INTERIOR BOARD OF LAND APPEALS

In re Bare Nelson Timber Sale

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IN RE BARE NELSON TIMBER SALE

IBLA 91-72 Decided April 21, 1993

Appeal from a decision of the Grants Pass Resource Area Manager, Medford District, Bureau of Land Management, denying a protest against the Bare Nelson Timber Sale. OR 110-TS90-23.

Affirmed.

1. Timber Sales and Disposals

One appealing the denial of a protest to a timber sale and the attendant EA must affirmatively demonstrate why the decision was in error. Mere disagreement with the timber sale without substantial evidence showing the sale violates or is inconsistent with management policies is insufficient to show error. Likewise, it is the timber sale implementing the timber management plan which is the specific action that may be reviewed for compliance with the pertinent statutes and regulations, and challenges to the general management policies and recommendations found in the timber management plan are beyond the Board's review.

APPEARANCES: Hubert L. Smith, Selma, Oregon; David A. Jones, District Manager, Medford District Office, Bureau of Land Management, Medford, Oregon.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Hubert L. Smith has appealed the decision of the Grants Pass Resource Area Manager, Medford District Office, Bureau of Land Management (BLM), dated October 16, 1990, denying his protest of the Bare Nelson Timber Sale (OR 110-TS90-23). 1/

1/ According to Smith, 49 other residents of the area participated in the protest. In his statement of reasons (SOR) for appeal, Smith purports to act on behalf of the "parties to the protest." None of those individuals signed either the notice of appeal or the SOR. In the absence of any evidence that Smith is qualified to represent the interests of such individuals under the Departmental regulations governing eligibility to practice before the Department, 43 CFR 1.3, the appeal must be considered to be his alone.

On December 19, 1989, the Area Manager completed review of the preliminary work for an environmental assessment (EA) for the Bare Nelson Timber Sale. 2/ This proposed timber sale was intended to assist in meeting the annual timber harvest commitment for the Medford District as established by the Management Framework Plan for the Josephine Sustained Yield Unit, dated October 1, 1979, as amended by the Record of Decision for the Modification of the Josephine and Jackson-Klamath Timber Management Plans, dated November 15, 1985 (EA at 1). The proposed action was described as the sale and harvest of approximately 5.4 million board feet of timber from scattered parcels totalling approximately 344 acres in T. 38 S. and T. 39 S., R. 7 W., Willamette Meridian, Oregon. The sale was to be offered in fiscal year 1990 with an ensuing 3-year contract (EA at 2). The EA was tiered to the Josephine Final Timber Management Environmental Statement (JFTMES) (October 1978), as supplemented by the Josephine/Jackson-Klamath Timber Management Supplemental Environmental Impact Statement (SEIS) (May 1985) (EA at 1).

In December 1989, BLM provided notice of the proposed sale and the EA. 3/ The Area Manager issued a finding of no significant impact and a decision to proceed with the timber sale on February 13, 1990. 4/

2/ The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1988), requires preparation of an EIS whenever a proposed major Federal action will significantly affect the quality of the human environment. To determine the nature of the environmental impact of a proposed action and whether an EIS will be required, Federal agencies prepare an EA. 40 CFR 1501.4(b), (c). If, on the basis of the EA, the agency finds that the proposed action will produce "no significant impact" on the environment, an EIS need not be prepared and the agency may proceed with the proposed action. 40 CFR 1501.4(e).

3/ BLM invited comments on the proposed timber sale in June 1989. The numerous comments received were included in the case file for the proposed sale and were apparently utilized by BLM in the EA process. Further, the record indicates that in the fall of 1989 several of the local residents accompanied BLM on tours of the proposed timber units and participated in public meetings with BLM to discuss the sale.

4/ Most of the lands involved * * * Revested Oregon and California Railroad and Reconveyed Coos Bay Wagon Road grant lands (O&C lands). See SEIS at 2; Oct. 16, 1990, Decision at 1. Section 1 of the Act of Aug. 28, 1937 (O&C Act), 43 U.S.C. § 1181a (1988), provides that O&C lands

"shall be managed * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principles of sustained yield for the purpose of providing permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities."

