



KLAMATH-SISKIYOU WILDLANDS CENTER, *ET AL.*

182 IBLA 293

Decided June 25, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

KLAMATH-SISKIYOU WILDLANDS CENTER, *ET AL.*

IBLA 2012-78

Decided June 25, 2012

Appeal from a decision of the Ashland (Oregon) Resource Area, Medford District, Bureau of Land Management, approving the Sampson Cove Forest Management Project. OR-110-TS-10-19.

Appeal dismissed in part; decision affirmed; petition for stay denied as moot.

1. Timber Sales and Disposals: Generally

A BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed absent a showing that the decision is clearly erroneous. The decision will be deemed to be in conformance with the applicable land-use plan where it is specifically provided for in the plan, or if not specifically mentioned, is clearly consistent with the terms, conditions, and decisions of the approved plan. The burden is on the appellant to show error in the decision.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Rules of Practice: Appeals: Dismissal--Timber Sales and Disposals: Generally

A party challenging BLM's decision to approve a timber sale based on a finding of no significant impact has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Mere differences of

opinion provide no basis for reversal. If the appealed decision is the denial of a protest, the appellant must affirmatively point out error in the protest decision.

APPEARANCES: George Sexton, Ashland, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Klamath-Siskiyou Wildlands Center (KS Wild) and others (collectively, appellants) have jointly appealed from and petitioned for a stay of the effect of three December 22, 2011, decisions of the Field Manager, Ashland (Oregon) Resource Area, Medford District, Bureau of Land Management (BLM), denying their protests of the August 12, 2010, Decision Record (DR) and Finding of No Significant Impact (FONSI), which approved the Sampson Cove Forest Management Project (Project), OR-110-TS-10-19.¹ The DR and FONSI were based on a July 2010 Environmental Assessment (EA) (DOI-BLM-OR-M060-2010-0024), which was prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006).

For the following reasons, we affirm BLM's decision and deny the petition for stay as moot.

BACKGROUND

The Project, as authorized in the subject DR, involves the commercial cutting, yarding, and removal of a total of approximately 14,608 merchantable coniferous trees, totaling 2,618 thousand board feet (MBF) of timber, from 481 acres of public land situated in secs. 3 and 9, T. 38 S., R. 2 E., secs. 19 and 29-31, T. 38 S., R. 3 E., secs. 1, 3, 11, and 15, T. 39 S., R. 2 E., and secs. 6, 18, 19, 30, and 32, T. 39 S., R. 3 E., Willamette Meridian, Jackson County, Oregon, within the Cascade Mountains.

¹ The appeal was brought by KS Wild, together with the Soda Mountain Wilderness Council (SMWC), Cascadia Wildlands Project (CWP), Oregon Wild (OW), and Center for Biological Diversity (CBD). While appellants' Notice of Appeal/Statement of Reasons/Request for Stay (NA/Request) bears the typewritten names, addresses, and affiliations of representatives of the other appellants, it is signed only by George Sexton, Conservation Director, KS Wild, who states that he is "authorized and qualified to represent appellants in this matter." NA/Request at 46. However, while he purports to represent the other appellants, nowhere does he identify a relationship under 43 C.F.R. § 1.3 which would entitle him to represent them. Since KS Wild is well aware of this requirement, we dismiss the appeal as to SMWC, CWP, OW, and CBD. See *Klamath Siskiyou Wildlands Center*, 155 IBLA 347, 350-51 (2001).

The timber would be sold in 32 units ranging in size from 2 to 44 acres. The Project area consists of 481 acres proposed for timber harvesting and related activity, to be undertaken within a 2,320-acre Timber Sale Contract area (Sale area) that encompasses the 481 acres of timber harvesting and 1,839 acres of surrounding public lands that are reserved from harvesting.

The proposed timber harvesting would mostly involve Douglas-fir, as well as White fir, Ponderosa pine, and Incense-cedar, and would be accomplished by means of partial cutting, which includes commercial thinning (CT) (412 acres) and regeneration harvesting (RH) (69 acres). See Prospectus, Timber Sale Contract Map, dated Sept. 16, 2010, at “Page 1 of 14” to “Page 14 of 14.” With both CT and RH, BLM would cut, yard, and remove small groups of trees from areas ranging in size from one-quarter to one acre, thus creating small openings in the stands. See EA at 2-10, 2-11. BLM specifically provided for the retention of all unmarked coniferous trees in 28 units, 659 marked coniferous trees in Units 1-3, 1-4, 9-2, and 15-2A, and all hardwood trees 12" diameter at breast height (dbh) or larger in the case of all units. In addition, individual trees selected and marked as genetically superior seed trees would be retained. See Prospectus, Special Provisions, at “Page 1 of 33.” Commercial logging would be followed by 85 acres of pre-commercial thinning within 5 sale units (1-4, 3-1, and 9-2 through 9-4). The timber harvesting would promote the development of a vigorous multi-storied stand of healthy trees of diverse age, size, and species, resistant to insects, disease, and wildfires, and would maintain sufficient late-successional and old-growth forest habitat for the Northern Spotted Owl (NSO) and other dependent wildlife species. See EA at 1-1 to 1-3, 2-9 to 2-14, 2-28 to 2-29, 3-98 to 3-100; DR at 2-3; Decision (KS Wild) at 20, 28.

