IN RE BIG DEAL TIMBER SALE

IBLA 2002-131 Decided February 17, 2005

Appeal from a decision of the Area Manager, Myrtlewood (Oregon) Resource Area, Bureau of Land Management, denying protests of the proposed Big Deal timber sale. (OR120-TS-01-33).

Affirmed in part; set aside and remanded in part.

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

   The impact of more than one timber sale may be addressed in a single environmental analysis. The Board will not set aside a timber sale based on an appellant's objections that pertain to another timber sale which had been addressed in the same environmental analysis unless those objections are tied to the cumulative effect of the action.

2. Timber Sales and Disposals: Generally--Timber Sales and Disposals: Northwest Forest Plan: Generally

   When a resource management plan (RMP) provides that connectivity blocks will be managed on a 150-year control rotation and that regeneration harvests will occur at the rate of approximately 1/15 of the available acres per decade, the 1/15 limitation does not embrace harvests that occurred prior to the designation of the connectivity block.

3. Timber Sales and Disposals: Northwest Forest Plan: Aquatic Conservation Strategy

The Aquatic Conservation Strategy (ACS) of the Northwest Forest Plan (NFP) requires BLM to maintain and restore a number of environmental values in lands subject to the NFP. ACS components include riparian reserves, key watersheds, watershed analysis, and watershed restoration. Riparian reserves are lands along streams and unstable and potentially unstable areas where special standards and guidelines direct land use. Key watersheds are a system of large refugia comprising watersheds that are crucial to at-risk fish species and stocks and provide high quality water.

4. Timber Sales and Disposals: Northwest Forest Plan: Aquatic Conservation Strategy

Timber sales and forest management projects must be consistent with Aquatic Conservation Strategy (ACS) objectives, i.e., BLM must maintain the existing condition or move the watershed towards the range of natural variability. A determination regarding whether a particular timber sale or the overall forest management project is consistent with the ACS must be made at the sale or project level (not at the watershed level), and in the short-term (less than 10 years) as well as the long-term, especially when considering the cumulative site-specific impacts of all sales or projects in the affected watershed.

5. Endangered Species Act of 1973: Generally--Endangered Species Act of 1973: Section 7: Consultation--Timber Sales and Disposals: Generally--Timber Sales and Disposals: Northwest Forest Plan: Aquatic Conservation Strategy

When a fish species is listed as threatened or endangered, its critical habitat is afforded protection under section 7 of the ESA. Under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (2000), BLM may not take action likely to jeopardize the continued existence of an endangered or threatened (listed) species or result in the destruction or

adverse modification of its critical habitat. To that end, section 7(a)(2) of the ESA imposes an obligation on BLM to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (depending on whether the species is under the jurisdiction of the Secretary of the Interior or the Secretary of Commerce) to insure that "any action authorized, funded, or carried out" by BLM is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of its critical habitat. If, after either informal consultation or preparation of a biological assessment, BLM, with the concurrence of the Director of the wildlife agency, makes a determination that the action is not likely to adversely affect listed species or critical habitat, then formal consultation is not required.

6. Timber Sales and Disposals: Generally

When a timber sale includes a unit that is infected with Port Orford Cedar root rot, BLM must specifically address how the spread of the infection is to be mitigated.

APPEARANCES: Francis Eatherington, Roseburg, Oregon, for Umpqua Watersheds, Inc.; Doug Heiken, Eugene, Oregon, for Oregon Natural Resources Council Action; Bonnie Joyce, Myrtle Point, Oregon, for Friends of the Coquille River; Richard Conrad, Field Manager, Myrtlewood Resource Area Office, and Roger W. Nesbit, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Umpqua Watersheds, Inc., Oregon Natural Resources Council Action, and Friends of the Coquille River have jointly appealed an October 30, 2001, decision issued by the Field Manager, Myrtlewood (Oregon) Resource Area, Bureau of Land Management (BLM), denying their protest of the proposed Big Deal timber sale. (OR120-TS-01-33).

On August 27, 2001, BLM's Myrtlewood Field Manager signed the "DECISION DOCUMENTATION for Big Deal Timber Sale" (Decision Document). The Decision Document explained that the sale is a segment of a proposed action described in a December 23, 1999, finding of no significant impact (FONSI), which was issued following completion of the Revised Big Creek Analysis Area Environmental

Assessment (Revised EA), OR128-98-11. [1/] On September 11, 2001, appellants filed a "Protest of Big Creek Analysis Area" objecting to the Revised EA, FONSI, and the Big Deal sale. On October 30, BLM issued its decision denying their protest.

The actions analyzed in the Revised EA, including the Big Deal sale, are subject to the Northwest Forest Plan (NFP), which was prepared to address and respond to environmental issues related to timber harvests in old growth forests in the Pacific Northwest, including impacts upon watersheds and protected species habitat. [2/] Upon completion in 1994, the NFP was approved by the Secretaries of Interior and Agriculture. The NFP incorporated Standards and Guidelines (S&Gs) for timber harvesting and related activity. The S&Gs include the Aquatic Conservation Strategy (ACS), developed to restore and maintain the ecological health of watersheds and aquatic ecosystems on public lands.

The 1994 ROD addressed more than 24 million acres of Federal land in the planning area. After noting that approximately 30 percent of that land had been set aside by Acts of Congress, the ROD established allocations for the remaining 70 percent as: a) late-successional reserves (30 percent); b) adaptive management areas (6 percent); c) managed late-successional areas (1 percent); d) administratively withdrawn areas (6 percent); e) riparian reserves (11 percent); and f) Matrix (16 percent). (1994 ROD, 2.) Although certain thinning and salvage activities would be allowed in the reserves, programmed timber harvest would occur only in the 22 percent of the land designated as Matrix or adaptive management areas, and that harvest was to be conducted in compliance with standards and guidelines designed to achieve conservation objectives. Id. Sixteen percent of the Federal land within the range of the northern spotted owl, Matrix (3,975,300 acres) "is the area in which most timber harvest and other silvicultural activities will be conducted." Id. at 7. That Matrix consists of the General Forest Management Area (GFMA) and Connectivity/Diversity Blocks (CDBs). The GFMA is managed for timber harvest, while the CDBs are managed to provide for timber harvest and, at the same time, provide connectivity between Late-Successional Reserves and Riparian Reserves. The

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[1/] BLM issued EA OR128-98-11 and a FONSI for the Big Creek Analysis Area on April 1, 1999.

[2/] The NFP is the short name for the 1994 "Record of Decision for Standards and Guidelines for Management of Habitat for Late Successional and Old Growth Forest Related Species Within the Range of the Northern Spotted Owl." That document is hereinafter cited as the 1994 ROD. In January 2001, the agencies adopted amendments in a Record of Decision and Standards and Guidelines for Amendments to the Survey and Manage, Protection Buffer, and other Mitigation Measures Standards and Guidelines. That document is hereinafter cited as the 2001 ROD.

1994 ROD established S&Gs pertinent to harvests in Matrix managed by BLM in the Coos Bay District that include the following requirements:

> [P]rovide 640-acre blocks (Connectivity/Diversity Blocks) as currently spaced, that are managed on a 150-year rotation. When an area is cut, 12 to 18 green trees per acre will be retained. There must be 25 to 30 percent of each block in late-successional forest at any point in time. Late successional stands in Riparian Reserves contribute toward this percentage. In the remainder of [M]atrix, (General Forest Management Area), retain 6 to 8 green trees per acre in harvest units.

(1994 ROD S&Gs, C-42.) Thus, regeneration harvests in Matrix that meet these criteria further the objectives of the NFP.

The ACS requires BLM to "[m]aintain and restore" a number of environmental values in lands subject to the NFP. (1994 ROD, B-11.) ACS components include riparian reserves, key watersheds, watershed analysis, and watershed restoration. Riparian reserves are "[l]ands along streams and unstable and potentially unstable areas where special standards and guidelines direct land use." (1994 ROD, B-12.) Streams that occur throughout Matrix are protected by riparian reserves. However, the acreage allocated to riparian reserves is not included in the acreage allocated to the Matrix. Key watersheds are "[a] system of large refugia comprising watersheds that are crucial to at-risk fish species and stocks and provide high quality water." Id.

The Revised EA states that there are no key watersheds in the Big Creek Analysis Area (a 6th field subwatershed), or in the relevant 5th field watershed, the middle fork of the Coquille River. (Revised EA, Section K, 1.) In its May 1997 Big Creek Watershed Analysis, BLM stated its findings that the Big Creek Watershed was "at risk" with respect to two of the nine ACS objectives, and "not properly functioning" with respect to the other seven. (Watershed Analysis, 155, Table III.8-2.) In Umpqua Watersheds, 158 IBLA 62, 77 (2002), we noted that BLM had recognized that, as a whole, the watershed may be degraded. However, we also found that the NFP did not require BLM "to improve or restore the subwatershed as a condition precedent to approving" the timber sales. Id.

The Revised EA addressed a timber harvest program in BLM's Myrtlewood Resource Area that included the units involved in the Big Deal sale and other units that have been sold or will be offered at future sales. [3/] The proposed action which

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[3/] The "Big Creek Analysis Area" consists of 16,661 acres (9,021 acres (Federal), 1,047 acres (Coquille Indian Tribe), and 6,593 acres (private)), in the Big Creek 6th field subwatershed. The three alternatives considered three different harvests, (continued...)

was analyzed and reported in the Revised EA involves the harvest of 16.55 million board feet (mmbf) of timber from 587 acres of forest land in 22 units. The Big Deal sale contemplates the harvest of 2.182 mmbf of timber from four units, comprising a total of 53 acres. [4/] The four units are located in sections 29 and 31, T. 28 S., R. 9 W., section 6 in T. 29 S., R. 10 W., and section 1 in T. 29 S., R. 11 W., Willamette Meridian, Coos County, Oregon. The Decision Document gives the following description of the Big Deal sale:

> This action includes one regeneration harvest unit in the General Forest Management Area (GFMA) (7 acres) [[5/]], two regeneration harvest units in Connectivity (33 acres) [[6/]], and one hardwood conversion unit in Connectivity (13 acres) [[6/]]; totaling 53 acres. The acreage analyzed in the Revised Big Creek Analysis Area EA associated with these units is reduced due to implementation of protection buffers for Survey and Manage [(S&M)] species. This action would produce approximately

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[3/] (...continued)
described by total area covered and estimated timber volume: Alternative I (No Action) -- None; Alternative II (Preferred Alternative) -- 587 acres (16.55 million board feet (mmbf)); Alternative III (Alternative Action) -- 704 acres (22.87 mmbf). Alternative II contemplates Regeneration Harvest (308 acres in 13 units); Commercial Thinning (245 acres in 6 units); Density Management Thinning (11 acres in 1 unit); Hardwood/Brush Conversion (23 acres in 3 units). In addition, 90 acres of commercial/density management thinning and 2 acres of hardwood/brush conversion in Riparian Reserves would be conducted. Alternative II would also authorize construction of 1.9 miles of new roads, renovation of 13.8 miles of road, improvement of 0.9 miles of road, and closure of 11.1 miles of existing roads.

[4/] The units are numbered 1 through 4 in the Decision Document. Unit 1 in the Decision Document corresponds to a portion of unit 9; unit 2 corresponds to a portion of unit 11; unit 3 corresponds to a portion of unit 19; and unit 4 corresponds to unit 20 in the Revised EA.

[5/] Unit 3 (unit 19) is the only unit in the GFMA in this sale, and the Revised EA indicates that this regeneration harvest is for hardwood conversion. (Revised EA, Appendix 2.)

[6/] These are units 1 and 2 in the Decision Document which correspond to units 9 and 11 in the Revised EA.

[7/] This is unit 4 in the Decision Document and unit 20 in the Revised EA. The revised EA indicates this is a regeneration harvest. (Revised EA, Appendix 2.)

> 2,182 thousand board feet of timber. Harvest will be accomplished by using skyline yarding systems.

(Decision Document at 2.)

Regeneration harvest in the GFMA unit would retain approximately 7 trees per acre and 13 trees per acre in CDB units. (Revised EA, 7.) A 300-foot semi-permanent road would be constructed in one of the units. [8/] BLM adopted design features described in the Revised EA and best management practices described in the Coos Bay District Resources Management Plan (RMP), with certain modifications.

In their appeal, appellants argue that BLM erred when finding that the project was "not likely to adversely affect" the coastal coho salmon, which has been designated a threatened species under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531–1543 (2000). (SOR, 11-17.) They further assert that approval of the project violates the ACS of the NFP because it would further degrade an already degraded watershed. (SOR, 17-20.) Appellants contend that BLM's proposed action is not in compliance with several court decisions concerning ACS compliance, particularly with respect to the scale of ACS measurement, analysis of short term effects, and watershed analysis. (SOR, 20-24.) They further contend that BLM erred in failing to properly analyze peak flow effects on water resulting from clearcutting and the cumulative effects of building roads, and to provide adequate protection from Port Orford Cedar root rot and Sudden Oak Death. (SOR, 24-29.) Finally, appellants assert that BLM cannot log the three units in the CDBs because BLM has already exceeded the amount of harvest allowable within these blocks. (SOR, 29-31.)

The notice of appeal captioned "Big Creek Timber Sales" covered by the Revised EA, "including the Big Deal Timber Sale," and appellants' protest and appeal are directed at the Big Deal sale and the overall project. Appellants refer to the

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[8/] The Revised EA called for the construction of 800 feet of gravel road in GFMA unit 3 (unit 19) (Revised EA, Appendix 2). The Decision Document explains that the shape and size of this unit has changed due to implementation of buffers for S&M species, and the road is not needed. When the size and shape of unit 1 (unit 9) was changed to provide for the buffers for S&M species, it was no longer possible to use an existing road, and an additional 300 feet of road was called for. This road was originally characterized as "semi-permanent." However, the Decision Document states that the road will have a "natural surface (dirt) and will be fully decommissioned after completion of use." (Decision Document, 3.) BLM states: "[T]his ridgetop road construction (outside Riparian Reserves and habitat retention areas) meets the Aquatic Conservation Strategy (ACS) Objectives and is within the scope of the revised EA analysis." Id.

"cumulative effects of the forest management decision" and assert that "[b]y only implementing little pieces at a time, it could appear that the little pieces do no damage." (SOR, 7.) Appellants argue that they "have a right to appeal the cumulative effects of the entire forest management decision."