(Emphasis added). Thus, other intended purposes for these lands, including management for multiple uses, are "subordinate to prudent timber harvesting." Oregon Natural Resources Council, 116 IBLA 355, 371-72 (1990). BLM's guidelines for the harvesting of timber under the subject sale is detailed

However, on February 14, 1990, BLM received a written response to the December 1989 notice from Smith and others (identified as the residents of the Thompson Creek Forest Subdivision and property owners in the Thompson Creek Valley). In recognition that a February 15, 1990, comment deadline had been established in the notice, the Area Manager in a February 27, 1990, letter to Smith addressed each of the concerns expressed by the area residents and held that it was unnecessary to modify or rescind the February 13 decision. 5/

On July 5, 1990, BLM advertised the Bare Nelson Timber Sale for public auction. Smith and others filed a protest to the sale on July 10, 1990. They asserted with detailed arguments that the proposed sale would not achieve the sustained yield and multiple-use standards mandated by statute; that the EA did not adequately address obvious negative impacts to contiguous residential areas; and that the EA did not properly address the potential harm to wildlife, particularly the Northern Spotted Owl. The protestants complained that the EA did not present alternative management plans to minimize identifiable negative impacts.

By decision dated October 16, 1990, the Area Manager denied the protest, addressing each of the protestants' arguments in detail and concluding that all issues of concern had been adequately dealt with in the timber sale plan. Smith appealed.

On December 13, 1990, BLM awarded a sale contract to Rough & Ready Lumber Company, the high bidder at the timber sale conducted on July 26, 1990. 6/

With his appeal, Smith requested that the sale be stayed. By order dated February 4, 1991, the Board denied that request, finding that Smith had failed to establish that a stay was warranted. 7/

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fn. 4 (continued)
in the sale prospectus and EA. The determination to offer the sale concluded that the proposed harvest conforms with the management framework plan and does not, when combined with the mitigating measures, constitute a significant impact affecting the quality of the human environment.

5/ The record shows that the Area Manager similarly responded to comments filed Feb. 15, 1990, by a group designated as the Bear Creek Residents. In a letter dated Mar. 1, 1990, the Area Manager similarly noted the confusion over the comment period and addressed each of the expressed concerns. However, in that instance the Area Manager rendered a determination to modify the sale in two areas in response to the comments submitted.

6/ BLM noted that the public auction was conducted with notice to the potential bidders that a pending protest could delay or modify the sale.

7/ The timber harvest figures released by BLM in November 1992 show that little has been done under the sale contract during the first 2 years of its 3-year duration. Those harvest figures are still viable inasmuch as logging operations are restricted between Oct. 15 and May 15, each year.

[1] An appellant is required to point out affirmatively why the decision under appeal is in error. In Re Mill Creek Salvage Timber Sale,
121 IBLA 360 (1991), and cases cited. Thus, an appellant cannot merely reiterate the arguments presented in his protest and ignore the decision below. Id. Accordingly, we will proceed to review Smith's individual arguments on appeal with due consideration given to the issues presented in the protest and the conclusions rendered by the Area Manager in his decision.

Smith's SOR is divided into two parts. The first sets forth substantive arguments, while the second raises procedural objections to the decisionmaking process. Our review will follow the arguments in the order presented by appellant and responded to by BLM.

In the first argument of his appeal Smith contends that the Bare Nelson Timber Sale exceeds the allowable level for clearcutting "high-intensity lands" established under the JFTMES. He asserts that the 65-percent level scheduled for clearcutting under the Bare Nelson sale exceeds the 26-percent level specified in JFTMES.

BLM explains that Smith's contention ignores the SEIS which establishes the clearcut harvest at 73 percent for the Josephine Unit (SEIS at 5). The SEIS states that such refinement of the management plan would not change the decadal allowable harvest and was based on site-specific factors and management constraints. Id. BLM clarifies the percentage figure to mean the percent of total acres affected over a 10-year period and contends that the Bare Nelson's clearcut at a 65-percent level conforms with the totals for the Josephine Unit (Answer at 1). Since it is evident that the allowable level for clearcut harvesting is not exceeded in this instance, we find that Smith has not shown error.

In Smith's next two arguments he states that his protest was unduly criticized as too general and not site-specific, and then contends that the Area Manager erroneously concluded that current timber management plans cannot be challenged.

With respect to the first of these, he contends that the JFTMES, used by BLM to conduct the sale, is also general. BLM correctly responds by explaining that the EA for this timber sale is site-specific to the sale and the decision to implement the sale is contained in this EA. Accordingly, protests of the sale should properly address the conclusions in the EA and the associated record of decision. The purpose of the JFTMES and the 1985 SEIS, to which the subject EA is tiered, was to analyze the impacts of policy decisions and recommendations set forth in BLM's 10-year timber management plan for the 425,720 acres of public lands in the Josephine Sustained Yield Unit. Once those general management policies and recommendations were established, they are no longer subject to review on a sale-by-sale basis. Rather, the immediate concern of each sale is how the site-specific considerations are to be undertaken in accordance with the management practices. See Portland Audubon Society v. Lujan, 884 F.2d 1233, 1235 (9th Cir. 1989), cert. denied, 494 U.S. 1026 (1990).

In arguing that BLM's management plans may be challenged here, Smith asserts that the "Section 314 rider to the Interior Appropriations Bill containing that restriction was not renewed for fiscal year 1991."

We assume appellant means Section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1989, P.L. 100-446, 102 Stat. 1774, 1825 (Sept. 27, 1988) (later codified at 16 U.S.C. § 1604). 8/ This provision was reenacted for 1990, without modification, by section 312 of the Department of the Interior and Related Agencies Appropriations Act, 1990, P.L. 101-121 (1990 Appropriations Act), 103 Stat. 701, 743 (Oct. 23, 1989). Section 314 barred "challenges to any existing plan * * * solely on the basis that the plan does not incorporate information subsequent to the completion of the existing plan." That section further provided that "any and all particular activities to be carried out under existing plans may nevertheless be challenged."

In Headwaters, Inc., 116 IBLA 129, 133 (1990), we recognized that a timber plan establishes a management policy subject to final review only by the Director, BLM, but that the Board's authority to review individual timber sale appeals was not limited by section 314. Thus, we concluded that it is the timber sale implementing the management plan which is the specific action that may be reviewed for compliance with the pertinent statutes and regulations. Id. at 133-34; see also Portland Audubon Society v. Lujan, 884 F.2d at 1237-39 (under proper implementation of section 314, a challenge to an individual sale is limited to site-specific considerations where the EIS for the timber management plan adequately addresses the environmental impacts). Likewise, the Board's responsibility in this case is to scrutinize BLM's compliance with applicable statutes, regulations, and policies in its supervision of the subject timber sale and not to examine the general timber management plan under which the sale was conceived.

8/ BLM suggests that appellant "is referring to the 318 rider" to the "Interior Appropriations Bill" (Answer at 2), and then asserts that this section does not apply to the Bare Nelson timber sale.

Under section 318 of the 1990 Interior Appropriations Act, 103 Stat. 701, 745-50, often identified as the Northwest Timber Compromise, Congress required harvesting of timber on certain lands known to contain spotted owls in Oregon and Washington under 1990 timber sales to be conducted in accordance with a timber management plan set forth in subsection (b) of section 318. Congress also suspended judicial review of certain environmental issues in limited situations. See Robertson v. Seattle Audubon Society, __ U.S. ___, 112 S.Ct. 1407 (1992) (the Court reversed a ruling that the judicial review bar of section 318 is unconstitutional).

We find nothing persuasive in BLM's conjecture that section 318 was intended. It does not appear that the lands at issue here were subject to section 318. Smith's argument, however, was in direct response to the Area Manager's specific reliance on the 10-year timber management plan for the Josephine Unit, and section 314 would have been the pertinent reference to a challenge to an existing management plan. Regardless, appellant has no standing to challenge the operative timber management plan under either section 314 or 318 (see discussion infra).

In arguments four through seven, Smith assails BLM's management performance in past timber sales in the general area and contends that this sale will result in those same alleged management failures. On appeal, Smith has submitted a video tape, which he contends, "demonstrates" how BLM has failed in reforestation attempts, slash management, and stream protection. BLM opposes the admission of the video as evidence, arguing that a proper foundation has not been made by appellant. To constitute substantial evidence, unsubstantiated declarations such as appellant's presentation, like any other evidence, must meet minimum criteria for admissibility--it must have probative value and bear indicia of reliability. See R.C.T. Engineering v. OSMRE, 121 IBLA 142, 151 (1991), citing Calhoun v. Bailar, 626 F.2d 145, 149 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981).

The Board has reviewed the video tape, and while we will accept it as part of the record in this case, it has little or no probative value and lacks reliability because there is nothing other than appellant's assertions to support claims that the areas depicted therein represent failed timber management practices on public lands. Moreover, even if we were to accept appellant's argument that the areas shown are areas of the public lands, BLM has offered reasonable explanations why any failures portrayed therein are not to be expected in the areas covered by this sale.

In addition, it is well established that a party seeking to establish BLM has violated applicable management policies must show error in BLM's actions; mere disagreement or difference in opinion will not establish such error. In Re Trailhead Timber Sale, 97 IBLA 8 (1987); In Re Upper Floras Timber Sale, 86 IBLA 296, 305 (1985). Further, an appellant who challenges a timber sale on the basis that the sale is allegedly inconsistent with the applicable management plan or policies must demonstrate the inconsistency. In Re Grassy Overlook Timber Sale, 115 IBLA 359 (1990). Smith has not established such inconsistency.

In his next argument, Smith charges that BLM has implied that it will use a "super tree" which will purportedly "grow rapidly enough to justify" the current allowable cut but that it has not cited evidence of this "super tree" (SOR at 5). BLM responds that the allowable cut is justified by the use of better nursery stock, site preparation, and post-planting treatments, not by utilization of some "super tree." It points out that the utilization of "genetically superior plantings" was rejected in the JFTMES at 1-18. Smith has failed to substantiate his challenge with substantive evidence that BLM's reported allowable cut is in error. Therefore, this argument must also be rejected. See In Re Trailhead Timber Sale, 97 IBLA at 10; In Re Upper Floras Timber Sale, 86 IBLA at 305.

In argument nine, Smith challenges BLM's rejection of his protest against the use of herbicides. BLM informed Smith and the other protestants that there were no plans to use herbicides in the sale area. However, Smith "re-asserts" a "widespread local belief" that several reported cases of cancer and miscarriages have resulted from "herbicide spraying in the higher elevations around this residential subdivision" (SOR at 5).

Whether or not community concern for herbicide use exists or is justified is irrelevant in this case because BLM has reported that herbicide use is not planned for this sale area. BLM further explains that should a plan to employ herbicides be proposed, such use must necessarily be preceded by appropriate environmental review, including public notice and input regarding dangers to the human environment.

Smith next objects to "our public lands being subjected to what many feel is reckless over-cutting simply because private firms have diminished timber supplies" (SOR at 5). Appellant must do more than simply level general charges against BLM; he must allege error in the subject timber sale with reasonable particularity and support his challenge with objective proof. As noted above, we find no violation in this case of the levels approved for timber harvesting.

In his final argument in the first part of his appeal, Smith references a BLM biologist's sighting of a Northern Spotted Owl, a threatened species, in the sale area. BLM responds that "[t]he sale area has been inventoried several times and no sightings of spotted owls were made" (Answer at 6). BLM reports that the Bare Nelson timber sale has gone through formal consultation with the U.S. Fish and Wildlife Service (FWS), and FWS approved the sale. There is no evidence that BLM has failed in its duty under the Endangered Species Act to seek to conserve threatened and endangered species. See 16 U.S.C. § 1532(3) (1988); Headwaters, Inc., 122 IBLA 362, 367-68 (1992). Further, there is no indication that the Northern Spotted Owl will be otherwise affected as a species. Id. Smith has not shown where BLM has failed in its duties relating to endangered and threatened species.

After a careful review of the record, we conclude that Smith has not established BLM erred in any respect in denying for substantive reasons the protest of the decision to proceed with the Bare Nelson Timber Sale.

In the second part of his appeal, Smith claims that BLM failed to provide for "adequate solicitation and consideration of public comment" (SOR at 7). Smith first notes that the public announcement of the sale did not reach most of those who would be affected. He then refers to the February 1990 situation where a decision to proceed with the sale was rendered 2 days before the stated deadline for public response. He contends that a promised "re-evaluation" of the decision was not received. He mentions that a letter requesting more information on Northern Spotted Owl issues received an equivocal response from the District Office, BLM. Finally, Smith objects to BLM proceeding with the Bare Nelson timber sale "some ten weeks" prior to the District Office's official response to the protest.

BLM should, of course, afford the public an adequate opportunity to comment on proposed action (see 40 CFR 1506.6(b)), and it did so in this case. Smith and his co-protestants were afforded sufficient time and occasion to make their presentations to BLM. Further, their solicited comments to the proposed sale and the EA were adequately considered by BLM in the

February 27, 1990 "reevaluation" of the February 13, 1990, decision to proceed with the sale.

The forest management regulations provide that when a decision is made to conduct an advertised sale, the notice of that sale shall be considered the decision document. 43 CFR 5003.2(b). Protests may be filed within 15 days of the publication of that decision. 43 CFR 5003.3(a). Upon the denial of such a protest, "the authorized officer may proceed with implementation of the decision." 43 CFR 5003.3(f). While this regulation implies that no further action will be taken prior to adjudication of the protest, we do not believe that the course of action pursued in this case violated that regulation. Although after the filing of that protest and prior to its adjudication BLM conducted the sale, it notified the bidders of the pending protest, thereby alerting them to the subsequent potential alteration or cancellation of the sale. Moreover, the timber sale was not awarded by issuance of the contract until after denial of the protest. We find that Smith has not shown that BLM erred procedurally in reviewing and denying the protest. 9/

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

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

9/ To the extent that Smith asserts that the District Office, BLM, did not properly respond to its request for more information concerning the Northern Spotted Owl (information which was not directly relevant to the protested timber sale), we find the Board has no jurisdiction over such matters.