

JAN WRONCY

IBLA 92-466

Decided September 30, 1992

Appeal from a decision of the Area Manager, McKenzie Resource Area, Bureau of Land Management, denying protest of application of repellent to timber seedlings.

Motion for stay denied, decision affirmed.

1. Rules of Practice: Appeals: Motions--Rules of Practice:  
Appeals: Stay

A motion by appellant to stay the effect of a decision pending review by the Board on appeal is generally decided on the basis of certain factors: the likelihood of success on the merits; the threat of irreparable injury to the moving party if the stay is denied; whether the threatened injury to the moving party outweighs the threatened injury to nonmoving parties; and whether the stay is contrary to the public interest. In order to support a preliminary stay the probability of success on the merits need not be free from doubt, but the motion must be supported by a showing of a reasonable basis for challenging the legal soundness of the decision below meriting careful review. In the absence of such a showing, the motion is properly denied.

APPEARANCES: Jan Wroncy, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Jan Wroncy has appealed to the Board from a decision of the Area Manager, McKenzie Resource Area, Bureau of Land Management (BLM), denying her protest. Appellant protested the decision record and finding of no significant impact (FONSI) for the application of "Deer Away" big game repellent (BGR) to tree seedlings planted in certain timber management areas. 1/

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1/ Appellant also protested that part of the proposed timber management action involving mountain beaver trapping (killing) in order to reduce

The decision to apply BGR was based on an environmental assessment, EA ORO90-92-28. The EA explains that the purpose of application of Deer Away is to act as a "repellant \* \* \* to protect seedlings from deer and elk browse" (EA at 1). Deer Away is described in the EA as a "repellant [which] consists of five percent active ingredients (putrescent whole egg solids) and 95 percent inert ingredients (emulsion, water, white mineral oil, and emulsifiers)" (EA at 2). The EA concluded that: "Deer Away big game repellant and tubing [2/] has [sic] no known adverse impact on any animal species since these products work by aversion" (EA at 4).

In addressing concerns raised in appellant's protest, BLM explained the procedures to be used in applying the repellant made of putrescent egg solids and how these procedures should avoid any adverse impacts such as water contamination, spraying of nontarget vegetation, and spraying of any animals. The decision of the BLM Area Manager noted that "he had determined to proceed with the implementation of this decision" pursuant to the regulations at 43 CFR Subpart 5003. 3/

Appellant's notice of appeal included a request for a stay of the action pending resolution of the appeal by the Board. No grounds were given to support the requested stay, although appellant indicated that a statement of reasons (SOR) for appeal would be filed within the time allowed. The subsequently filed SOR asserts that the proposed application of repellant "which may have human health effects" requires compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1988). Although appellant refers to the "potential human health effects" of the application of BGR, no evidence is presented to indicate either the existence of adverse impacts or controversy among scientists regarding the potential for adverse impacts from application of BGR to the forest seedlings.

[1] We have expedited our review of this case in light of the motion to stay. Since there have been increasing numbers of motions to stay filed in administrative appeals before the Board and in view of the

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fn. 1 (continued)

seedling mortality. The decision regarding this aspect of the protest, however, is not at issue in this appeal.

2/ Tubing is another form of protection of timber seedlings.

3/ Contrary to the general rule under which administrative decisions are stayed during the time in which an appeal may be filed and during the pendency of any administrative appeal by an adversely affected party, *see* 43 CFR 4.21(a), the regulations at 43 CFR Part 5000 provide that upon denial of a protest the authorized officer may proceed to implement the timber sale. 43 CFR 5003.3(f). Thus, the filing of a notice of appeal does not automatically stay or suspend the effect of a decision relating to forest management. 43 CFR 5003.1.

brief time allowed for effective review of such motions, 4/ we find it appropriate to address the standards applied in reviewing a motion to stay filed in an appeal before the Board. In the past this Board has found certain factors to be particularly relevant in determining whether to grant a stay of a decision appealed from: likelihood of success on the merits, threat of irreparable injury to the moving party if the stay is not granted, whether the threatened injury to the moving party outweighs the potential harm the stay may cause to the nonmoving party, and whether the stay is contrary to the public interest. Marathon Oil Co., 90 IBLA 236, 245-46, 93 I.D. 6, 11, 12 (1986); see Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958), followed, Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 842 (D.C. Cir. 1977); Taylor Diving & Salvage Co. v. U.S. Department of Labor, 537 F.2d 819, 821 (5th Cir. 1976); Sun Oil Co., 42 IBLA 254 (1979). 5/ Such factors still constitute relevant criteria in ruling on stay requests. High Desert Communications, Inc., 123 IBLA 20, 23-24 (1992) (right-of-way); cf. In Re Bar First Go Round Salvage Sale, 121 IBLA 347, 348 (1991) (citing the Marathon criteria in a timber management case).