[1] The overall cumulative effect of the Big Deal sale and other timber sales in the Big Creek area must be considered. However, we will not set aside the Big Deal sale based on the appellants' objections that pertain to units other than the Big Deal sale unless those objections are somehow tied to the cumulative effect of the Federal action. The decision we are called upon to review is BLM's denial of appellants' protest of the Big Deal sale, and our consideration does not include sales that BLM has yet to propose or the propriety of its earlier decision adopting the Revised EA. [9] In turn, whether the cumulative effects of the Big Deal sale and other sales that have taken place prior to the Big Deal sale warrant reversal of BLM's decision approving the Big Deal sale depends on how and to what extent the Big Deal timber harvest would contribute to those cumulative effects. [10] In Umpqua Watersheds, Inc., 158 IBLA 62, we made it clear that a decision awarding a timber sale would not be reversed based on objections pertaining only to other sales, even though the sale before us and the other sales were addressed in the same EA. In that case, as in this one, we addressed an appeal concerning units considered in the Big Creek Revised EA. The appellants had raised issues that were not pertinent to the parcels involved in those sales, and we stated that the only decision before the Board was BLM's decision addressing the two sales at issue. 158 IBLA at 68. "Future decisions regarding other timber harvests and associated activity * * * are not now in issue because no notice of sale or other decision document authorizing that activity has been issued." Id. It should be noted, however, that in that case we did find it appropriate to consider whether BLM's analysis of the cumulative impacts of those timber sales and the other timber harvesting and associated activity was sufficient to satisfy NEPA, ESA, NFP, and FLPMA requirements. Id. at 68-69.

The sale in the earlier appeal involving the Revised Big Creek EA did not include regeneration harvest in a CDB, and we declined to consider appellants' arguments that sales of timber within a CDB did not comply with applicable land use plans. Three of the four units in the Big Deal sale now before us involve regeneration harvests in CDBs, so appellants' argument that BLM cannot log those units is at issue here. We consider this argument first, because if appellants are correct that BLM has

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[9] We note that the FONSI with respect to the Revised EA was issued on Dec. 13, 1999.

[10] We need not speculate regarding any sales that might take place some time in the future. What will be sold, what tracts might be offered, when they will be offered, and the exact terms and conditions of those sales are not known.

already exceeded the amount of harvest allowable within these units, it would not be necessary to consider the other issues.

The May 1995 Coos Bay District Record of Decision and Resource Management Plan (RMP) states that one of the management objectives for the land allocated to Matrix is to "[p]rovide connectivity (along with other allocations such as Riparian Reserves) between Late-Successional Reserves." (RMP, 22.) CDBs are to be spaced throughout the Matrix, and are to be managed in a manner that will maintain 25 to 30 percent of each block in late-successional forest, manage available forest land on a 150-year area control rotation, and retain 12-18 green trees per acre when an area is regeneration harvested. (RMP, 22-23.) When managing forest land on a 150-year control rotation, the RMP provides that regeneration harvests will occur at the rate of approximately 1/15 of the available acres per decade. However, because of the limited size of areas within a given block, up to three decades of harvest could be removed from a single block at any one time, in order to make a viable harvest unit. (RMP, 54.)

The Big Deal timber harvests would log 46 acres in three units in two CDBs. Thirteen acres would be harvested from unit 1 in block 1; a total of 33 acres would be harvested from units 2 and 4 in block 2. Appellants contend that more than 25 percent of the timber in those blocks has been harvested in the past 30 years, and therefore BLM cannot harvest these blocks at this time. (SOR, 30.) Both the appellants and BLM refer to Revised Table W-2 in the Amendment to Section I of the Revised EA, which sets forth the age class distribution in the two blocks and how that distribution would be affected by the alternatives. However, they draw different conclusions from that data.

Referring to the requirement that only 1/15 of the area may be subject to harvest every 10 years or 1/5 every 30 years, appellants assert that 27 percent of block 1 and 45 percent of block 2 have been harvested in the past 30 years. Although Revised Table W-2 suggests that these percentages may have been harvested in the past 40 years, [11/] it appears that more than 20 percent in each block may have been harvested in the past 30 years, and appellants contend that no more can be taken now. (SOR, 30.)

[2] BLM construes the RMP differently. According to BLM, the limitations of 1/15 every 10 years or 1/5 every 30 years do not embrace harvests that occurred prior to the adoption of the NFP or the RMP. Appellants assert that such an interpretation "defeats the ecological purpose of connectivity blocks" which "is to provide connectivity NOW" so that "BLM cannot remove more of the old growth

[11/] Revised Table W-2 shows 27 percent of the forest in block 1 and 45 percent of the forest in block 2 in the 0-40 year age class.

now." (SOR, 30.) We find that the language of the RMP sustains BLM's view that the limitations are to be applied prospectively: "Regeneration harvests will occur at the rate of approximately 1/15 of the available acres per decade." (RMP, 54, emphasis added.)

BLM states that block 1 contains 1,296 available acres, so that 1/15 of that acreage or 86 acres is available each decade. (Answer, 19.) The 13 acres for regeneration harvest in unit 1 therefore does not exceed the RMP limit for block 1. Block 2 contains 564 available acres, so the RMP limit will be exceeded only if more that 37 acres are harvested in a decade. The 33 acres to be harvested in units 2 and 4 do not exceed this limit.

When addressing appellants' arguments, it is important to remember that connectivity is an allocation within Matrix. In light of the criteria for managing connectivity blocks within Matrix, it would not have been appropriate for BLM to designate these areas as connectivity blocks if 1/15 of the available acreage could not be made subject to regeneration harvest each decade as of the time when that designation was made. In arguing that BLM cannot remove more old growth now, appellants overlook the provisions of the RMP for the regeneration harvesting of old growth trees in connectivity blocks:

> [I]n the Coos Bay District, portions of some stands would be cut at stand ages as low as 60 years during the first decade, where older stands are not available or to develop a better distribution of age classes over time. Regeneration harvest would not be planned for stands less than 60 years of age.

(RMP, E-4.) In its decision denying appellants' protest, BLM set forth a table showing how selecting 37 acres for harvest each decade from various age classes in block 2 would culminate in an even distribution of available land among the age classes at the end of the first 150-year period. To adopt appellants' construction of the RMP requirements for connectivity blocks would actually frustrate the RMP objectives for those areas.

Appellants express concern about retaining sufficient old growth for connectivity. The RMP requires that connectivity blocks be managed to maintain 25 to 30 percent of each block in late-successional forest. (RMP, 22-23.) Any greater percentage of late-successional forest would be difficult to reconcile with the requirement that connectivity blocks be managed on a 150-year rotation. The record shows that older stands are available in these connectivity blocks and those stands are the proper targets for harvesting. BLM refers to Revised Table W-2 and asserts that block 1 had 59 percent late seral or late-successional forest (older than 80 years), and that harvesting 13 acres in unit 1 would reduce this percentage to 58.6

percent. (Answer, 17.) Block 2 has 44 percent in late-successional forest, and harvesting the 33 acres in units 2 and 4 would reduce this percentage to 41 percent, well above the 25-30 percent requirement set out in the RMP. Id. Nevertheless, we do not construe the requirement that connectivity blocks are to be managed to maintain 25 to 30 percent of each block in late-successional forest at any point in time to mean that BLM must reduce late-successional stands to 30 percent now if doing so would require BLM to cut more than 1/15 of the available acres within a given decade or 1/5 of the available acres in a 30-year period.

Most of the issues raised by appellants relate to the effect of the sales on the water quality in the Big Creek watershed. They assert that the project violates the ACS because it would further degrade an already degraded watershed, and that the project is not in compliance with several court decisions concerning ACS compliance, particularly with respect to the scale of ACS measurement, analysis of short term effects, and watershed analysis. They further contend that BLM erred by failing to properly analyze peak flow effects on water resulting from harvests and the cumulative effects of building roads. They also challenge BLM's not-likely-to-adversely-affect finding with respect to the coastal coho salmon.

[3] Responding to appellants' allegations regarding ACS compliance, BLM asserts that the proposed action will be conducted in a manner that will not further degrade the watershed, and that maintaining a watershed in its existing condition is allowed under the NFP. The ACS requires BLM to "[m]aintain and restore" a number of environmental values in lands subject to the NFP. (1994 ROD, B-11.) ACS components include riparian reserves, key watersheds, watershed analysis, and watershed restoration. Riparian reserves are "[l]ands along streams and unstable and potentially unstable areas where special standards and guidelines direct land use." (1994 ROD, B-12.) Throughout Matrix the streams are protected by riparian reserves, and the acreage allocated to riparian reserves is not included in the acreage allocated to Matrix. Key watersheds are "[a] system of large refugia comprising watersheds that are crucial to at-risk fish species and stocks and provide high quality water." Id.

The Revised EA states that there are no key watersheds in the Big Creek Analysis Area (a 6th field subwatershed), or in the relevant 5th field watershed, the middle fork of the Coquille River. (Revised EA, Section K, 1.) In its May 1997 Big Creek Watershed Analysis, BLM found that the Big Creek watershed was "at risk" with respect to two of the nine ACS objectives and "not properly functioning" with respect to the other seven. (Watershed Analysis, 155, Table III.8-2.) In Umpqua Watersheds, 158 IBLA at 77, after noting that BLM had recognized that the watershed as a whole may be degraded, we also found that the NFP does not require BLM "to improve or restore the subwatershed as a condition precedent to approving" the timber sales considered in that case.

[4] Each project must be consistent with ACS objectives, i.e., it must maintain the existing condition or move the watershed towards the range of natural variability. Pacific Coast Federation of Fishermen's Association v. National Marine Fisheries Service (PCFFA II), 71 F. Supp.2d 1063, 1067 (W.D. Wash.), aff'd in part, vacated in part, 253 F.3d 1137 (9th Cir. 2001); Umpqua Watersheds, 158 IBLA at 77. A determination regarding whether a particular timber sale or the overall forest management project is consistent with the ACS must be made at the sale or project level (not at the watershed level), and in the short-term (less than 10 years) as well as the long-term, especially when considering the cumulative site-specific impacts of all sales or projects in the affected watershed. PCFFA II, 71 F. Supp.2d at 1069-70, 1073; see PCFFA v. NMFS, 253 F.3d at 1143-47; Umpqua Watersheds, 158 IBLA at 79.

In this case, the requisite determination has been made, and BLM has concluded that implementation of the projects adopted in the Revised EA would maintain but not degrade ACS objectives. (Biological Assessment, 7, 9-13.) While addressing two other sales in Umpqua Watersheds, 158 IBLA at 79-80, we examined the Revised EA and its supporting Biological Assessment and found that the record demonstrated "that BLM undertook an appropriate comprehensive analysis, and found that proceeding with the individual sales (and the Project) would result in maintaining the existing condition of the subwatershed."

Appellants assert that the regeneration harvests [12/] authorized under the Revised EA would degrade the watershed by increasing peak flows. (SOR, 24.) Appellants contend:

> The best available science states that peak flows increase in proportion to acres of regeneration harvests and roads in the watershed. Jones and Grant (1996) [[13/]] have reviewed a long record of storm flows in western Cascade streams, and determined that the cumulative effect of roads and harvest in western Cascade basins cause a significant and long-term increase in peak flows. These peak flows in turn cause bank erosion and undercutting and unnaturally high rates of streamed landslides. Higher peak flows are also thought to cause scouring and displacement of salmon egg masses and alteration of the

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[12/] Appellants erroneously refer to regeneration harvests as "clearcutting." (SOR, 24.)

[13/] Appellants cite Jones, J.A., Grant, G.E., "Peak flow response to clear-cutting and roads in small and large basins, western Cascades, Oregon," Water Resources Research, 32(4) 959-974, April 1996.

> aquatic invertebrate communities which have repercussions all the way up the food chain.

(SOR, 26.)

BLM asserts that "slightly increased peak flows may occur for the first few storms in the fall, but that the total water volume is small and does not affect channel form or water quality." (Answer, 12.) Trees and vegetation in riparian reserves between the harvest units and the streams "uptake soil water." Id. BLM contends that excess water from the regeneration harvest units must fill the soil in the riparian reserves first, "likely dampening the effect on peak flows." Id. Noting that treatment prescriptions of the NFP such as riparian reserves are relatively new, BLM asserts that "previous watershed studies do not assess this process change." Id. Thus, studies that do not take into account the protective features of the NFP such as riparian reserves provide less relevant and less persuasive evidence on this issue.

BLM and appellants appear to recognize that peak flows in streams may increase after a regeneration harvest because there are fewer trees to absorb or impede the water. For BLM, the significance of this increase depends on how much the increase in flow attributable to harvests affects watershed quality by increasing sediment content and by altering channels. According to BLM, any increase in flow attributable to timber harvests in the Big Creek sales would not significantly increase the sediment content of the water or alter channels. The hydrologist's report for the Revised EA states: "Extreme peak and minimum flows in the low elevation Coast Range are dependent on climatic patterns rather than vegetation manipulation." (Revised EA, Section M, 1.) Even with boundary adjustments, the hydrologist found that the "Riparian Reserves provide more than adequate filter strips for preventing sediment delivery, and there should be no delivery from these units." Id.

The hydrologist's report further states:

> Peak flows are dependant on precipitation inputs such as rain or snowmelt, infiltration, routing to channels and concentration within channels. Evapotransporation losses by forest harvest may cause elevation of small peak flows in the fall and to a less[e]r extent the spring, but such flows are substantially smaller than the boundaries of the active channel or bankfull flow. These flows are not significant to channel form or function, because they are not a channel forming flow. In other words, these flows do not have enough stream power to mobilize bed or banks of the streams.

(Revised EA, Section M, 5.) The hydrologist then provides an example of a fall storm peak runoff in a Big Creek tributary and calculates the effect of a 50 percent increase

in peak flow from a regeneration harvest. The hydrologist concludes that small elevation of peak flow from forest regeneration harvest should not change boundaries of small, steep landform controlled headwater channels with fine substrates outside the harvest areas. Id. at 6. The hydrologist further states:

> There is little study or evidence that increased peak flows caused by trees['] transpiration loss from a regeneration unit even occurs, when an intervening Riparian Reserve of trees and vegetation are between the unit and the small headwater channel.

Id. (Emphasis added). To the extent that appellants believe that BLM has reached erroneous conclusions based on its failure to consider other factors contributing to peak flow, they have failed to carry their burden of providing evidence regarding how those factors would change the conclusions.

[5] ACS compliance is an important factor in determining whether it would be likely that the contemplated timber harvest would adversely affect the coho salmon. In their protest and their appeal, appellants have asserted that BLM erred when it determined that the Big Creek sales were not likely to adversely affect the coho salmon. [14/] Appellants also raised this argument in the earlier case involving the Big Creek EA, Umpqua Watersheds, Inc., 158 IBLA at 80-84. In that case we noted that when a fish species is listed as threatened or endangered, its critical habitat is afforded protection under section 7 of the ESA. Under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (2000), BLM may not take action likely to jeopardize the continued existence of an endangered or threatened (listed) species or result in the destruction or adverse modification of its critical habitat. Id.; Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1125, 1127 (1998). To that end, section 7(a)(2) of the ESA, imposes an obligation on BLM to consult with the U.S. Fish and Wildlife Service or the NMFS to insure that "any action authorized, funded,

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[14/] In its decision rejecting appellants' protest and in its Answer, BLM referred to a Sept. 10, 2001, court ruling to the effect that the coho salmon in the area of the sale is no longer a listed species and urged a finding that appellants' challenge to the consultation process was moot. However, as we noted in Umpqua Watersheds, Inc., 163 IBLA 94, 99 n.7 (2004), the decision to which BLM refers, Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001), was stayed, and the Federal circuit court has yet to reach the merits. We further noted that in response to the Alsea Valley ruling, NMFS stated in a July 25, 2002, notice of findings that it supports removal of the Oregon Coast coho salmon from the list of T&E species pending the results of further study. 67 FR 48601 (July 25, 2002). NMFS has not made a final decision, nor has FWS acted on the question of de-listing. So long as the species remains a listed T&E species it is entitled to the "protective requirements of [section 7 of the ESA]." Umpqua Watersheds, Inc., 158 IBLA at 84.

or carried out" by BLM is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of its critical habitat. [15/] 16 U.S.C. § 1536(a)(2) (2000); 50 CFR 402.01 and 402.14(a) and (b)(1); Natural Resources Defense Council v. Houston, 146 F.3d at 1125-27. The consultation regulations set out several mechanisms for identifying listed species and critical habitat and assessing the impact of a proposed action on listed species and critical habitat. 50 CFR Part 402. If, after either informal consultation or preparation of a biological assessment, BLM, with the concurrence of the Director of the wildlife agency, makes a determination that the action is not likely to adversely affect listed species or critical habitat, then formal consultation is not required. 50 CFR 402.12(k), 402.13(a); Natural Resources Defense Council v. Houston, 146 F.3d at 1126; Sierra Club, Angeles Chapter, Santa Clarita Group, 156 IBLA 144, 168 (2002).

After issuing its Revised EA, BLM prepared a Biological Assessment that included a "Consultation Report for Effects Determinations on Listed and Proposed Fish Species and Proposed or Designated Critical Habitat" for the Big Creek timber sales. The report identified applicable S&Gs and found the project to be consistent with those standards and guidelines. The report also referred to the riparian reserve evaluation in the 1997 Big Creek Watershed Analysis and found the design features and adjustment to riparian reserve widths to be consistent with the ACS. The report noted that there are no key watersheds in the Big Creek analysis area or the Middle Fork Coquille River, the relevant 5th field watershed. With respect to watershed restoration, the report noted that the proposed actions include some restoration such as road decommissioning, but that most restoration in the Big Creek area is addressed in other documents.

The Consultation Report contains a "Checklist for Documenting Environmental Baseline and Effects of Proposed Action(s)" which identifies various factors and indicators that are at risk or not properly functioning as identified in the Big Creek Watershed Analysis, but also indicates that the effect of the actions would be to maintain rather than degrade those indicators. The report determines that the Big Creek sales may affect but are not likely to adversely affect the coho salmon and other protected fish species. The report sets forth the rationale for its finding with respect to each factor and indicator.

On June 21, 2000, the NMFS issued its letter of concurrence (NMFS letter) after informal consultation with BLM regarding the impact of the proposed actions, including the Big Creek timber sales, upon coho salmon and other species. The NMFS letter referred to three thinning units and one regeneration harvest unit that

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[15/] The determination regarding which service is to be consulted is dependent on whether the species is under the jurisdiction of the Secretary of the Interior or the Secretary of Commerce.

contain or are adjacent to streams containing coho salmon, steelhead and/or resident cutthroat trout, and stated that all other streams within and adjacent to harvest units are non-fish bearing. (NMFS letter, 15.) NMFS summarized its findings as follows:

> [T]here will be very little ground disturbance within Riparian Reserves, and that which occurs is expected to enhance riparian and aquatic function. Riparian functions such as summer and winter thermal regulation, nutrient and sediment filtering, and coarse woody debris recruitment to aquatic habitats will be maintained. The proposed action is not expected to impact water temperature, sediment or turbidity, or result in the release of hazardous materials. Negligible turbidity increases or sediment deliveries are expected to occur as the result of harvest activities, the haul route, or the road work. Activities involving gas or diesel-powered machinery in close proximity to stream channels are not likely to occur.

(NMFS Letter, 16-17.) NMFS concurred in the not-likely-to-adversely-affect determination, noting:

> Although some of these projects create ground disturbance, the NMFS' best judgment is that no adverse impacts [sic] to salmonid habitats creates adverse impacts to individual fish by causing mortality, reduced growth or other physiological changes, harassment, spawning disruption, diminished reproductive success, delayed or premature migration, or other adverse behavorial changes of any life stages. For example, the potential sediment deliveries from these projects are discountable (extremely unlikely to occur), or of such small volume and duration to be insignificant consequence to [Oregon Coast] coho or [Oregon Coast] steelhead, or their habitat.

(NMFS letter, 17.) The NMFS agreed with BLM's conclusion that BLM's contemplated actions, including the Big Creek sales, were consistent with the NFP and ACS. Id. The NMFS concluded that the action does not have the potential to hinder the attainment of relevant properly functioning indicators and would have negligible probability of causing a take of the species. Id. at 17-18. The NMFS further concluded that the actions would not be likely to adversely affect critical habitat. Id.

Appellants assert that the Big Creek project will entail building 1.9 miles of new roads that will degrade the watershed and violate ACS objectives. (SOR, 26-27.) In its response, BLM notes that the Big Deal sale involves the construction of only 0.3 miles of semi-permanent roads, which are either on stable benches or ridge tops and that roads will be blocked upon completion of use. The roads do not cross any

stream. (Answer, 15.) Appellants' concerns about roads provide no basis for reversal of BLM's decision.

When considering appellants' objections to the sale based on water quality issues such as ACS compliance, effects on listed fish species, peak flows, and roadbuilding, it is important to remember that none of the Big Deal units contains or is adjacent to fish-bearing streams. (Decision, 2.) Notwithstanding this fact, the appellants' objections to the Big Creek EA generally are expressions of differences of opinion that are insufficient to overcome the conclusions reached by BLM and NMFS. By focusing on the Big Creek EA generally, rather than the Big Deal sale, appellants do not trace their objections to any aspect of the Big Deal sale that would provide a basis for reversal of the decision under appeal.

[6] Appellants contend that the measures taken in the Big Creek project area are inadequate to protect against Port Orford Cedar root rot, and that the Big Creek Watershed Analysis shows an infection center in Big Deal unit 2 (Revised EA unit 11). (SOR, 28-29.) In Umpqua Watersheds, Inc., 158 IBLA at 70-71, we considered a similar contention with respect to another timber sale covered by the Big Creek EA. We referred to "the basic strategy for [Port Orford Cedar] management to limit the spread of root rot by restricting timber haul to the dry season" and found that there was no evidence that BLM had approved winter hauling in the sale under review. In its Decision and Answer, BLM makes a general reference to its practices regarding management of this disease and the prospectus requires the purchaser to complete the treatment of Port Orford Cedar prior to the removal of any timber. However, the prospectus for this project provides for hauling in unit 2 during the winter months. Because BLM had not addressed this particular concern, we must set aside and remand BLM's decision with respect to unit 2 to the extent that it permits winter haulage.

We do not agree with appellants' contention that Sudden Oak Death warrants a prohibition on winter hauling with respect to any of the units in this sale. (SOR, 29.) In its Answer, BLM explains:

> Sudden Oak Death (SOD) is caused by the fungal-like organism Phytophthora ramorum. It was first detected in Curry County, Oregon, in July 2001. The four known infection centers are at least 70 air miles from the Big Deal timber sale. SOD causes stem canker, leaf spotting, and plant mortality. Known hosts where mortality is common are tanoak, coast live oak, black oak, and Shreve's oak. Madrone trees, rhododendron, and huckleberry shrubs have not been commonly killed by the disease. White oak trees are not a known host species for the disease. How the disease is spread is not completely understood by disease pathologist[s]; however, early evidence strongly suggests that it

> may be transferred in rain splash and wind-driven rain as well as in soil and plant material that is moved from place to place. There is no new information on SOD that is relevant to the Big Deal timber sale that needs to be considered or analyzed.

(Answer, 16.) In the absence of any further evidence of a connection between the occurrence of the disease and the parcels in this sale, we find that appellants have not provided a basis for reversing BLM.

Therefore, 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 with respect to units 1, 3, and 4, and set aside and remanded in part with respect to unit 2.

R.W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge