

IN RE GRIZZLY KNOB TIMBER SALE

IBLA 92-87

Decided February 4, 1992

Appeal from a decision of the Ashland Resource Area Manager, Medford District, Oregon, Bureau of Land Management, denying protest of proposed timber sale OR-110-TS91-7.

Affirmed.

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

It is proper for BLM to deny a protest to a proposed timber sale contending that BLM failed to consider the impact of permitted overstory, salvage operations, and road building on the Pacific yew and that the proposed timber sale does not conform with applicable State office policy regarding management of the yew when BLM specifically reserved the yew from cutting in the sale contract, and the protestant submits no evidence that the sale may adversely affect the yew or that BLM is not abiding by its stated policy.

APPEARANCES: Mark M. Hubbard, Oregon Natural Resources Council, Eugene, Oregon, for Oregon Natural Resources Council; David A. Jones, Medford District Manager, Medford, Oregon, Bureau of Land Management, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Oregon Natural Resources Council (ONRC) has appealed from an October 2, 1991, decision of the Ashland Resource Area Manager, Medford District, Oregon, Bureau of Land Management (BLM), denying its protest of the proposed Grizzly Knob timber sale (OR-110-TS91-7).

The Grizzly Knob sale would involve the removal of 3,232 thousand board feet of timber from 388 acres of land in 12 units situated in secs. 3, 9, and 16, T. 38 S., R. 2 E., Willamette Meridian, Jackson County,, Oregon. The harvest would be by clearcutting a 10-acre right-of-way, overstory removal on 58 acres, and mortality and sanitation

salvage operations on 320 acres. The sale would also involve construction of 1.4 miles of access road and renovation of 5.5 miles of access roads.

This appeal concerns BLM's management of the populations of Pacific yew trees (Taxus brevifolia) on public lands during the course of harvesting other tree species from this and other sale areas. 1/ Taxol, a substance chiefly derived from the bark of the Pacific yew, is being extensively studied because of its significant cancer-fighting properties. 2/ Despite efforts exerted by certain groups, the Fish and Wildlife Service (FWS), U.S. Department of the Interior, has declined to declare the Pacific yew a threatened species under the ESA. See 56 FR 40854 (Aug. 16, 1991).

On October 15, 1990, BLM prepared an environmental assessment (EA) assessing the environmental consequences of and alternatives to the sale (including no action). This EA was tiered to the Jackson and Klamath Sustained Yield Units Ten-Year Timber Management Plan Environmental Impact Statement (EIS) (November 1979) and the Final Supplement to the Final EIS' for the Josephine and Jackson-Klamath Sustained Yield Units Ten-Year Timber Management Plans (SEIS) (May 1985). The EA was designed to assist BLM in determining whether the sale would result in significant site-specific impacts to the human environment which had not been addressed previously in the EIS and SEIS. If it would, section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2) (C) (1988), would dictate the preparation of another EIS.

In a finding of no significant impact issued on October 15, 1990, the BLM Area Manager relied on the EA and concluded that no significant environmental impacts beyond those already addressed in the EIS and SEIS would result from the proposed sale. On December 4, 1990, he issued a "Decision Record," in which he adopted the proposed action and decided to go forward with the sale.

On August 14, 1991, ONRC protested the sale. In his October 1991 decision, the BLM Area Manager responded to each charge levied by ONRC and denied ONRC's protest. He then decided to implement the decision pursuant to 43 CFR 5003.3(f) and proceed with the sale. ONRC appealed this decision, BLM went forward with the sale, accepting the high bid

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1/ This appeal raises no issues regarding the Northern spotted owl (Strix occidentalis caurina), a Federally designated threatened species (see 55 FR 26114 (June 26, 1990)), its proposed critical habitat (see 56 FR 40002 (Aug. 13, 1991)), or the marbled murrelet (Brachyramphus, marmoratus), a Federally proposed threatened species (see 56 FR 28362 (June 20, 1991)), under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531-1543 (1988).

2/ ONRC also notes that yew bark has been shown to have potential for protecting agricultural crops by inhabiting the feeding activity of cucumber beetles. It further states that yew trees generally contribute to the forest ecosystem by providing cover and food for animals and stabilizing stream banks and alleges other uses yet to be discovered. See Statement of Reasons for Appeal (SOR) at 3.

submitted by the Medford Corporation on August 29, 1991, and directed the Medford corporation to execute the timber sale contract within 30 days. We have not yet been apprised whether the contract has been executed or whether logging has commenced.

ONRC's SOR is an almost verbatim copy of its protest. For this reason it completely fails to identify in what way BLM erred in its consideration of ONRC's protest, and we can discern no error in BLM's adjudication of the protest from the face of BLM's answer to the protest or the case file now before us. In these circumstances we have summarily affirmed BLM decisions. See In re Mill Creek Salvage Timber Sale, 121 IBLA 360, 362 (1991). Nevertheless, we deem it appropriate in this case to address ONRC'S arguments regarding the Pacific yew.

ONRC contends principally that BLM did not adequately take the Pacific yew into account when deciding to go forward with the Grizzly Knob timber sale. <sup>3/</sup> It argues that BLM has failed to determine whether any Pacific yews are present in the sale area and, particularly, whether they are present in a sufficient density to warrant bark collection. ONRC also argues that BLM failed to consider the impact that timber harvesting, road building, and post-harvest activities (particularly slash burning) will have on the yew, or the alternatives of harvesting yews prior to logging or else protecting them.

In its answer, BLM states, at page 2, that it found one Pacific yew in the right-of-way, <sup>4/</sup> but it is not required to determine their presence in the sale units or assess the impact upon the Pacific yews in the sale area because they are reserved from cutting. This fact is confirmed by section 40 of the timber sale contract, which provides that "[a]ll Pacific yew trees in all cutting units" are "reserved from cutting and removal under the terms of this contract and\* \* \*retained as the property of [the United States]."

[1] ONRC's argument that BLM must consider the impact of timber harvesting and other activities on the Pacific yew and make special provision for its protection in the context of the Grizzly Knob timber sale assumes that this sale may adversely affect any yew trees that might be found in the sale area. With the exception of the single yew found in the right-of-way, we find no evidence that this threat exists, even assuming there are Pacific yews in the sale area.

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<sup>3/</sup> ONRC also alleges that it had insufficient time to review the proposed sale before filing its protest because BLM failed to tender the EA and Decision Record in a timely manner. See SOR at 2. BLM should, of course, afford the public an adequate opportunity to comment on proposed action (see 40 CFR 1506.6(b)), but it is our opinion that ONRC was afforded sufficient time. Further, ONRC clearly had sufficient time after filing its August 1991 protest to "review this sale, and to appropriately modify, make additions to, or potentially withdraw portions of this appeal" (SOR at 2).

<sup>4/</sup> See Memorandum to the EA file from BLM Environmental Coordinator.

At best, ONRC demonstrates that clearcutting is incompatible with survival of the yew growing in a given clearcut area. As proof, ONRC points only to a "report" by Chuck Bolsinger, an ecologist with the Forest Service, U.S. Department of Agriculture, which stated:

Although yew trees are appearing in some second growth stands, there is no doubt that short-rotation, even-age management is not good for the species. In areas where stands are clearcut, planted to genetically superior Douglas-fir commercially thinned year intervals, it is unlikely that yew will survive. [Certain] plots indicate that yew is absent from vast areas of second and third generation forests on timber industry holdings now. \* \* \* and clearcut at 30-50

(SOR at 4). According to ONRC, Bolsinger recommended that partial cover be retained to stimulate yew growth, slash not be burned near yews and nearby frost pockets not be harvested because the yew is sensitive to both fire and frost, and that the ground near yews not be disturbed because they are sensitive to soil compaction and removal of soil. From this, ONRC extrapolates that "[e]ven salvage and/or overstory removal timber cutting activities could adversely [affect the Pacific yew in]\* \* \*one or more [of these respects]." Id.

We note that in Instruction Memorandum (IM) No. OR-90-467, dated July 5, 1990, the BLM State Director also recognized that clearcutting is incompatible with survival of the Pacific yew because the existing yews are inevitably destroyed during clearcut harvesting and subsequent slash burning. It is important to note that he did not find overstory removal or salvage operations (which make up the majority of harvesting activities in the Grizzly Knob timber sale area) are incompatible with the survival of the Pacific yew. In fact the decision denying ONRC's protest and IM No. OR-90-467 clearly indicate BLM's position that this is not the case: "Because all Pacific yew was reserved on the sale [with the exception of the right-of-way] and the fact that no clearcuts or burning for site preparation is scheduled, the destruction of Pacific yew does not become an issue or an impact to be analyzed" (Decision at 3). 5/ See also Answer at 1-2. The Area Manager emphasized at page 3 of his decision that BLM is not permitting any slash burning, 6/ This statement is supported at page A-1 of the EA. BLM will rely on natural regeneration without any post-harvest site preparation. See "Silviculture Prescription" (SP), dated Feb. 4, 1991, at 3, 4-5. In addition, trees will be left where necessary (primarily in units designated for salvage operations) to minimize

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5/ BLM is obviously aware of and considered the impact on the one Pacific yew that would be harvested when clearcutting the 10 acres of right-of-way. 6/ ONRC also contends that BLM must provide in the sale contract for the salvage of yew trees unintentionally cut in the course of approved logging operations prior to slash burning. See SOR at 4. There is nothing to indicate that Pacific yews exist in the sale area, that such unintentional cutting will occur, and in the absence of such burning we have no evidence that a Pacific yew is threatened.



reforestation problems resulting from frost. <sup>7/</sup> See EA at 1; SP at 1, 3. Finally, the record indicates that the design features adopted by the Area Manager will minimize disturbance of the soil generally in the sale area. See EA at 6. There is no evidence in the record that any Pacific yews in the sale areas subject to overstory and salvage operations will be threatened by removing the cover necessary for growth, exposure to fire and frost, or soil disturbance, and ONRC presents no evidence that these consequences are likely. <sup>8/</sup> We are not persuaded that BLM is required to prepare an EIS, or even address the impact of the Grizzly Knob timber sale on the Pacific yew in the EA it prepared in connection with that sale when that impact is improbable. See Oregon Natural Resources Council v. Marsh, 832 F.2d 1489, 1499 (9th Cir, 1987), rev'd and remanded on other grounds 490 U.S. 360 (1989) (EIS must consider "probable" environmental consequences of proposed action); Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732, 740 (3rd Cir. 1982) (EA must consider "expected effects" of proposed action); Trout Unlimited v. Morton, 509 F.2d 1276, 1283-84 (9th Cir. 1974) (EIS); G. Jon Roush, 112 IBLA 293, 297 (1990) (EA must consider "relevant environmental concerns").

In particular, ONRC has not shown that the reservation of any yew trees in the sale units and other mitigating measures will not be adequate to protect existing trees (save the one). The mere implicit assertion by ONRC that such will be inadequate does not establish that BLM failed to give adequate consideration to protection of the yew. See Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682-84 (D.C. Cir. 1982); G. Jon Roush, supra at 303, 304, 307, 309, and cases cited therein.

ONRC contends that BLM must "[u]ltimately" develop, at the State and/or District level, an overall management plan with respect to the

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<sup>7/</sup> It is also by no means established that overstory removal, with a resulting increased exposure to sunlight and frost, will necessarily result in a higher incidence of mortality among yew trees. After a brief review of the scientific literature, FWS concluded that overstory removal "likely only effects minor or temporary adverse impacts to yew populations." 56 FR 40856 (Aug. 16, 1991).

<sup>8/</sup> We take particular note of ONRC's assertion that overstory removal "may not be consistent with [the] sustainable harvest of light sensitive Pacific yew trees" (SOR at 3 (emphasis added)). ONRC suggests that removal may kill yew trees. There is no evidence supporting this contention. Bolsinger indicated only that partial cover should be provided in order to "stimulate growth in yew trees." Id. at 4. ONRC refers to a Sept. 28, 1990, proposal by Forest Service geneticist Richard Miller that Pacific yews could be cultivated in areas which have "been subject to intensive management" (SOR at 4). See also 56 FR 40856 (Aug. 16, 1991). It would appear that yews can survive in unprotected areas. Nonetheless, the record indicates that all of the sale area other than the right-of-way will contain trees following harvesting. In his October 1991 decision, the Area Manager noted that, after harvesting, the units subject to overstory removal "will remain fully stocked with well-distributed trees" (Decision at 2). See also EA at 2; SP at 5.

Pacific yew to ensure a sustained yield of yew tree products (SOR at 3). ONRC also contends that BLM should prepare an EIS to assess the environmental consequences of such a management plan. 9/

BLM's policy for the conservation of the Pacific yew in permitted timber sale areas in western Oregon was set out by the State Director in IM No. OR-90-467, as amended by Change 1 (June 17, 1991) and Change 2 (July 23, 1991). ONRC seeks to have BLM "immediately begin" preparation of a management plan (SOR at 2). We do not regard preparation of a management plan as a prerequisite to the conduct of this timber sale. The record demonstrates that BLM has made adequate provision for protection of the Pacific yew in this sale. 10/ Thus, regardless of the merits of having a management plan in place, we can find no error in BLM's decision to go forward without one. 11/

Finally, ONRC contends that BLM has failed to adequately document compliance with IM No. OR-90-467. This IM provides for reservation of Pacific yew trees in partial and selective cut areas. It also recognizes the "impracticality of reserving individual Pacific yew trees within \* \* \* clearcut areas \* \* \* since they are normally destroyed either during harvest or slash burning activities," and provides for sale (rather than the reservation) of Pacific yews in clearcut areas (IM No. OR-90-467 at 1). The record generally supports the conclusion that BLM is complying with the IM in the proposed Grizzly Knob timber sale, and ONRC has not specified how BLM is not complying. 12/ Therefore, we conclude that BLM's decision to proceed with the subject sale conforms with the IM.

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9/ In particular, ONRC asserts that BLM should consider an alternative of harvesting only the needles of the yew (which, unlike the collection of bark, would not destroy the tree), because it may be possible, in the very near future, to synthesize taxol using only the needles (SOR at 3). Notwithstanding this concern, BLM is not required to prepare a management plan or environmental review for the yew as a prerequisite for the Grizzly Knob timber sale, and we need not consider any yew harvest alternatives BLM might consider in that document.

10/ ONRC contends that BLM must "ultimately" consider the effect of the proposed sale on the ability to propagate Pacific yews in the sale area (SOR at 3). This concern need not be considered in the present context because there is no evidence that this sale would adversely affect such use.

11/ We express no opinion on whether BLM should prepare a comprehensive management plan for the conservation of the Pacific yew.

12/ ONRC contends that BLM must systematically inventory sale units for Pacific yews. See SOR at 2. IM No. OR-90-467 requires a count of Pacific yews on all areas subject to clearcut timber sales, and prohibits the sale of Pacific yews in the areas of partial cut. BLM identified one Pacific yew in the clearcut area, and we do not find BLM's apparent failure to count Pacific yews in the units subject to overstory removal and salvage operations as a violation of the IM directive because the sale contract specifically prohibits the harvest of Pacific yews in those units.



BLM has provided generally for the reservation of yew trees in those units involving overstory and salvage operations and has identified only one yew tree in the right-of-way being clearcut. IM No. OR-90-467 provides for harvest of Pacific yews in clearcut areas and calls for harvest prior to sale offering when practical. There is no evidence that it would be practical to sell the lone tree in the 10-acre clearcut area prior to the sale. We, therefore, find no error.

In conclusion, after a careful review of all of ONRC's allegations and the record, we find that ONRC has failed to identify any error in BLM's denial of ONRC's protest or its decision to proceed with the Grizzly Knob timber sale. 13/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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R. W. Mullen

Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge

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13/ ONRC seeks to have the Board stay any further action on the sale, including timber harvesting and road construction, pending a final Departmental decision on the merits of its appeal. We are now deciding finally for the Department (see 43 CFR 4.1(b)(3)), and need take no action on the stay request.