. It has submitted no proof. Such failure is fatal to ONRC's

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7/ ONRC also suggests that the design features and mitigating measures which BLM intends to implement in conducting the sales will not be adequate to minimize the impact of the sales to an insignificant level. The burden is upon ONRC to establish the inadequacy of these measures. It has failed to do so. See In re Blackeye Again Timber Sale, supra at 111.

case where it ultimately bears the burden of proving error on the part of BLM in this regard. See In re Blackeye Again Timber Sale, 98 IBLA 108, 110 (1987).

Overall, the record establishes that BLM took a hard look at the environmental consequences of proceeding with the subject timber sales, considering all relevant matters of environmental concern, and reasonably decided to go ahead with the sales based on this analysis. In this manner, BLM fulfilled its duty under section 102(2)(C) of NEPA. See G. Jon & Katherine M. Roush, supra at 297.

B.

ONRC presents a number of arguments directed at the alleged negative effect of the sales on the northern spotted owl and its habitat. It charges that NEPA has been violated because the impact of the sales will likely be significant given the fact that they might adversely affect the northern spotted owl, which is "regarded by many scientists as endangered," where such owls "could potentially find important habitat in the sale area" (SOR, Thomas Mountain Timber Sale, at 9). In terms of deciding whether a proposed action might significantly affect the human environment, 40 CFR 1508.27(b)(9) instructs an agency to consider the degree to which the action "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical." (Emphasis added.)

At the time BLM conducted its environmental reviews of the subject sale areas, the northern spotted owl was listed neither as an endangered nor as a threatened species. Therefore, despite the fact that BLM's policy is to treat proposed species (which the northern spotted owl was at that time) as if they have been listed, except that formal consultations are not required (BLM Manual 6840.06(B) (Sept. 16, 1988)), 40 CFR 1508.27(b)(9) was not controlling as to BLM's determinations regarding the effects of the sales.

In addition, prior to approving the subject timber sales, BLM sought, pursuant to section 7(a)(4) of ESA, 16 U.S.C. § 1536(a)(4) (1988), and 50 CFR 402.14, formal conferencing with FWS regarding the effect of the sales on the northern spotted owl, then considered a proposed threatened species. Attachment A to BLM Brief, dated Aug. 17, 1990. BLM later changed that request to informal conferencing. Attachment D and E to BLM Brief, dated Aug. 17, 1990. Also, in each case, BLM sought the recommendation of an advisory board, composed of seven individuals named by the Secretary, including representatives of environmental and business concerns, pursuant to section 318(c)(2) of the Act of October 23, 1989, 103 Stat. 748 (1989).

ONRC faults BLM for failing to notify the advisory boards reviewing the subject timber sales of the conclusions of FWS regarding the effect of the sales on the northern spotted owl, and it also asserts that BLM erred in not considering such conclusions.

ONRC has not directed our attention to any statute or regulation which requires BLM to notify the advisory board of the result of the FWS conferencing; nor are we aware of any. Section 318(c)(2) of the Act of

October 23, 1989, only requires BLM to consider the separate recommendations of FWS and the advisory board. It does not say that the advisory board must render its opinion based on that of FWS, or vice versa. It is left for BLM to weigh the two independently derived recommendations together and to sort through any conflict in the recommendations. 8/

ONRC also contends that BLM failed properly to consider the conclusions of FWS regarding the effect of the subject timber sales on the northern spotted owl. ONRC refers to certain comments by FWS with respect to the anticipated adverse effect on the spotted owl from any reduction of existing and potential habitat and from any failure to leave connecting corridors between existing and potential habitat.

Contrary to that contention, the record shows that BLM received and considered FWS' comments prior to its decisions to proceed with the timber sales. It is clear that BLM made the decision to protect designated spotted owl habitat areas, i.e., the 110 areas (each averaging about 2,100 acres of suitable spotted owl habitat) identified in the December 1987 BLM/Oregon Department of Fish and Wildlife (ODFW) agreement and the additional 12 areas (each averaging about 1,900 acres of suitable spotted owl habitat) established pursuant to section 318(b)(5) of the Act of October 23, 1989, 103 Stat. 746-47 (1989). 9/ Further, BLM concluded that the sales would not affect the viability of these designated habitat areas, although some of the sale areas would be situated in close proximity to these areas, because the overall acreage outside of the habitat areas would not be reduced below that believed to be necessary to support the owls. 10/ Further, BLM states on appeal that it has, in some cases, also provided for connecting corridors between existing and potential habitat.

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8/ ONRC asserts that BLM biased the recommendations of the advisory boards in favor of approving the sales by informing the boards that they "would have to release all of the volume of timber sales they were to review in order for the Bureau to meet its assigned timber target" (SOR, Panther Bob Timber Sale, at 3). Assuming that BLM so informed the boards, we do not agree that such a statement would have been prejudicial. Such information would have merely constituted informal advocacy by BLM of its position for proceeding with the sales. It would not have removed the independent authority of the boards to render recommendations. We note that, in one instance involved herein, the advisory board recommended that BLM not proceed with the timber sale. See also Table 6 of Attachment H to BLM Brief, dated Aug. 17, 1990. In these circumstances, we cannot conclude that BLM acted in violation of section 318(c) of the Act of Oct. 23, 1989.

9/ Under section 318(b)(5) of the Act of Oct. 23, 1989, BLM was generally precluded from conducting any timber sales in the spotted owl habitat areas either as identified in the December 1987 BLM/ODFW agreement or established pursuant to that statutory section.

10/ In only one case was a portion of a sale area, i.e., unit 2 of the Slater Slider (formerly the Easy Slider) timber sale, within a designated habitat area (Slide Creek). In that case, BLM reports that this portion of the sale was authorized pursuant to the December 1987 BLM/ODFW agreement, under which the habitat area was designated. Thus, this portion of the sale did not violate the prohibition in section 318(b)(5) of the Act of Oct. 23, 1989, which excluded "sales identified in said agreement".

Therefore, it appears that ONRC's concern is not that BLM failed to consider FWS' comments, but that it decided to go ahead with the sales in the face of certain negative comments. However, we are not aware of any requirement that BLM withdraw sales because of negative comments by FWS, particularly where FWS did not recommend that the sales not go forward, but only that BLM adopt measures to minimize or avoid adverse consequences of the sales. 11/

In any event, the original comments by FWS did not indicate that the sales would have a significant adverse effect on spotted owls. In many cases, according to the record as developed at the time of the BLM decisions, neither FWS nor BLM could identify any owl pairs which might be adversely affected by the sales, especially where the nesting site or activity center of a pair was located further than 2.1 miles from the sale area (as was the case with 15 of the 33 timber sales). 12/ As explained by FWS in a December 21, 1989, document entitled "A Fish and Wildlife Service Overview of the Bureau of Land Management Timber Sale Program for Fiscal Years 1989-1990" (Overview), at page 3, the 2.1-mile radius surrounding a nesting site or activity center, encompassing approximately 9,000 acres, approximates the "average home range size for paired birds on [BLM] lands [and] \* \* \* does not necessarily reflect the actual home range of a specific pair of birds." See February 1987 Spotted Owl EA, at 14 (actual home ranges range from 2,800 to 10,400 acres). In the remaining cases, BLM concluded that, although the sale areas would be located within 2.1 miles of a nesting site or activity center, clearcutting would be far enough away and/or leave suitable habitat areas with, in most cases, sufficient undisturbed acreage surrounding owl pairs (in some cases, exceeding the 2,500 and 3,800 acres considered fully adequate by FWS, respectively, in the Coast Ranges and Klamath Mountain provinces and the Cascade provinces of western Oregon). 13/ Also, although clearcutting, in

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11/ Section 318(c)(2) of the Act of Oct. 23, 1989, required BLM only to "consider recommendations made by [FWS]." 103 Stat. 748 (1989); see also 50 CFR 402.10(c).

12/ These 15 sales are the Green Hornet, Camas Creek, Rock Creek, Bear Spot, Easy Elk, Bearwood, Buck Roberts, New Shoe, Siletz Forty, Over the Rainbow, Daniel's Divide, Northwest Cedar, Windy Car, Bell Creek, and Tall Oak II.

13/ In its Dec. 21, 1989, "Interim Guidelines to Assist in Review of Timber Sales" (Interim Guidelines) at page 2, FWS recommended that BLM concentrate its review of timber sales on timber harvesting activity between 0.5 and 2.1 miles of a nesting site or activity center for a northern spotted owl pair unless more than 2,500 acres of suitable habitat, in the case of sales in the Coast Ranges and Klamath Mountain provinces, or 3,800 acres of suitable habitat, in the case of sales in the Cascade province, remained within the 2.1-mile radius after timber harvesting. Thus, FWS regarded 2,500 and 3,800 acres as fully adequate habitat in the respective provinces. However, in addition, FWS indicated that 1,000 acres, in the case of the Coast Ranges and Klamath Mountain provinces, and 2,100 acres, in the case of the Cascade province, is the minimal amount of habitat that must remain between 0.5 and 2.1 miles of a nesting site or activity center. FWS stated that otherwise "[s]ufficient habitat may not be available to support viable spotted owl

these instances, would reduce spotted owl habitat within a 2.1-mile radius of the identified owl pairs, according to FWS, this would only raise the possibility that owls would be adversely affected by reducing available habitat and limiting their ability to disperse between physiographic provinces. In only one case (Slater Slider), according to the record, would the timber sale intrude into what is considered by FWS the "core nest site," i.e., within 0.5 miles of a nesting site or activity center (Overview at 4). However, as noted above, this is an excepted sale. See note 10.

[2] As noted supra, effective July 23, 1990, the northern spotted owl was officially listed as a threatened species. The question introduced by that listing was whether allowing the subject timber sales to proceed would likely jeopardize the continued existence of that species and/or result in the destruction or adverse modification of its critical habitat, contrary to section 7(a)(2) of the ESA, 16 U.S.C. § 1536 (a)(2) (1988). See Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 687 (D.C. Cir. 1982); Missouri Coalition For The Environment v. Corps of Engineers of United States Army, 678 F. Supp. 790, 803 (E.D. Mo. 1988), aff'd, 866 F.2d 1025 (8th Cir.), cert. denied, 110 S. Ct. 76 (1989).

Thereafter, the Board, by order dated July 30, 1990, requested BLM to apprise it regarding the "effect of the listing on the [subject] appeals, including what action, if any, it has taken in light of such listing, and whether or not remand to the agency of any or all of these timber sale cases would be appropriate."

On August 20, 1990, BLM responded to the Board's order, indicating that at some time following the listing it again reviewed all of its fiscal-year 1990 timber sales, including the sales involved herein, in order to determine, as a preliminary matter, if the northern spotted owl was "likely to be affected" by the action. See Enos v. Marsh, 769 F.2d 1363, 1368 (9th Cir. 1985); Attachment H to BLM Brief, dated Aug. 17, 1990. This review is contained in a "Biological Assessment" appended to Attachment H to BLM's August 17, 1990, brief along with various attachments. 14/

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fn. 13 (continued)

pairs." Id. at 2, 3. FWS' conclusion is supported by BLM's February 1987 Spotted Owl EA, which concluded, at page 15, that suitable habitat areas will range from 1,300 to 3,100 acres in size. In the majority of the present cases where timber harvesting would take place between 0.5 and 2.1 miles of a nesting site or activity center, the acreage remaining at the conclusion of harvesting would exceed the minimum. In the rest of the cases, the acreage prior to timber harvesting already did not exceed the minimum.

14/ With respect to the subject timber sales, such potential adverse effect was considered to be limited to sales where a nesting site or pair activity center was present within the contract area because BLM believed that, only in such circumstances, did it have the discretionary authority to suspend existing contracts. BLM's timber sale contracts provide that the contractor is to immediately cease all construction or timber harvest-ing operations upon notification by BLM that a spotted owl and/or a sensitive, threatened or endangered species is located in the sale area.

Based on its review of the fiscal-year 1990 timber sales, BLM concluded that seven of the subject sales might adversely affect the northern spotted owl due to the presence of a nesting site or pair activity center within the contract area. These seven sales were the Jack Creek, Big Tom Folley, Balder Alder, Boulder Cat, Good Old Boy, Puny Puddles, and Panther Bob. The remainder of the subject timber sales were considered to have no effect on the northern spotted owl.

By letter dated July 18, 1990 (Attachment H to BLM Brief, dated Aug. 17, 1990), the State Director requested FWS for a formal conference, later modified to a consultation pursuant to section 7(a)(2) of the ESA, with respect to those seven timber sales, as well as certain other sales not at issue here. See Enos v. Marsh, supra at 1368. BLM changed this request by letter dated August 7, 1990 (Attachment F to BLM Brief, dated Aug. 17, 1990), to exclude the Jack Creek and Balder Alder timber sales because BLM either determined no owls were actually present in the contract area (Jack Creek) or timber harvesting or felling had been completed prior to July 23, 1990, the effective date of FWS' listing of the northern spotted owl as a threatened species (Balder Alder).

Further, by letters dated July 19 and 20, 1990 (Attachment G to BLM Brief, dated Aug. 17, 1990, and Attachment I to BLM Correction Brief, dated Sept. 4, 1990), BLM notified the purchasers of the Big Tom Folley, Boulder Cat, Good Old Boy, Puny Puddles, and Panther Bob timber sale contracts that, owing to the determination that these sales might adversely affect the northern spotted owl, the contracts would be suspended effective July 23, 1990, pending the conclusion of BLM's consultation with FWS.

For each of the other sales, BLM determined that proceeding would not likely adversely affect the owl and, thus, it was not necessary to seek further consultation with FWS regarding whether the sales would likely jeopardize the owl's continued existence or destroy or adversely modify its critical habitat. This, in effect, constituted a determination by BLM that the sales would not violate section 7(a)(2) of the ESA.

15/

Despite being afforded an opportunity to respond to BLM's brief, ONRC has to date failed to do so. Given ONRC's failure to respond to the information submitted by BLM following our order, we must conclude that it does not object to the action taken by BLM in response to the listing. Therefore, in the face of no objection to that action, we conclude at this time that ONRC has failed to establish that the sales will likely jeopardize the continued existence of the northern spotted owl or result in the destruction or adverse modification of its critical habitat or be otherwise adversely affected by the subject sales. Nevertheless, because BLM is now consulting with FWS regarding five of the sales, we will set aside the BLM decisions on those sales (IBLA 90-328, 90-346, 90-367, 90-397, and 90-439) and remand those cases to BLM to reconsider the sales in light of the results of that consultation.

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15/ We note that FWS has not yet designated any of the sale areas as critical habitat for the owl. According to FWS, designation of critical habitat may not occur until June 23, 1991. See 55 FR 26192 (June 26, 1990).

C.

ONRC contends that BLM failed to assess fully the environmental impact of the subject timber sales on sensitive plant species within the sale areas. In response, BLM notes that the State Director has not designated any plant species in the state of Oregon as sensitive, and that it analyzed the impact of the sales only from the standpoint of threatened, endangered, and candidate species. BLM argues that it was required to do nothing more. BLM is correct.

ONRC does not identify any authority that requires designation. It merely cites the language in section 6840.06(D) of the BLM Manual (Sept. 16, 1988) to the effect that BLM state directors "may designate sensitive species." (Emphasis added.) Because no designation has been made, no assessment was required.

In the case of some of the timber sales, ONRC objects to the fact that BLM's efforts to identify the presence of sensitive, threatened or endangered plant species within the sale areas occurred not at the time of preparation of the EA's, but, rather, after issuance of the ROD's. While this was true, in each case, the ROD noted that the sale was contingent on the results of the plant surveys, stating that the sale might be withdrawn if such a species was found to be present in the sale area. Further, the record establishes that BLM decided to go forward with the sales only after completion of the surveys.

ONRC also challenges the timing of the surveys where they took place at a time when sensitive, threatened or endangered plant species would not be in evidence (winter and spring). BLM responds that it had in the past conducted surveys during the summer months and/or that its observation of the habitat was sufficient to permit it to determine the presence of such species. ONRC has submitted nothing to establish that BLM's surveys were inadequate or that BLM could not accurately gauge the presence of such species by looking for associated habitat. Nor has ONRC submitted any evidence that such species are present in the sale areas. Thus, ONRC has not shown BLM's surveys to be in error.

D.

ONRC argues that BLM failed to consider the impact of many of the subject timber sales on the viability of a particular migratory bird species, the marbled murrelet (Brachyramphus marmoratus). Specifically, ONRC states that this bird is found in the old-growth forests of coastal Oregon and that it is recognized by FWS as a Category 2 candidate for listing as a threatened or endangered species because of the increasing destruction of such forests (see 54 FR 554, 560 (Jan. 6, 1989)). 16/

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16/ Category 2 candidate species are those species for which FWS has information which "indicates that proposing to list as endangered or threatened is possibly appropriate, but for which conclusive data on biological vulnerability and threat are not currently available to support [proposed listing]." 54 FR 554 (Jan. 6, 1989).

BLM admits that it has not conducted any inventories for the marbled murrelet in the sale areas, but rather is cooperating in efforts to learn more about the bird. However, even though BLM did not consider the effect of the timber sales on the bird in any of its environmental review documents, ONRC has failed to establish error because it has not provided evidence that the species in question is found in any of the sale areas. On the other hand, BLM states that, while the bird has been observed in west-ern Oregon outside the area of the timber sales, no nests have been found anywhere in Oregon. Thus, BLM concludes that it is unlikely that this species is utilizing the habitat of the sale areas. ONRC has not shown otherwise.

ONRC indicates that BLM has failed to abide by its own "guidelines," as set forth in section 6840.06(C) of the BLM Manual (Sept. 16, 1988) (SOR, Thomas Mountain Timber Sale, at 6). That section provides that BLM "shall carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and shall ensure that actions authorized, funded, or carried out do not contribute to the need to list any of these species as T/E [threatened/endangered]." <sup>17/</sup> While the guidelines to which ONRC refers are binding on BLM, ONRC does not set forth in what ways BLM has deviated from them.

[3] Also, ONRC claims that the subject timber sales, in conjunction with other planned and ongoing sales, "threaten the [marbled] [m]urrelet with extinction" where they destroy old-growth habitat and, thus, "will result" in a "taking" of the bird, in violation of section 2 of the Act of July 3, 1918 (Migratory Bird Treaty Act (MBTA)), as amended, 16 U.S.C. § 703 (1988).

Section 2 of the MBTA renders it unlawful, except where a regulation so permits, to, "by any means or in any manner, \* \* \* pursue, hunt, take, capture, [or] kill \* \* \* any migratory bird." 16 U.S.C. § 703 (1988). The marbled murrelet is a designated migratory bird. See 50 CFR 10.13.

ONRC contends that a taking under section 2 of the MBTA should be construed in the same manner as a taking prohibited under section 9(a)(1) of the ESA, as amended, 16 U.S.C. § 1538(a)(1) (1988), and notes that a taking has been held to occur under section 9(a)(1) where habitat has been degraded to the point that extinction of a particular species could result, citing Palila v. Hawaii Department of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988), and Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988).

BLM contends that section 2 of the MBTA should not be construed to prohibit acts which reduce the habitat of a migratory bird species, argu-ing that where "there is hardly any plant species, land form, or man-made

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<sup>17/</sup> ONRC also refers to section 6840.06(B) of the BLM Manual (Sept. 16, 1988) which provides that "[s]pecies proposed for listing as T/E \* \* \* shall be managed with the same level of protection provided for T/E species." However, as the Federal Register notice listing the marbled murrelet as a Category 2 candidate species points out, such a species is not proposed for listing as a T/E species. See 54 FR 554 (Jan. 6, 1989).

structure which is not in some way used by \* \* \* a migratory bird for nesting, roosting, or foraging, under [ONRC's] interpretation, no plant could lawfully be cut, no land use or land form lawfully changed, or man-made structure lawfully built or destroyed without first obtaining a permit from the FWS" (Answer, Thomas Mountain Timber Sale, at 5).

BLM points out that, in those cases where a taking has been held to embrace habitat degradation, the court was specifically construing the more expansive language in the ESA which defines a taking under that Act as including not only that which constitutes a taking under section 2 of the MBTA (see 50 CFR 10.12 ("to pursue, hunt, shoot, wound, kill, trap, capture, or collect")), but also acts which "harm" (16 U.S.C. § 1532(19) (1988)). See Palila v. Hawaii Department of Land & Natural Resources, supra at 1107-08; Sierra Club v. Lyng, supra at 1270-71. BLM also directs us to 50 CFR 17.3, which implements section 9(a)(1) of the ESA and which was relied upon by the courts in Palila and Lyng. That regulation further defines acts which harm to encompass "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." It is the inclusion of the additional reference to harm in the ESA definition of a taking, as further interpreted by Departmental regulation, which, BLM would have us conclude, renders Palila and Lyng inapplicable in deciding what constitutes a taking under section 2 of the MBTA.

While the language of the ESA may "shed light" on that of the MBTA (Andrus v. Allard, 444 U.S. 51, 62 (1979)), the ESA differs in that it defines a taking to include acts which "harm" a protected species and the MBTA does not. For that reason, cases applying the ESA definition, such as Palila and Lyng, have limited applicability in interpreting section 2 of the MBTA.

Nevertheless, the language of section 2 of the MBTA is broad in scope and, as the court noted in United States v. Corbin Farm Service, 444 F. Supp. 510, 532 (E.D. Cal. 1978), aff'd, 578 F.2d 259 (9th Cir. 1978), section 2 of the MBTA essentially precludes a person or entity from act-ing "'by any means or in any manner, to \* \* \* kill \* \* \* any migratory bird.'" Thus, the court held that, although the statute did not specifically prohibit the spraying of a field which subsequently led to the death of migratory birds, nevertheless, such stricture was evident in the language precluding killing "'by any means or in any manner.'" Id.

Therefore, action which degrades the environment in such a way as to result in the death of a migratory bird is prohibited by section 2 of the MBTA. See United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (violation of section 2 of MBTA sustained where water containing toxic chemical discharged by pesticide manufacturing plant resulted in death of migratory birds). The requisite precondition to imposition of that prohibition is that it must be shown that such action has led to the death of a migratory bird.

In this case, ONRC merely asserts that the subject timber sales, together with other sales, constitute a taking under section 2 of the MBTA

to the extent that they threaten the extinction of the species based on the cumulative destruction of old-growth forest. ONRC has not shown, however, that previous harvesting of old-growth timber has resulted in the death of any particular bird or that timber removal in the present sale areas will do so. For that reason, we must hold, at this juncture, that BLM's decision to proceed with the sales does not violate section 2 of the MBTA.

E.

[4] ONRC contends that the subject timber sales will violate the multiple use mandates of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1701-1784 (1988), and the Act of August 28, 1937 (O & C Act), as amended, 43 U.S.C. §§ 1181a-1181f (1988), to the extent that they will remove the remainder of mature and old-growth trees from the sale areas, thereby threatening the recreational, scenic, wildlife, and water resources of these areas.

First, the lands involved in these sales are O & C lands (Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road grant lands), which are not governed by the broad principle of multiple use management mandated by FLPMA.

Section 1 of the O & C Act, 43 U.S.C. § 1181a (1988), provides that O & C lands

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 for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities. [Emphasis added.]

ONRC would have us construe the phrase "permanent forest production" to encompass the protection of timber resources from harvesting, in order to promote other general uses of the land. However, section 1 of the O & C Act makes it clear that permanent forest production is intended only to permit timber harvesting so as to ensure a sustained yield over time. See Oregon Wilderness Coalition, 71 IBLA 67, 70 (1983); see also State of Wyoming Game & Fish Commission, 91 IBLA 364, 366 (1986); In re Lick Gulch Timber Sale, 72 IBLA 261, 266-67, 90 I.D. 189, 192-93 (1983). As the Ninth Circuit Court of Appeals recently stated in Headwaters, Inc. v. Bureau of Land Management, No. 89-35688 (9th Cir. Sept. 10, 1990) at 22:

Nowhere does the legislative history [of the O & C Act] suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O & C Act at all. The BLM did not err in construing the O & C Act as establishing timber production as the dominant use. [18/]

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18/ In Headwaters, the Ninth Circuit was faced with the question of whether "forest production" under the O & C Act could be interpreted to

The O & C Act also makes reference to various "purpose[s]," including protecting watersheds and providing for recreational facilities, but only in the context of what the harvesting of timber is intended to accomplish. See In re Lick Gulch Timber Sale, supra at 267, 90 I.D. at 192-93. Thus, as we said in Oregon Wilderness Coalition, supra at 70, such purposes are "subordinate to prudent timber harvesting." See also O'Neal v. United States, 814 F.2d 1285, 1287 (9th Cir. 1987); In re Lick Gulch Timber Sale, supra at 267, 90 I.D. at 193.

Second, while FLPMA expressly provides for management of public lands for multiple uses, such management is precluded in the case of O & C lands. Section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (1988), requires multiple use management of the public lands, "except \* \* \* where a tract of such public land has been dedicated to specific uses according to any other provisions of law." O & C lands have been "dedicated to specific uses" under section 1 of the O & C Act. Also, section 701(b) of FLPMA, 90 Stat. 2786 (1976), provides that, in the case of a conflict between FLPMA and the O & C Act with respect to the management of timber resources, the O & C Act is to prevail. Accordingly, with respect to O & C lands, management of the lands for permanent forest production, rather than multiple uses, is to take precedence where these forms of management conflict. Cf. Oregon Wilderness Coalition, 45 IBLA 347, 350 (1980) (O & C Act is "dominant use act").

#### F.

ONRC contends that BLM failed, at the time it proposed the subject timber sales, to request FWS to notify BLM whether any species listed or proposed for listing as an endangered or threatened species was present in any of the sale areas, as required by section 7(c)(1) of the ESA. That statutory section requires a Federal agency to request from the Secretary "information whether any species which is listed or proposed to be listed may be present in the area of [the] proposed action." 16 U.S.C. § 1536(c)(1) (1988).

We have held that, where BLM itself determines whether there are any endangered or threatened species within a timber sale area, there is no violation of section 7(c)(1) of the ESA, 16 U.S.C. § 1536(c)(1) (1988), because that section provides that the request for information be directed to the "Secretary [of the Interior]." Oregon Natural Resources Council, supra at 185. In each of the present cases, BLM determined whether

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fn. 18 (continued)

encompass the exemption of O & C land from timber harvesting for purposes of the conservation of northern spotted owl habitat. The court concluded initially that this would be "inconsistent with the principle of sustained yield." Headwaters, Inc. v. Bureau of Land Management, supra at 21. Further, relying on the legislative history of the O & C Act, the court stated: "It is entirely consistent with these [statutory] goals to conclude that the O & C Act envisions timber production as a dominant use, and that Congress intended to use 'forest production' and 'timber production' synonymously."

there were any endangered or threatened species within the sale area, thus alleviating any further responsibility under section 7(c)(1) of the ESA.

Although 50 CFR 402.12(c), which implements section 7(c)(1) of the ESA, requires that the request for information be directed to FWS, that regulation is applicable only in cases where the proposed action is a major Federal action significantly affecting the quality of the human environment. The case cited by ONRC in support of its position, Thomas v. Peterson, supra at 759, 763, involved a major Federal action. As we have determined, BLM properly concluded in these cases that the timber sales will not have a significant environmental impact. See Oregon Natural Resources Council, supra at 185.

G.

ONRC asserts that some of the subject timber sales "may" violate both the Clean Air Act, as amended, 42 U.S.C. §§ 7401-7642 (1988), and the Clean Water Act, as amended, 33 U.S.C. §§ 1251-1376 (1988), because BLM failed to insure that the sales will comply with those acts (SOR, Camas Creek Timber Sale, at 15; SOR, Thomas Mountain Timber Sale, at 16). BLM responds that, in the case of each sale, either it has adopted certain measures to protect the quality of the air, sufficient to comply with the Clean Air Act, or there will be no appreciable impact to air quality and that it adopted certain measures to protect the quality of water potentially affected by the sale, sufficient to comply with the Clean Water Act. ONRC has failed to demonstrate that any violations of either Act will result from these sales.

H.

To the extent that ONRC has raised other challenges to these timber sales not expressly or impliedly addressed in this decision, those challenges have been reviewed and we have determined that ONRC has failed to establish any error in BLM's decisions. See G. Jon & Katherine M. Roush, supra at 311; Glacier-Two Medicine Alliance, supra at 156.

I.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, ONRC's appeal in the case of IBLA 90-393 is dismissed as untimely filed, BLM's decisions denying ONRC's protests in the case of IBLA 90-253, 90-254, 90-264, 90-316, 90-322, 90-329, 90-347, 90-348, 90-351, 90-353, 90-357 through 90-359, 90-365, 90-366, 90-369, 90-378, 90-396, 90-398 through 90-403, 90-438, 90-440, and 90-441 are affirmed, and BLM's decisions in the remaining cases (IBLA 90-328, 90-346, 90-367, 90-397, and 90-439) are set aside and remanded for action consistent with this opinion.

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Wm. Philip Horton

I concur: Chief Administrative Judge

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Bruce R. Harris  
Administrative Judge

## APPENDIX A

<u>IBLA No.</u>	<u>Timber Sale Name</u>	<u>Sale No.</u>	<u>Partial Clearcut Acreage</u>	<u>Cut Acreage</u>	<u>Harvestable Timber (MBF)</u>	<u>High Location</u>	<u>Contract Bidder</u>	<u>Contract Date</u>
90-253	Thomas Mountain	OR-120-TS90-27	95		7,503	Secs. 12 & 13 T. 29 S., R. 10 W., Willamette Mer., Coos Co., OR	Murphy Timber Co.	
90-254	Green Hornet	OR-080-TS0-406	117		5,086	Secs. 3,5 & 9 T. 5 S., R. 4 E., Willamette Mer., Clackamas Co., OR	Freres Lumber Co., Inc.	
90-264	Camas Creek	OR-090-TS90-302	113		6,174	Secs. 19 & 29 T. 19 S., R. 4 W.,	Swanson Bros. Lumber Co., Inc.	
							Willamette Mer., Lane Co., OR	
90-316	Lazy Jack	OR-090-TS90-202	15	274	3,470	Secs. 26, 35 & 36 T. 15 S., R. 2 W., Willamette Mer., Lane Co., OR	Willamette Industries, Inc.	

116 IBLA 374

<u>IBLA No.</u>	<u>Timber Sale Name</u>	<u>Sale No.</u>	<u>Partial Clearcut Acreage</u>	<u>Cut Acreage</u>	<u>Harvestable Timber (MBF)</u>	<u>High Location</u>	<u>Contract Bidder</u>	<u>Contract Date</u>
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IBLA 90-253, et al.

<u>No.</u>	<u>Name</u>	<u>No.</u>	<u>Acreage</u>	<u>Acreage</u>	<u>Timber (MBF)</u>	<u>Location</u>	<u>Bidder</u>	<u>Date</u>
90-322	Wildeer Ridge	OR-110-TS90-18	145	101	8,733	Secs. 3 & 4 T. 39 S., R. 6 W., Secs. 15, 21-23 26, 27 & 34, T. 38 S., R. 6 W., Willamette Mer., Josephine Co., OR	Murphy Creek	
90-328	Panther Bob	OR-110-TS90-30	32	20	2,169	Secs. 27, 33 & 35 T. 31 S., R. 9 W., Willamette Mer., Douglas Co., OR	Huffman & Wright Timber Corp.	4/23/90
90-329	August Knob	OR-110-TS90-28	14		924	Sec. 18 T. 32 S., R. 9 W., Willamette Mer., Douglas Co., OR	Ken Sorenson Logging, Inc.	4/25/90
90-346	Good Old Boy	OR-080-TSO-502	84		3,951	Secs. 32 & 33 T. 11 S., R. 3 E., Linn Co. OR	Lumber & Log Co.	Thomas Creek

IBLA 90-253, et al.

<u>IBLA No.</u>	<u>Timber Sale Name</u>	<u>Sale No.</u>	<u>Partial Clearcut Acreage</u>	<u>Cut Acreage</u>	<u>Harvestable Timber (MBF)</u>	<u>High Location</u>	<u>Contract Bidder</u>	<u>Date</u>
90-347	Rock Creek	OR-080-TSO-501	88	4,507	Sec. 1	Thomas Creek T. 10 S., R. 3 E., Willamette Mer., Linn Co., OR	Lumber & Log	
90-348	Bear Spot	OR-120-TS90-14	31	1,990	Sec. 24	Douglas Co.	4/17/90	
90-351	Easy Elk	OR-120-TS90-31	47	3,048	Secs. 32 & 33	Rogge Forest	4/21/90	
90-353	Slater Slider	OR-120-TS90-32	50	2,690	Sec. 17	Scott Timber Co.	4/12/90	

Co., OR

116 IBLA 376

<u>IBLA No.</u>	<u>Timber Sale Name</u>	<u>Sale No.</u>	<u>Partial Clearcut Acreage</u>	<u>Cut Acreage</u>	<u>Harvestable Timber (MBF)</u>	<u>High Location</u>	<u>Contract Bidder</u>	<u>Contract Date</u>
90-357	Bearwood	OR-080-TSO-302	67		5,111	Sec. 31 T. 12 S., R. 8 W., Sec. 5 T. 13 S., R. 8 W., Willamette Mer., Lincoln Co., OR	Diamond-B Lumber Corp.	3/20/90
90-358	Taylor Teaser	OR-080-TSO-311	91		8,187	Secs. 5 & 9 T. 15 S., R. 8 W., Willamette Mer., Benton & Lane Co., OR	Boise Cascade Corp.	4/16/90
90-359	Buck Roberts	OR-080-TSO-312	96		6,872	Secs. 1, 11 & 12 T. 14 S., R. 7 W., Willamette Mer., Benton Co., OR	Rosboro Lumber Co.	4/26/90
90-365	New Shoe	OR-080-TS90-201	20		1,948	Sec. 27 T. 7 S., & Treating,	Taylor Lumber	4/23/90

IBLA 90-253, et al.

R. 7 W., Inc.  
Willamette Mer.,  
Polk Co., OR

116 IBLA 377

<u>IBLA No.</u>	<u>Timber Sale Name</u>	<u>Sale No.</u>	<u>Partial Clearcut Acreage</u>	<u>Cut Acreage</u>	<u>Harvestable Timber (MBF)</u>	<u>High Location</u>	<u>Contract Bidder</u>	<u>Contract Date</u>
90-366	Siletz Forty	OR-080-TS90-203	40		3,015	Sec. 26 T. 9 S., R. 10 W., Willamette Mer., Lincoln Co., OR	Farms, Inc. Hampton Tree	4/12/90
90-367	Puny Puddles	OR-080-TSO-503	59		5,619	T. 11 S., R. 3 E., Willamette Mer., Linn Co., OR	Secs. 30 & 32 Industries, Inc. Willamette Mer., Linn Co., OR	Willamette
90-369	Over the Rainbow	OR-080-TS90-205	53		3,292	T. 3 S., R. 6 W., Willamette Mer., Yamhill Co., OR	Sec. 35 Treating, Inc.	Taylor Lumber &
90-378	Red Rock Special	OR-080-TSO-505	67		5,818	T. 11 S., R. 3 E., Willamette Mer., Linn Co., OR	Sec. 2 Lumber & Log Co.	Thomas Creek
90-393	Palmer	OR-120-TS90-33						



<u>IBLA No.</u>	<u>Timber Sale Name</u>	<u>Sale No.</u>	<u>Partial Clearcut Acreage</u>	<u>Cut Acreage</u>	<u>Harvestable Timber (MBF)</u>	<u>High Location</u>	<u>Contract Bidder</u>	<u>Date</u>
90-396	Balder Alder	OR-080-TSO-401	134	35	7,275 Co.	Secs. 27, 33, &	Avison Timber	
						T. 2 S., R. 6 E., Secs. 34 & 35 T. 2½ S., R. 6 E., Willamette Mer., Clackamas Co., OR		
90-397	Boulder Cat	OR-080-TSO-404	88		5,125 Co.	Secs. 27 & 35	Avison Timber	
						T. 2 S., R. 6 E., Willamette Mer., Clackamas Co., OR		
90-398	Daniel's Divide	OR-120-TS90-18	103		5,600 Co.	Secs. 10 & 15	Scott Timber	6/1/90
						T. 26 S., R. 12 W., Willamette Mer., Coos Co., OR		
90-399	Bone-crusher	OR-120-TS90-17	46		4,535	Sec. 33	Rogge Forest Products, Inc.	5/16/90
						T. 25 S., R. 10 W., Willamette Mer., Coos Co., OR		



IBLA 90-253, et al.

Timber IBLA No.	Sale Name	Partial Sale No.	Clearcut Acreage	Cut Acreage	Harvestable Timber (MBF)	High Location	Contract Bidder	Date
90-400	North-west Cedar	OR-120-TS90-3	139	9,026	Secs. 7, 8, 17 & 18 T. 20 S., Willamette Mer., Douglas Co., OR	Swanson Bros. Lumber Co., Inc.	5/21/90	R. 9 W.,
90-401	Windy Car	OR-120-TS90-10	100	5,538	Secs. 23, 25-27 & 35 T. 20 S., R. 9 W., Willamette Mer., Douglas Co., OR	Murphy Timber Co.		
90-402	Tioga Triangle	OR-120-TS90-48	121	9,132	Secs. 17 & 20 T. 27 S., R. 9 W., Willamette Mer., Coos Co., OR	C&D Lumber Co.	5/3/90	
90-403	Bell Creek	OR-120-TS90-8	158	7,012	Secs. 1 & 2 T. 20 S., R. 11 W., Willamette Mer., Douglas Co., OR	Huffman & Wright Timber Corp.	5/15/90	
90-438	Tall Oak II	OR-100-TS90-8	52	1,391	Sec. 23 T. 28 S.,	Ken Sorenson Logging, Inc.	6/6/90	R. 4 W.,

IBLA 90-253, et al.

Willamette Mer.,  
Douglas Co., OR

116 IBLA 380

IBLA No.	Timber Sale Name	Sale No.	Partial Clearcut Acreage	Cut Acreage	Harvestable Timber (MBF)	Location	High Bidder	Contract Date
90-439	Big Tom Folley	OR-100-TS90-11	130		6,701	Sec. 19	Western T. 21 S.,	6/11/90 Timber Co. R. 6 W., Sec. 25 T. 21 S., R. 7 W., Willamette Mer., Douglas Co., OR
90-440	Jack Creek	OR-100-TS90-39	112		6,544	Secs. 27 & 35	Lone Rock T. 21 S.,	6/6/90 Timber Co. R. 6 W., Willamette Mer., Douglas Co., OR
90-441	Leaping Wolf	OR-100-TS90-40	152		6,660	Secs. 16,17, 20	Douglas County & 21	5/10/90 Forest Products, Inc. T. 27 S., R. 2 W., Willamette Mer., Douglas Co., OR

## APPENDIX B

<u>IBLA No.</u>	<u>Timber Sale Name</u>	<u>Date of Sale No.</u>	<u>BLM Decision</u>	<u>Deciding District</u>	<u>Official</u>
90-253 Myrtlewood	Thomas Mountain Resource Area Manager	OR-120-TS90-27	1/18/90	Coos Bay	
90-254 Manager	Green OR-080-TS0-406 Clackamas Resource Hornet		1/22/90	Salem	Area
90-264	Camas Creek	OR-090-TS90-302	1/22/90	Eugene	Eugene District Manager
90-316	Lazy Jack Manager	OR-090-TS90-202	3/19/90	Eugene	Eugene District
90-322	Wildeer Medford District Ridger	OR-110-TS90-18	3/21/90	Medford	Manager
90-328	Panther Medford District Bob Manager	OR-110-TS90-30	3/29/90	Medford	
90-329	August OR-110-TS90-28 Medford District Knob Manager		3/29/90	Medford	
90-346	Good Old Boy Resource Area Manager	OR-080-TSO-052	3/9/90	Salem	Acting Santiam
90-347 Area Manager	Rock Creek	OR-080-TSO-501	3/9/90	Salem	Acting Santiam Resource
90-348	Bear Acting Tioga Spot Resource Area Manager	OR-120-TS90-14	3/14/90	Coos Bay	
90-351	Easy Myrtlewood Elk Resource Area Manager	OR-120-TS90-31	3/20/90	Coos Bay	
90-353	Slater OR-120-TS90-32 Myrtlewood Slider		3/20/90	Coos Bay	Resource Area

Manager

90-357	Bearwood	OR-080-TSO-302	3/9/90	Salem	Alsea Resource Area Manager
90-358	Taylor Teaser	OR-080-TSO-311	4/9/90	Salem	Alsea Resource Area Manager
90-359	Buck Roberts	OR-080-TSO-312	4/9/90	Salem	Alsea Resource Area Manager
90-365	New Shoe	OR-080-TS90-201	3/9/90	Salem	Yamhill Resource Area Manager

<u>IBLA No.</u>	<u>Timber Sale Name</u>	<u>Date of Sale No.</u>	<u>BLM Decision</u>	<u>Deciding District</u>	<u>Official</u>
90-366	Siletz Forty	OR-080-TS90-203	3/9/90	Salem	Yamhill Resource Area Manager
90-367	Puny Puddles	OR-080-TSO-503	3/29/90	Salem	Acting Santiam Resource Area Manager
90-369	Over the Rainbow	OR-080-TS90-205	5/3/90	Salem	Yamhill Resource Area Manager
90-378	Red Rock Special	OR-080-TSO-505	4/17/90	Salem	Santiam Resource Area Manager
90-393	Palmer Butte	OR-120-TS90-33	4/5/90	Coos Bay	Myrtlewood Resource Area Manager
90-396	Balder Alder	OR-080-TSO-401	4/13/90	Salem	Clackamas Resource Area Manager
90-397	Boulder Cat	OR-080-TSO-404	4/16/90	Salem	Clackamas Resource Area Manager
90-398	Daniel's Divide	OR-120-TS90-18	5/1/90	Coos Bay	Acting Tioga Resource Area Manager
90-399	Bonecrusher	OR-120-TS90-17	5/1/90	Coos Bay	Acting Tioga Resource Area Manager
90-400	Northwest Cedar	OR-120-TS90-3	5/1/90	Coos Bay	Acting Umpqua Resource Area Manager
90-401	Windy Car	OR-120-TS90-10	5/1/90	Coos Bay	Acting Umpqua Resource Area Manager
90-402	Tioga Triangle	OR-120-TS90-48	4/30/90	Coos Bay	Acting Tioga Resource Area Manager
90-403	Bell Creek	OR-120-TS90-8	5/1/90	Coos Bay	Acting Umpqua Resource Area Manager
90-438	Tall Oak II	OR-100-TS90-8	5/3/90	Roseburg	South Umpqua Resource Area Manager
90-439	Big Tom Folley	OR-100-TS90-11	5/3/90	Roseburg	Drain Resource Area Manager
90-440	Jack Creek	OR-100-TS90-39	5/3/90	Roseburg	Drain Resource Area Manager
90-441	Leaping Wolf	OR-100-TS90-40	5/3/90	Roseburg	North Umpqua Resource Area Manager