Timber sales in the public lands at issue are governed by the “Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl,” generally known as the Northwest Forest Plan (NFP), which was adopted by the Secretaries of Interior and Agriculture in an April 13, 1994, Record of Decision (ROD).² The NSO (*Strix*

² The NFP, which is set forth as Attachment A to the ROD, provides for the comprehensive management of timber and other natural resources on all Federal lands in California, Oregon, and Washington, within the geographic range of the NSO. It amended existing land-use plans and was thereafter incorporated into the April 1995 Medford District Resource Management Plan (RMP). See DR at 6; Decision (KS Wild) at 2, 10; Response to the Request for Stay/Statement of Reasons (Response) at 32, 33. Although the April 1995 Medford District RMP and five other RMPs were collectively revised by the Western Oregon Plan Revisions (WOPR) on Dec. 30, 2008, the revisions were withdrawn by the Acting Assistant Secretary, Lands (continued...)

occidentalis caurina) is a terrestrial avian species designated as a threatened and endangered (T&E) species under the Endangered Species Act of 1976 (ESA), 16 U.S.C. §§ 1531-1543 (2006). It is undisputed that all of the trees at issue will be felled in areas designated pursuant to the NFP as Matrix, where timber harvesting is generally permitted by the NFP.³ See NFP ROD, Attachment A, at C-39; ROD and RMP, dated Apr. 14, 1995, at 38; Response at 3. No timber harvesting will occur in areas designated as Late-Successional Reserve (LSR) or Riparian Reserve (RR).

Using an interdisciplinary team of resource experts, BLM prepared its final EA for the Project on July 9, 2010, for the purpose of considering the potential environmental impacts of the proposed Timber Sale and related activities in the Sale area.⁴ BLM considered the proposed action (Alternative 2), and a no-action alternative (Alternative 1), under which none of the proposed timber harvesting would occur. See EA at 2-1. Under Alternative 2, BLM proposed timber harvesting on a total of 481 acres of public land in the Sale area, as well as 0.1 miles of new temporary road construction. See EA at 2-1 to 2-15. While harvesting would primarily occur by means of CT and RH, BLM further defined the harvesting methodology to encompass 174 acres of “Maintain NSO Nesting, Roosting, and Foraging [(NRF)] Habitat”; 123 acres of “Maintain NSO Dispersal Habitat”; 11, 42, 30, and 50 acres, respectively, of “Pine Series,” “Dry Douglas-fir,” “White Fir,” and “Mixed Conifer” Thinning; 49 acres of “Disease Management (Mistletoe)”;

and 25 acres of RH. EA at 2-2 (Table 2-1 (Summary of Acres by Silvicultural Prescription

² (...continued)

and Minerals, on July 16, 2009. See *infra* n.5. In the Aug. 12, 2010, DR approving the Project, BLM determined that the Project conformed to the RMP at that time. See EA at 1-5; DR at 3, 6.

³ The Matrix lands in the Medford District are broken down into the Northern and Southern General Forest Management Areas (GFMA), depending on whether the lands are situated north or south of Grants Pass, Oregon, totaling approximately 482,081 acres, and Connectivity/Diversity Blocks, totaling approximately 28,761 acres. The 481 acres of land at issue are situated in the Southern GFMA.

⁴ The EA was tiered to the October 1994 Final Environmental Impact Statement (EIS) prepared in connection with promulgation of the Medford District RMP, and the February 1994 Final Supplemental EIS prepared in connection with the ROD for the NFP. See Decision (KS Wild) at 2, 12; FONSI at 5; EA at 1-4. Preparation of the final EA occurred following the end of a lengthy scoping period that formally began on Mar. 25, 2010, during which members of the public provided comments regarding the likely environmental issues raised by the Project. BLM solicited public comment on the final EA on July 9, 2010, for a 30-day period. Comments were provided by appellants and other members of the public.

and Harvest Method)). Yarding was broken down into 105 and 339 acres, respectively, of skyline cable and tractor yarding. *Id.*

BLM prepared a Biological Assessment (BA) for the Project on May 3, 2010, pursuant to section 7(c)(1) of the ESA, 16 U.S.C. § 1536(c)(1) (2006), in order to assess whether the Sampson Cove and five other timber sales would adversely affect the NSO and its designated critical habitat. *See* DR at 5. The Fish and Wildlife Service (FWS), U.S. Department of the Interior, reviewed the BA and issued a July 19, 2010, Biological Opinion (BiOp) (No. 13420-2010-F-0107), concluding that the timber sales were not likely to jeopardize the continued existence of the NSO, or result in the destruction or adverse modification of its critical habitat. *See* DR at 4, 5; BiOp at 64. FWS concluded that these activities would not result in any “incidental take” of NSO, and found that, based upon many consecutive years of surveys, the sites were unoccupied by the species; that if new surveys show the presence of spotted owls, BLM will drop the subject sale units; and/or that BLM “will modify the prescriptions to reduce the effects to spotted owls.” BiOp at 65.

On August 12, 2010, the Field Manager issued the subject DR approving the proposed Sampson Cove Timber Sale (Alternative 2), subject to implementation of numerous project design features (PDFs) intended to avoid or minimize the adverse environmental consequences of the Sale. *See* DR at 1-2, 5. He held that the Timber Sale achieves the best balance between satisfying resource use objectives and protecting resource values by providing for the production of a sustainable supply of timber, while promoting a healthy forest ecosystem that maintains sufficient existing late-successional and old-growth forest habitat for NSOs and other dependent wildlife species. *See* DR at 2-3. He also held that the Sale conforms to the April 1995 Medford District RMP, the applicable land-use plan, as well as to the NFP, in accordance with section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2006). *See* DR at 6. He separately concluded in his August 12, 2010, FONSI, based on consideration of the context and intensity (or severity) factors of 40 C.F.R. § 1508.27, that the Timber Sale was not likely to result in any significant impacts to the human environment, and thus that BLM was not required by section 102(2)(C) of NEPA to first prepare an EIS. *See* FONSI at 7.

Three protests to the Sale were filed by the appellants: (1) KS Wild, CWP, and OW; (2) SMWC; and (3) CBD. In the protests, appellants advanced all of the same concerns now raised on appeal. The Field Manager denied the protests in the three December 22, 2011, decisions now on appeal. He upheld the DR, finding it to be consistent with the timber harvesting and other objectives of the NFP and the 1995

Medford District RMP, and to reflect the appropriate level of NEPA analysis.⁵ See, e.g., Decision (KS Wild) at 29. After addressing all of appellants' concerns, he effectively concluded they had not provided any new or specific evidence that the likely effects of the Timber Sale were not adequately analyzed in the EA, as tiered to the RMP Final EIS and NFP Final Supplemental EIS. He concluded that appellants had not shown that the Timber Sale would cause significant harm to any particular resource, and that they had stated a "preference" for resource allocations and outcomes that differ from those previously decided upon in the NFP and RMP. *Id.* at 28.

Appellants timely appealed the Field Manager's December 2011 decisions⁶ and requested a stay of the effect of the decision to approve timber harvesting and related

⁵ Although the WOPR was withdrawn on July 16, 2009, it was reinstated when that withdrawal was vacated by the U.S. District Court on Mar. 31, 2011. *Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245 (D.D.C.). The WOPR was therefore in effect when the decisions on appellants' protests were issued on Dec. 22, 2011, but it was then the subject of a legal challenge, wherein the Department acknowledged error in its issuance of the WOPR. See Findings and Recommendations, *Pacific Rivers Council v. Shepard*, No. 3:11-cv-00442-HU (D. Or. Sept. 8, 2011), at 20 ("Having found the BLM's adoption of the WOPR RODs without consultations as required by [the ESA, 16 U.S.C. § 1536 (2006),] to be arbitrary and capricious, the appropriate remedy here is to set aside the agency action, vacating the WOPR RODs, and reinstating the NFP"); see also Memorandum Opinion, *Douglas Timber Operators, Inc. v. Salazar*, No. 09-1704 (JDB) (D.D.C. Dec. 23, 2011). Since final judgment has yet to issue in *Pacific Rivers Council*, it is not entirely clear whether the 2008 WOPR or the 1995 Medford District RMP were and are now the applicable RMP. But even if the less prescriptive WOPR should have been applied, it would not affect our conclusion that BLM's approval of the Project conformed fully to the more prescriptive requirements of the 1995 Medford District RMP and therefore complied with its obligations under FLPMA.

⁶ Only KS Wild has, through the submission of a Jan. 20, 2012, declaration by George Sexton, a KS Wild member and employee, demonstrated that it is a party to the case "adversely affected" by the Dec. 22, 2011, decisions, and that it thus has standing under 43 C.F.R. § 4.410 to appeal from and seek a stay of the decisions. See, e.g., *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 81-82, 86-87 (2005). The absence of a showing of standing on the part of the other appellants provides an additional basis on which to dismiss their appeals. See n.1 *supra*.

activity,⁷ including any preparation, layout, contract award, or any other site preparations by BLM, during the pendency of their appeal. They are concerned that the Timber Sale will result in the cutting, yarding, and removal of “mature and late successional” trees in the Sale area, noting that, “once trees are cut, those trees cannot be put back.” NA/Request at 3, 45. BLM opposes any stay.

DISCUSSION

KS Wild offers two primary arguments: BLM’s approval of timber harvesting and related activity under the Project violates the land-use plan conformance requirement of section 302(a) of FLPMA; and BLM’s decision to approve the Project violates the environmental review requirements of section 102(2)(C) of NEPA. We will address the arguments in turn.

A. The Project Complies with FLPMA

[1] Sections 301 and 302 of FLPMA, 43 U.S.C. §§ 1731, 1732 (2006), provides the Secretary of the Interior and BLM with the authority and responsibility to manage the public lands under principles of multiple use and sustained yield. This Board has consistently construed the relevant provisions of FLPMA as granting BLM substantial discretion in the management of Federal timber lands. *E.g.*, *Diana Coogle*, 61 IBLA 393, 394 (1982), and cases cited. “[A] BLM decision to proceed with a proposed timber sale, when reached after consideration of all relevant factors and supported by the record, will not be disturbed absent a showing that the decision is clearly erroneous.” *Id.*; *A.C.O.T.S.*, 61 IBLA 166, 168 (1982); *see also Ernest J. Goertzen*, 51 IBLA 196, 197 (1980).

BLM is required by section 302(a) of FLPMA, 43 U.S.C. § 1732(a) (2006), to “manage the public lands . . . in accordance with the [applicable] land use plan[],” thereby ensuring that the exercise of its discretionary authority to approve actions conforms to the existing land-use plan. *See* 43 C.F.R. § 1610.5-3(a) (“All future resource management authorizations and actions . . . shall conform to the approved plan”); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004); *Tom Van Sant*, 174 IBLA 78, 91-92 (2008); *Dona Jeanette Ong*, 165 IBLA 274, 278 (2005);

⁷ Under 43 C.F.R. § 5003.1, the filing of a notice of appeal does not automatically suspend the effect of a timber sale or other forest management decision. BLM was authorized to proceed with implementation of the decision. 43 C.F.R. § 5003.3(f); *see In Re Eastside Salvage Timber Sale*, 128 IBLA 114, 115 (1993). However, BLM has reported that, although the timber sale had occurred on Sept. 16, 2010, resulting in the Boise Cascade Timber Company (BCTC) being declared the high bidder, the 3-year timber sale contract had not been awarded. *See* Decision (KS Wild) at 1.

Jenott Mining Corp., 134 IBLA 191, 193-94 (1995). A proposed management action will be deemed to be in conformance with a land-use plan where it is “specifically provided for in the plan, or if not specifically mentioned, [is] . . . clearly consistent with the terms, conditions, and decisions of the approved plan[.]” 43 C.F.R. § 1601.0-5(b) (“*Conformity or conformance*”).

First, KS Wild argues that BLM failed to consider the findings and recommendations of the Upper Bear Creek Watershed Analysis (WA), as required by the NFP that was incorporated into the Medford District RMP. *See* NA/Request at 16-18, 29-30. KS Wild asserts that both the NFP and the RMP require BLM to directly address the findings and recommendations of the WA, which included minimizing disruptions to wildlife, decreasing erosion and the amount of sediment entering local streams, and reducing compaction and other adverse soil impacts from logging, ground-based yarding activities, and road building. *Id.* at 18.

The purpose for a WA is to develop and document a “scientifically-based understanding of the ecological structure[s], functions, processes, and interactions occurring within a watershed[.]” NFP ROD, Attachment A, at E-4. Both the NFP and RMP emphasize the principal role of a WA: “Watershed analysis will focus on collecting and compiling information within the watershed *that is essential for making sound management decisions*. It will be an analytical process, not a decision-making process[.]” NFP ROD, Attachment A, at E-20; and ROD and RMP at 94 (emphasis added). KS Wild correctly notes that both the NFP and RMP further state that “[t]he information from the watershed analyses will contribute to [agency] decision making at all levels”; that “Project-specific NEPA planning will use information developed from watershed analysis”; and, finally, that “subsequent [agency] decisions will need to address . . . [relevant] information” developed in a WA. NA/Request at 16, 17 (quoting NFP ROD, Attachment A, at E-20; and ROD and RMP at 94 (emphasis omitted)). Indeed, “[t]he results of watershed analysis will influence final decisions both on timing of land-disturbing activities such as timber sales and on application of [project] design features and mitigating measures[.]” ROD and RMP at 96.

However, not every BLM decision implicates all of the information in a WA. BLM may consider the findings and recommendations of a WA when they arise in the course of its decisionmaking. BLM did so here, addressing all of the concerns raised by KS Wild, since they were relevant to its decision to approve the Timber Sale at issue. *See* EA at 1-6; *see also* EA at 1-7 to 1-8, 2-15 to 2-19, 3-2, 3-7 to 3-11, 3-12 to 3-19, 3-20 to 3-21, 3-22 to 3-23, 3-25 to 3-36, 3-57 to 3-64, 3-65 to 3-74; FONSI at 2; Decision (KS Wild) at 9-12; Response at 17-18, 19. Appellants fail to establish any error or deficiency in BLM’s analysis.

Second, KS Wild argues that BLM failed to abide by the requirement to ensure the attainment of Aquatic Conservation System (ACS) objectives. *See* NA/Request at 28. KS Wild asserts that BLM had previously determined that ACS objectives would not be met in the future, owing to timber harvesting on private lands and grazing and other activity on public lands. KS Wild concludes that “the contention in the EA that the project does not violate the ACS is just wrong.” *Id.*

The record shows, contrary to KS Wild’s argument, that BLM fully assessed whether the Timber Sale comports with the ACS objectives. BLM concluded that the Timber Sale satisfies ACS objectives, since the Sale will maintain existing conditions, even with other outstanding activities on private and public lands. *See* EA at 3-37 to 3-39; Decision (KS Wild) at 17-18; NFP ROD, Attachment A, at B-9 to B-11. Nowhere do we find any statement by BLM to the effect that ACS objectives would not be met were the Sale to go forward. Nor does KS Wild offer any convincing argument or supporting evidence that the Sale will not achieve ACS objectives.

Next, appellants argue that BLM failed to abide by the standards and guidelines by not providing for the retention of 16 to 25 large green trees per acre in the case of the RH units. *See* NA/Request at 34. Large green trees are defined as trees having a dbh greater than 20". ROD and RMP at 193.

With respect to the GFMA, the NFP provides that, for harvest units in lands administered by BLM in Oregon south of Grants Pass, 16 to 25 large green trees per acre will be retained, and for lands north of Grants Pass, 6 to 8 large green trees per acre will be retained. NFP ROD, Attachment A, at C-42; ROD and RMP at 193. Such prescriptions are to be applied “throughout the matrix forests.” NFP ROD, Attachment A, at C-41. BLM refined this prescription in the Medford District RMP, providing for the retention of at least 16 to 25 and 6 to 8 large green conifer trees per acre, respectively, in the Southern and Northern GFMA, in the case of “regeneration harvest units.” ROD and RMP at 73.

In the case of RH, the NFP and RMP specifically provided for retaining 16 to 25 large green conifer trees per acre. *See* EA at 2-13 to 2-14, 3-100. However, it is understood that BLM retains the authority to deviate from the green tree retention prescriptions in the NFP and RMP based on site-specific conditions. Thus, the RMP provides for adopting the Northern GFMA prescription in managing the Southern GFMA: “[T]here will be local situations in the northern GFMA that should be managed along southern GFMA prescription guidelines and vi[ce] versa.” ROD and RMP at 72. Further, the RMP also directs BLM that, in order to manage timber stands for insects and disease, it should “[d]esign silvicultural treatments so that within-stand endemic levels do not increase.” ROD and RMP at 194.

In the case of the Timber Sale at issue, the EA included the proposal to adopt a Disease Management prescription for 49 acres of the Sale area, outside the NSO NRF and dispersal habitats, that were so heavily infected by dwarf mistletoe disease that the forest canopy was already below the minimum level of 40 percent. See EA at 2-13, 3-100; Decision (KS Wild) at 24, 28. For such acreage, BLM decided to remove the heavily infected groups of trees, since these timber stands already exhibited less than 40 percent canopy closure “as a result of substantial tree mortality” and were “continuing to deteriorate due to disease.” Decision (KS Wild) at 24 (citing EA at 2-13). In these stands, BLM adopted a per acre green tree retention prescription of at least 6 to 8 large green trees greater than or equal to 20" dbh or the largest available trees. See EA at 2-13, 3-100; Decision (KS Wild) at 24. It also provided for planting the stands “with disease resistant species to restore the integrity of the stand.” EA at 2-13. BLM concluded that this level of harvesting, which was approved in the DR, was allowed under the RMP to ensure that within stand endemic levels of disease do not increase. Decision (KS Wild) at 24.

Other than the 49-acre area, KS Wild has not identified any acreage in the Sale area where BLM has authorized a deviation from the Southern GFMA prescription for per acre green tree retention. Nor has KS Wild established that the deviation approved by BLM, in the case of the 49 acres, violates the dictates of the NFP and RMP.

KS Wild argues that BLM failed to abide by the standards and guidelines by not providing for the retention of coarse woody material (CWM) in the form of standing dead or dying trees (snags) and downed logs. See NA/Request at 42-45. KS Wild refers to the fact that the RMP requires that the landscape (1) provide a renewable supply of snags well distributed across the Matrix lands in a manner that provides habitat for cavity-using birds, bats, and other species; and (2) provide a renewable supply of large down logs well distributed across the Matrix lands in a manner that meets the needs of species and provides for ecological functions. *Id.* at 42-43; ROD and RMP at 38. KS Wild argues that BLM failed to abide by these standards and guidelines by making no effort to determine (1) how much CWM currently exists on a per-acre basis within the proposed action area; (2) how much CWM would be destroyed or removed by the proposed action; or (3) how much CWM will be retained after project implementation. NA/Request at 43.

BLM clearly recognized the importance of CWM, and included measures for conforming to the NFP and RMP directives. See, e.g., EA at 2-9, 2-16, 2-21, 3-59, 3-60, 3-65 to 3-68, 3-95, 3-98 to 3-100; Decision (CBD) at 2-4; Response at 30-32. BLM provided, as a PDF, that the purchaser would assure the retention of minimum levels of coarse woody debris and recruitment snags “as specified in the Standards and Guidelines on p. C-40 in the Northwest Forest Plan ROD.” EA at 2-17, 2-18.

BLM also specifically provided for the retention of “[s]ome . . . dying and dead trees,” including “snags or downed large coarse woody material.” EA at 2-9; 3-98; *see id.* at 2-16, 2-21. BLM further assessed the present incidence of CWM in the Sale area. *See* EA at 3-95. Since BLM provided for retaining existing snags and large downed logs, the CWM level would remain the same after the conclusion of timber harvesting and related activity in the Sale area.

KS Wild objects to BLM’s assessment of the presence of CWM in the Sale area by averaging CWM over the entire Sale area, rather than determining the CWM “on a per-acre basis.” NA/Request at 43 (citing *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007)). However, they fail to offer any expert opinion or supporting evidence demonstrating that the Sale will not leave snags and large downed logs distributed across the Sale area sufficient to generally meet the needs of wildlife species, provide structural and habitat diversity, and provide for other ecological functions, as required by the NFP and RMP. It is not sufficient to simply state that the “destruction of snags and downed logs is an *inevitable result* of the proposed action,” which is currently at issue. NA/Request at 43 (emphasis added).

We conclude that KS Wild has not demonstrated that BLM’s decision to approve the Timber Sale failed to conform to the NFP and RMP, and thus violated the land-use plan conformance requirement of section 302(a) of FLPMA. *See supra* n.5.

B. The Environmental Review Requirements of NEPA

[2] KS Wild argues on a myriad of bases that the EA for the Project is deficient under section 102(2)(C) of NEPA, which requires consideration of the potential environmental impacts of a proposed action in an EIS if that action is a “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2006); *see* NA/Request at 8-16, 23-27, 30-31, 34-39. A BLM decision to proceed with a proposed action, based on an EA tiered to a programmatic EIS, will be upheld as being in accord with section 102(2)(C) of NEPA, where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts and made a convincing case that no significant impact will result that was not already addressed in the EIS or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007); *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (quoting *Don’t Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247 (M.D. Pa. 1992)).

A party challenging BLM’s decision to approve a timber sale based on a finding of no significant impact has the burden of demonstrating with objective proof that the

decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Mere differences of opinion provide no basis for reversal. If the appealed decision is the denial of a protest, the appellant must affirmatively point out error in the protest decision. An appellant seeking to overcome such a decision carries the ultimate burden to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Bales Ranch, Inc.*, 151 IBLA at 357.

KS Wild argues that BLM failed to disclose whether trees with broken or forked tops, important to cavity-nesters and other late-successional forest dependent wildlife, will be retained or logged. *See* NA/Request at 8-9. However, BLM provided, under its PDFs, for reserving from harvest “a minimum of 3 snags per acre greater than 17 inches dbh, where available,” and for not logging “large, broken-top trees and large snags with loose bark . . . where possible,” in order to provide habitat for cavity-nesters and other late-successional forest dependent wildlife. EA at 2-21; *see* Decision (KS Wild) at 4; EA at 2-9; Response at 10. BLM did not require the retention of *all* trees with broken or forked tops. BLM allowed trees to be logged where minimum snag requirements and wildlife habitat objectives were satisfied and would promote the growth of the healthier trees. EA at 2-9; *see* Decision (KS Wild) at 4; Response at 10.

Next, KS Wild contends that BLM failed to ensure that T&E and special status botanical species would be adequately protected by no-treatment buffers. *See* NA/Request at 9. KS Wild refers only to two botanical species: (1) Gentner’s missionbells (*Fritillaria gentneri*), a T&E plant species; and (2) red-pored bolete mushrooms (*Boletus pucherrimus*), a BLM sensitive fungal species. BLM concluded that neither species was likely to be adversely affected by any timber harvesting or other Sale activity, since identified populations of such species were not situated in or near either the Sale area or any Sale activity. *See* EA at 3-40, 3-41, 3-43, 3-44, 3-45, 3-46 to 3-47; Decision (KS Wild) at 4-5; Response at 11. BLM provided for suitable measures to address potential adverse effects, principally no-treatment buffers and/or seasonal restrictions to protect special status botanical species. *See* EA at 1-8, 2-22 to 2-26, 3-46; Decision (KS Wild) at 5 (quoting EA at 3-46). Appellants offer no argument or supporting evidence disputing BLM’s analysis or conclusions.

KS Wild argues that BLM failed to disclose the most recent analysis of the Southern Oregon Cascade Study Area (Study Area), which includes the Sale Area, depicting a general downward trend in NSO occupancy and nesting success. *See* NA/Request at 9-10. However, the record is clear that BLM fully considered the likely effects of timber harvesting and related activity on the NSO. *See* EA at 3-59 to

3-60, 3-65 to 3-68, 3-98 to 3-100. It concluded that the Sale would not downgrade or remove any suitable NSO habitat within the home ranges of existing NSO sites that overlap the Sale area, and would, by undertaking timber harvesting in the remainder of the Sale area, only downgrade less than 2% of NRF habitat and 4.6% of dispersal habitat in the larger analysis area for the NSO, thus portending little or no adverse impact to the NSO or its habitat. See EA at 3-59 to 3-60, 3-65 to 3-68, 3-98 to 3-100; FONSI at 2; DR at 2. BLM noted that the Sale would adversely affect a total of 76 and 25 acres, respectively, of NRF and dispersal habitat, but concluded that there was likely to be no adverse impact to the NSO, given the retention of most of the NRF and dispersal habitat. EA at 2-9 to 2-11, 3-60, 3-65 to 3-68, 3-98 to 3-100; Decision (KS Wild) at 8. Further, BLM provided for maintaining the minimum level of canopy closure, taking into account all manner of timber harvesting. See EA at 1-3; Decision (KS Wild) at 8, 20; Response at 14-15.

BLM further reports that the 2009 updated analysis of the Study Area, to which appellants cite, was considered in the July 2010 BiOp and was available to the Field Manager at the time of his August 2010 DR. In that BiOp, FWS concluded that the Timber Sale and five other timber sales were not likely to jeopardize the continued existence of the NSO or result in the destruction or adverse modification of its critical habitat. See Decision (KS Wild) at 5-6; Response at 11. BLM also notes that, in general, the 2009 and more recent 2011 updated analyses do not substantially differ from the 2006 updated analysis, which reported, with the utmost statistical precision, a generally stable NSO population in southern Oregon. See *id.* KS Wild fails to substantiate its argument that the 2009 updated analysis of the Study Area directly contradicts BLM's consideration of the likely effects of the present Sale on the NSO, either within the Sale area or throughout its range in the Study Area. NA/Request at 9.

Next, KS Wild argues that BLM failed to disclose the likely effects of timber harvesting and related activity on the Critical Habitat Unit (CHU) designated by FWS in 1992. See NA/Request at 10-11, 31. KS Wild notes that, by doing so, BLM failed to assess the "very real impacts" of the Sale on habitat "in fact critical to the survival and recovery of the Northern Spotted Owl." *Id.* at 11.

BLM considered the likely effects of timber harvesting and related activity on the CHU (OR-38) as revised by FWS in 2008, when none of the Sale area was in the CHU, and as originally designated by FWS in 1992, when the Sale area included 241 acres (206 (NRF) and 35 (Dispersal)) in the 60,642-acre CHU. See EA at 3-60, 3-65 to 3-68, 3-98 to 3-100; BA at 8, 21-23; Decision (KS Wild) at 6, 20. BLM did so because, at the time of preparation of the BA in May 2010 and the EA in July 2010, it appeared that the 2008 revision might be revoked: "In dealing with th[e] uncertainties [concerning redesignation], the BLM addressed both the 1992 CHU

designation and the 2008 CHU designation.” Response at 12. BLM concluded that the Sale was not likely to adversely affect the NRF or dispersal habitat in either CHU. See BiOp at 42, 43, 60-62; Response at 12. KS Wild offers no expert opinion or supporting evidence regarding the likely impacts of the Sale on the NSO CHU or establishing that such impacts are likely to be significant.

Next, KS Wild argues that BLM failed to disclose when, where, and for how long BLM surveyed the Sale area for the Pacific fisher (*Martes pennanti*) or to adequately assess the likely impacts of timber harvesting and related activity on the species. See NA/Request at 11-13. KS Wild properly notes that a distinct population segment (DPS) of the Pacific fisher, generally situated on the west coast of the United States, has long been deemed by FWS to be warranted for listing as a T&E species under the ESA, but that listing was precluded by higher priority listing actions. See *id.* at 12 (citing 68 Fed. Reg. 18770 (Apr. 8, 2004)); see also 76 Fed. Reg. 38504, 38505 (June 30, 2011).

The record makes clear that BLM in fact considered the likely effects of timber harvesting and related activity on the Pacific fisher. See EA at 3-60 to 3-61, 3-68 to 3-70; FONSI at 6. It undertook limited surveys with the aim of assessing the presence of the fisher in the Sale area, and had focused on denning and resting habitat for the fisher, which was generally deemed to be synonymous with NSO NRF habitat. EA at 3-61. BLM acknowledged that the likely impacts of the Sale were “not well known,” but, as with the NSO, determined that there was likely to be no adverse impacts to the fisher, given the retention of most of the denning and resting habitat, which originally totaled 4,271 acres in the Analysis area for the Pacific fisher. EA at 3-69; see EA at 3-65, 3-69 to 3-70; Decision (KS Wild) at 6; Response at 13.

BLM determined that the Sale would not contribute to the need to list the Pacific fisher, since no fishers would be killed, affected habitat in the Sale area would still provide habitat components, substantial unaffected habitat would remain in the Sale area and elsewhere in the Upper Bear Creek Watershed, and fishers would, if necessary, simply disperse across their large home ranges. See EA at 3-69 to 3-70; FONSI at 6; Decision (KS Wild) at 7; Response at 13. BLM concluded that the Sale is not likely to bring about the further decline in the Pacific fisher DPS in the Sale area, or elsewhere throughout its range.⁸ See EA at 3-69 to 3-70; FONSI at 6; Decision

⁸ Although not yet designated as a T&E species, since the Pacific fisher is still considered a sensitive species, the BLM Manual requires BLM to ensure that its actions conserve the species and its habitat, promote removal of the species from the list of sensitive species, and avoid contributing to the need to list the species as a T&E species. See BLM Manual, §§ 6840.01, 6840.02, 6840.06, 6840.2 (Rel. 6-125

(continued...)

(KS Wild) at 7; Response at 13. KS Wild offers no expert opinion or supporting evidence regarding the likely impacts of the Sale on the fisher, or to establish that such impacts are likely to be significant.

KS Wild next argues that BLM failed to adequately consider the likely effects of timber harvesting and related activity on BLM sensitive bat species and migratory birds. See NA/Request at 14-15. However, the record does not support KS Wild's argument.

BLM considered the likely impacts of timber harvesting and related activity on BLM sensitive bat species and migratory birds. See EA at 3-63, 3-71, 3-72, 3-73; Response at 15. It concluded that, while it might adversely impact individual bats and migratory birds and their habitat, the Sale, as a whole, was not likely to adversely affect the overall population in the Sale and surrounding areas. See EA at 3-72, 3-73; Decision (KS Wild) at 8-9; Response at 15.

KS Wild, however, demands a level of specificity in the environmental analysis that would require BLM to quantify how and to what extent BLM sensitive bats "may be displaced or injured by project activities," and how and to what extent migratory birds "will be impacted." NA/Request at 14, 15. Based upon the record, we are not convinced that BLM can accurately quantify such impacts or that its qualitative analysis is insufficient to assess the likely impacts of the Sale and to conclude that no impact is likely to be significant. KS Wild again offers no expert opinion or supporting evidence regarding the likely impacts of the Sale on BLM sensitive bats and migratory birds, or to establish that such impacts are likely to be significant.

KS Wild contends that BLM failed to consider the likely effects of timber harvesting and related activity on wilderness characteristics in the Sale area. See NA/Request at 15-16. While BLM may be required to assess the existence of wilderness characteristics and to consider the likely effects of a proposed action on such characteristics, nowhere is it required to engage in such consideration when such characteristics have been found not to exist. See, e.g., *Oregon Natural Desert Association v. BLM*, 625 F.3d 1092, 1101, 1106-08, 1121-22 (9th Cir. 2010); *Oregon Natural Desert Association v. Rasmussen*, 451 F. Supp. 2d 1202, 1211-13 (D. Or. 2006); *Biodiversity Conservation Alliance*, 171 IBLA 218, 234 (2007). BLM has already specifically ruled out the existence of wilderness characteristics in the Sale area. See EA at 1-9; DR at 4; Decision (SMWC) at 11; Response at 16.

⁸ (...continued)
(12/12/2008)). KS Wild offers no argument or supporting evidence establishing that BLM violated its Manual prescriptions in approving the Timber Sale.

KS Wild nonetheless asserts that the Sale area has wilderness characteristics. However, it does not offer any opinion or supporting evidence to establish the existence of wilderness characteristics, or to otherwise establish any error in BLM's environmental analysis. *See* NA/Request at 15. Nor does KS Wild overcome the undeniable fact that the Sale and surrounding areas are extensively crisscrossed by existing roads, which fundamentally undermine their wilderness character. *See* Prospectus, Location Map; 16 U.S.C. § 1131(c) (2006); *e.g.*, *Lands Council v. Martin*, 529 F.3d 1219, 1230-31 (9th Cir. 2008). Rather, KS Wild only questions the accuracy of BLM's assessment of wilderness characteristics, which is not sufficient to establish error.

KS Wild argues that BLM failed adequately to consider the likely effects of timber harvesting and related activity on the NSO, owing to a decrease in the Sale area of mistletoe, which is important for nesting activity by the NSO. *See* NA/Request at 30-31. KS Wild asserts that BLM erred in proposing to reduce the incidence of mistletoe in the Sale area as part of the proposed harvesting, and argues that mistletoe is a desirable component of the forest ecosystem. *See id.* at 34-39.

BLM's aim was not to eliminate, but simply to limit the detrimental effects of mistletoe in the Sale area, especially by selectively removing heavily infected trees in conjunction with its proposed timber harvesting. *See* EA at 2-9, 2-10, 2-11, 2-12. BLM thus considered the likely impacts of timber harvesting on the NSO, owing to a decrease in mistletoe in the Sale area, as well as the overall advantages and disadvantages of taking such action. *See* Decision (KS Wild) at 20, 24-26 (citing EA at 1-8, 3-60, 3-66, 3-95, 3-97, 3-98); Response at 22-23, 26-27. It concluded that, while it might adversely impact individual NSO and their habitat, the Sale as a whole was not likely to adversely affect the overall population in the Sale and surrounding areas. *See* Decision (KS Wild) at 20. KS Wild offers no expert opinion or supporting evidence regarding the likely impacts of the Sale on the NSO, owing to a decrease in mistletoe in the Sale area, or to establish that such impacts are likely to be significant.

KS Wild further argues that BLM should have prepared an EIS to address the potential cumulative significant impacts on terrestrial and aquatic resource values of engaging in past, present, and reasonably foreseeable logging, yarding, and road construction/use/maintenance in the Sale and surrounding areas. *See* NA/Request at 23-27. In terms of reasonably foreseeable future timber sales, KS Wild refers only to the Cottonwood Forest Management Project (FMP), which, being formally proposed on October 29, 2010, was contemplated at the time of BLM's July 9, 2010, EA and August 12, 2010, DR/FONSI. KS Wild states that certain documents it obtained "clearly show that the BLM was aware of the Cottonwood [FMP] proposed action before it circulated the Sampson Cove EA for public comment[.]" *Id.* at 25.

At the time of preparation of the EA at issue, it seems clear that BLM was only contemplating a proposal for the Cottonwood FMP. However, the fact that BLM was “aware” that it might propose the FMP did not require BLM to consider the potential cumulative impacts of the present Timber Sale and the FMP. NA/Request at 25. It was only at the point that the FMP became reasonably foreseeable that BLM was required to consider it in conjunction with the present Sale. *See, e.g., Howard B. Keck, Jr.*, 124 IBLA 53 (1992), *aff’d*, *Keck v. Hastey*, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). KS Wild has not established that this was the case when BLM was preparing the EA in July 2010. In any event, we note that, in later addressing the likely effects of the FMP, BLM could consider the potential cumulative effects of the approved Timber Sale and the proposed FMP.

Otherwise, BLM fully considered the potential cumulative impacts of the Timber Sale, concluding that they were unlikely to be significant, since the effects of past harvesting, which affected the entirety of the Sale area, have ameliorated, and the effects of present and reasonably foreseeable future harvesting would leave large areas of land in the Sale and surrounding areas undisturbed, thus avoiding or minimizing any adverse consequences. *See* EA at 1-7, 3-1 to 3-2, 3-11, 3-21 to 3-22, 3-24 to 3-36, 3-47 to 3-49, 3-74 to 3-75, 3-104 to 3-105; FONSI at 5; Decision (KS Wild) at 15-17; Decision (SMWC) at 13. KS Wild has not identified any likely cumulative impact that was overlooked by BLM, or the nature and significance of which was not adequately addressed by BLM in the EA and the RMP Final EIS, which together afforded the appropriate site-specific level of analysis. *See, e.g., Umpqua Watersheds, Inc.*, 158 IBLA 62, 73 (2000); *Klamath Siskiyou Wildlands Center*, 157 IBLA 332, 339-41 (2002).

KS Wild fails to offer any argument or supporting evidence demonstrating that, owing to geographic proximity or any other factor, there is likely to be an interaction between the Timber Sale and any of the past, present, and/or reasonably foreseeable future projects or activities that might result in a specific cumulative impact, which BLM failed to address. *Wyoming Outdoor Council*, 147 IBLA 105, 109 (1998). We have long held that, in order to demonstrate a deficiency in BLM’s cumulative impacts analysis, “it is not sufficient merely to note the existence of other . . . projects . . . without concretely identifying the adverse impacts caused by such other . . . projects to which the action being scrutinized will add.” *National Wildlife Federation*, 150 IBLA 385, 399 (1999).

Finally, KS Wild contends that BLM impermissibly narrowed the purpose of the proposed action, and thus failed to consider reasonable alternatives to the proposed Timber Sale in the EA. *See* NA/Request at 19-21. KS Wild asserts that BLM should have considered alternatives that reduced the planned area of logging. Such alternatives would have precluded logging “near the Pacific Crest Trail,” “in the

Greensprings Mountain wild area,” “in units proposed for addition to the Cascade-Siskiyou National Monument,” and in the “designated 1992 NSO critical habitat.” *Id.* at 19.

In its EA, BLM admittedly considered only the proposed timber harvesting and related activity in the Sale area, and a no-action alternative. However, as the court stated in *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1246 (9th Cir. 2005), approving consideration in an EA of only the proposed action and a no-action alternative, “[NEPA and its implementing regulations] do[] not impose a numerical floor on alternatives to be considered.” Rather, the concern is with “the substance of the alternatives[.]” *Id.* In this regard, we conclude that BLM satisfied section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2006), by considering the likely effects of either logging or not logging the entire Sale area, or the effects “at either end of the spectrum.” *Biodiversity Conservation Alliance*, 171 IBLA at 238 (quoting *In Re Blackeye Again Timber Sale*, 98 IBLA 108, 111 (1987)); *see also Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *Bales Ranch, Inc.*, 151 IBLA at 363. An EA must generally include a “brief discussion[] . . . of alternatives[.]”

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal is dismissed to the extent it was brought on behalf of SMWC, CWP, OW, and CBD; the decisions appealed from are affirmed; and the petition for a stay is denied as moot.

_____/s/
James F. Roberts
Administrative Judge

I concur:

_____/s/
James K. Jackson
Administrative Judge