In balancing the movant's likelihood of success on the merits against the potential impact of an injunction on the parties, we have also noted that the appellant's probability of prevailing on the merits need not be free from doubt to justify at least an interim stay:

To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial,

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4/ In this case, BLM authorized implementation of the action prior to receipt of appellant's notice of appeal on June 1, 1992. The motion for stay, contained in appellant's notice of appeal, was not received by the Board until receipt of the case file on June 10, 1992. Subsequent to receipt by the Board on July 1, 1992, of appellant's SOR, the BLM Area Manager has advised that the protested action was completed between May 13 and June 4, 1992. Although the appeal is now moot in the sense that there is no further relief which we can grant appellant in this case, the Board may decline to dismiss as moot those appeals which raise issues "capable of repetition, yet evading review," *i.e.*, which are likely to arise again but may otherwise elude administrative review because the decision has already been implemented before the appeal is decided. See In Re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (1990). We think the question of the adequacy of a motion for stay presents such an issue which merits analysis in this appeal.

5/ Similar factors have been set forth for consideration of stay requests pending review on appeal by the Board where the subject has been addressed

difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), quoted in Marathon Oil Co., 90 IBLA at 246, 93 I.D. at 12. Although appellant need not conclusively establish entitlement to a decision in his or her favor to justify at least an interim stay, appellant must present at least a reasonable basis for challenging the legal sufficiency of the decision under appeal. Appellant in this case has failed to meet that threshold burden.

Appellant's motion for stay filed with the notice of appeal gave no grounds which would allow the Board to approve a stay even as a preliminary matter. We find the subsequently filed SOR was also deficient in raising a basis for a stay. While it is axiomatic that BLM decisions implementing its timber management program must be consistent with the obligations imposed on all Government agencies by NEPA, the question on administrative review is whether error has been shown. The EA in the case record concludes that the "repellant contains no known hazardous ingredients" (EA at 5). Further, the EA recites that the only hazard to humans from BGR concentrate is the possibility of eye irritation to those applying the repellant. Id. As noted above, the EA points out that potential adverse impacts to animals is avoided by the fact that the repellant works on the principle of creating an "aversion" to the treated seedlings (EA at 4). Accordingly, BLM made a FONSI concluding there was no significant impact of the proposed action other than those detailed in the programmatic timber management EIS's to which the FONSI was tiered which would require preparation of an EIS.

As a general rule, the Board will uphold a FONSI where the record indicates that relevant areas of environmental concern have been identified and that the determination that no significant effects will occur is reasonable in light of the analysis. E.g., Coy Brown, 115 IBLA 347, 357 (1990). A party challenging a FONSI generally has the burden of showing that the analysis failed to consider a substantial environmental impact of material significance to the proposed action. Id. In the absence of a showing of a failure to consider environmental impacts which casts significant doubt upon the reasonableness of the FONSI, speculation that there may be unknown adverse effects is insufficient to justify a stay. A fortiori, appellant's showing is insufficient to support overturning the decision of BLM under review.

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fn. 5 (continued)

in regulations. See, e.g., 43 CFR 4.21(a), 57 FR 44354 (Sept. 25, 1992) (proposed regulation regarding stay pending appeal); 43 CFR 3150.2(b), 57 FR 44337 (Sept. 25, 1992) (onshore oil and gas geophysical exploration); 43 CFR 3165.4(c), 57 FR 44337 (oil and gas operations); 43 CFR 3266.1(b), 57 FR 29651 (July 6, 1992) (appeal of geothermal resources operations decisions).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for a stay is denied and the decision appealed from is affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge