

INTERIOR BOARD OF LAND APPEALS

Oregon Natural Resources Council and
Hells Canyon Preservation Council

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OREGON NATURAL RESOURCES COUNCIL
HELLS CANYON PRESERVATION COUNCIL

IBLA 2004-149
IBLA 2004-173

Decided May 25, 2004

Appeals from a Decision Record of the Field Manager, Baker Field Office, Bureau of Land Management, approving the Cove Fuels Treatment Project. EA No. OR-030-2003-05.

Appeals dismissed in part; petitions for stay denied; order to show cause.

1. Appeals: Generally--Rules of Practice: Appeals: Generally

Under 43 CFR 4.411(a), a party to a case who is adversely affected by a decision of an officer of BLM may appeal to the Board of Land Appeals by filing a notice of appeal in the office of the officer who made the decision within 30 days after the date of service. A notice of decision published by BLM in a newspaper, providing that an appeal of the decision had to be filed "within 30 days after the publication of this notice," does not establish a date of service from which the 30-day appeal period can be calculated.

2. Appeals: Generally--Rules of Practice: Appeals:
Generally--Timber Sales and Disposals: Generally--Wildfire
Management Decisions: Generally

The procedures governing wildfire management decisions affecting forests are set forth at 43 CFR 5003.1(b). Appeals of such decisions are to the Board of Land Appeals, which is required under 43 CFR 4.416 to decide such appeals within 60 days after all pleadings have been filed, and within 180 days after the appeal is filed. Other BLM decisions governing or relating to forest management proceed through the protest and appeal process of 43 CFR 5003.1(a), 43 CFR 5003.2, and 43 CFR 5003.3.

3. Appeals: Generally--Rules of Practice: Appeals:
Generally--Timber Sales and Disposals: Generally--Wildfire
Management Decisions: Generally

When BLM provides in a decision record approving a fuels treatment project, and subsequent notice thereof, for a right of appeal to the Board of Land Appeals, pursuant to 43 CFR Part 4, but explains on appeal that the project will be implemented through a timber sale contract and a stewardship contract and that the timber sale contract will be subject to the protest and appeal procedures of 43 CFR Subpart 5300, the Board will grant BLM's motion to dismiss, as premature, an appeal of the decision record, as it relates to activities to be conducted pursuant to a timber sale contract.

4. Appeals: Generally--Rules of Practice: Appeals:
Generally--Timber Sales and Disposals: Generally--Wildfire
Management Decisions: Generally

Under 43 CFR 5003.1(b), BLM may make a wildfire management decision effective immediately or on a date certain when it determines that "vegetation, soil, or other resources on the public lands are at substantial risk of wildfire due to drought, fuels buildup, or other reasons, or at immediate risk of erosion or other damage due to wildfire." In the absence of such a determination, a wildfire management decision is automatically stayed in accordance with 43 CFR 4.21(a). Regardless, 43 CFR 4.21(b) clearly is applicable to wildfire management decisions whether or not such a decision is made effective immediately.

APPEARANCES: Doug Heiken, Oregon Natural Resources Council, Eugene, Oregon;
Gregory J. Dyson, Hells Canyon Preservation Council, La Grande, Oregon;
Penelope Woods, Field Manager, Baker Field Office, Bureau of Land Management,
U.S. Department of the Interior, Baker City, Oregon.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Oregon Natural Resources Council (ONRC) and Hells Canyon Preservation Council (HCPC) (hereinafter, collectively, appellants) have filed separate appeals from and petitions for a stay of the effect of a February 24, 2004, Decision Record (DR) of the Field Manager, Baker Field Office, Bureau of Land Management (BLM), approving the “Cove Fuels Treatment Project” (Project), which had been analyzed as Alternative A in Environmental Assessment (EA) OR-030-2003-05.^{1/} In the DR, the Field Manager stated at page 1: “Fuels treatments will be conducted on approximately 406 acres of BLM lands in the Cove Project area for the primary purposes of reducing fuel loads that currently impose a high risk of uncharacteristic high intensity stand replacement fire; particularly as such a fire would impact urban interface areas.”

The EA described the activities proposed on 446 acres of public lands under Alternative A as “a total of 262 acres of commercial thinning, 61 acres of shelterwood harvest, 91 acres of pre-commercial thinning, 406 acres of fuels treatment and 1.5 miles of road construction.” (EA at 8.) These activities would take place on scattered tracts of public land near Cove, Oregon, in secs. 25 and 35, T. 3 S., R. 40 E., and sec. 1, T. 4 S., R. 41 E., Willamette Meridian, Union County, Oregon, identified in the EA at page 61, Map 2, as the “Lower Units,” and in secs. 31 and 32, T. 3 S., R. 41 E., and sec. 5, T. 4 S., R. 41 E., identified in the EA at page 62, Map 3, as the “Upper Units.”

On February 27, 2004, BLM published a “Notice of Decision” in the La Grande Observer, which, although not further identified in the record, presumably is a newspaper of general circulation in the affected area. That notice stated that BLM had decided to implement the proposed action in EA OR-030-2003-05, and that the DR was available for review in the Baker Field Office, BLM, or on the internet at a particular website. It further stated that the DR could be appealed to the Board, but that the appeal had to be filed in the Baker Field Office “within 30 days after the publication of this notice.”^{2/} See DR at 3 (“If an appeal is taken, a notice of appeal

^{1/} The Board docketed ONRC’s appeal as IBLA 2004-149 and HCPC’s appeal as IBLA 2004-173.

^{2/} There is no provision in 43 CFR Part 4 relating to publishing a notice of a BLM decision in a newspaper of general circulation in the affected area. However, 43 CFR 5003.2(a) does provide that “[t]he authorized officer shall, when the public interest requires, specify when a decision governing or relating to forest management shall be implemented through publication of a notice of decision in a newspaper of
(continued...)

must be filed in the BLM office * * * within 30 days from the date that a notice of this decision is published in the La Grande Observer”).

[1] The applicable regulation relating to appeals to the Board of BLM decisions provides that a party to a case who is adversely affected by a decision of an officer of BLM may appeal by filing “in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal.” 43 CFR 4.411(a); see 43 CFR 4.410(a). Such a notice must be transmitted “in time for it to be filed in the office where it is required to be filed within 30 days after the date of service.” 43 CFR 4.411(a).

A purpose of the 30-day appeal period in 43 CFR 4.411(a) is to provide BLM with certainty regarding the finality of its decisions. That regulatory appeal period cannot be extended or shortened by a statement in a BLM decision that is contrary to the regulation. The commencement of the appeal period is triggered by service of the decision. While service can take various forms (e.g., certified mail return receipt requested, publication in the Federal Register, etc.), there must be evidence of service in the record.^{3/} Evidence of service provides a basis for determining whether an appeal is timely. A notice of decision published by BLM in a newspaper providing that an appeal of the decision must be filed “within 30 days after the publication of this notice,” does not establish a date of service from which the 30-day appeal period of 43 CFR 4.411(a) can be calculated. Although the present record does not contain evidence of the date of service of the DR on either of the appellants, we note that each appeal was filed within 30 days of the date of the DR.

[2] Given the purpose of the approved Project and the fact that the Field Manager provided for an appeal of the DR to this Board, it would appear that the DR is a “wildfire management decision” within the meaning of 43 CFR 5003.1(b). The

^{2/} (...continued)

general circulation in the area where the lands affected by the decision are located, establishing the effective date of the decision.” Such a notice must “reference 43 CFR subpart 5003--Administrative remedies.” Id. The notice in question did not reference 43 CFR Subpart 5003. Moreover, notices of decision are initially subject to the protest procedure in 43 CFR 5003.3, not the appeal procedures in 43 CFR Part 4. There is no indication that BLM intended, with the publication of the notice of decision, to invoke the procedures set forth in 43 CFR 5003.2 and 5003.3 in this case.^{3/} Actual notice may be a substitute for service. Thus, a notice of appeal must be filed within 30 days from the date of actual notice of the decision by the appellant or its authorized representative. Minchumina Homeowners Association, 93 IBLA 169, 173 (1986).

Department promulgated that regulation on June 5, 2003, effective July 7, 2003, incorporating into 43 CFR Subpart 5003--“Administrative Remedies” a new category of forest management decision, which is termed a “wildfire management decision.” 68 FR 33795 (June 5, 2003). ^{4/} That regulation provides that BLM may make such a decision “effective immediately or on a date established in the decision.” Id. In addition, 43 CFR 5003.1(c) provides that the Board “will issue a decision on the merits of an appeal of a wildfire management decision under paragraph (b) of [43 CFR 5003.1] within the time limits prescribed in 43 CFR 4.416.” The Board is obligated by 43 CFR 4.416 to “decide appeals” from wildfire management decisions “within 60 days after all pleadings have been filed, and within 180 days after the appeal was filed.”

At the time of promulgation of the wildfire management decision regulation in 2003, Subpart 5003 of Title 43 of the CFR provided, and still provides, for a protest and appeal process for a decision governing or relating to forest management. 43 CFR 5003.1(a); 43 CFR 5003.2; 43 CFR 5003.3. Under 43 CFR 5003.2(a), set forth supra at n.2, BLM provides notice of forest management decisions in accordance with the requirements of that regulation. ^{5/} Such decisions are then subject to the protest provisions of 43 CFR 5003.3. ^{6/} Upon denial of a protest by BLM, the

^{4/} In the proposed rulemaking, BLM explained that “[t]he changes included in this proposal are important because BLM must provide a way to implement fire management decisions on * * * forest lands with a minimum of delay.” 67 FR 77012 (Dec. 16, 2002). It also explained:

“The experience of recent fire seasons strongly suggests that the faster BLM is able to take action to reduce future threats of wildland fires, the more likely BLM can safeguard public and firefighter health and safety, protect property, and improve environmental baseline conditions in the wildland-urban interface and other priority areas. This recent experience shows that wildfire management decisions are by their nature urgent, both to speed recovery from past fires and thereby prevent erosion, water pollution, and other harmful legacies that they have caused, and to prevent or reduce catastrophic wildfires in upcoming dry seasons.” Id.; see 68 FR at 33795.

^{5/} While that regulation provides for the notice of decision procedure for forest management decisions, “when the public interest requires” it, neither the regulation itself nor the preamble to its promulgation provides any guidance on how such a public interest determination is to be made. See 49 FR 28561 (July 13, 1984). Thus, the regulation appears to contemplate that BLM does not have to follow the notice of decision requirements for all forest management decisions.

^{6/} “Protests of a forest management decision, including advertised timber sales,
(continued...) ”

protestant has a right of appeal to the Board.^{z/} It is clear that the Department intended that “wildfire management decisions” be appealable directly to the Board, rather than being subject to the protest and appeal procedures of 43 CFR 5003.2 and 43 CFR 5003.3.

[3] Nevertheless, despite the appearance that the present DR is a wildfire management decision governed by the procedures of 43 CFR 5003.1(b), BLM explains on appeal a distinction not otherwise disclosed in the EA or the DR, *i.e.*, that the Project activities will take place under two separate contracts: a Timber Sale Contract and a Stewardship Contract:

Part of the appealed decision is for a Stewardship Contract [^{8/}] to complete fuels reduction, and part of this project involves a commercial timber sale contract that has yet to be advertised. As provided in the

^{6/} (...continued)

may be made within 15 days of the publication of a notice of decision or notice of sale in a newspaper of general circulation.” 43 CFR 5003.3.

^{z/} This is inferred from the language of 43 CFR 5003.1(a), quoted above, which provides that filing a notice of appeal to the Board does not automatically suspend the effect of the forest management decision, “as described under sections 5003.2 and 5003.3.” Moreover, we have stated that, until a notice of sale is published and any timely filed protest adjudicated by BLM, no appeal lies to the Board of Land Appeals. *Sierra Club, Grand Canyon Chapter*, 136 IBLA 358, 360-63 (1996).

^{8/} Stewardship contracting is undertaken pursuant to section 347 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681, 2681-298 (1998), as amended by section 323 of the Consolidated Appropriations Resolution, 2003, Pub. L. 108-7, 117 Stat. 11, 275 (2003). As explained by the Director, BLM, in Instruction Memorandum (IM) No. 2004-081, dated Jan. 15, 2004, the primary objective of a stewardship contract is to achieve one or more land management goals, such as reducing fire hazards and improving forest health, rather than the production of timber (which is the principal aim timber of a sale contract), by providing for exchanging the value of any timber and other forest products generated for the cost of services rendered under the contract. As provided in “BLM Stewardship Contracting Guidance,” dated Jan. 14, 2004 (attached to IM No. 2004-081), at 1, “[a]ny vegetative material removal must be a by-product of meeting the stewardship contracting project goals * * *.” Also, a stewardship contract “is not a timber sale contract and, as such, is not subject to the requirements contained in 43 CFR, Part 5400, Sale of Forest Products.” *Id.* at 6.

regulations at 43 CFR § 5003.2 & 5003.3, an appeal of a Timber Sale Decision may be had only after the BLM has published advertisement of timber sale, which constitutes the decision document for the timber sale, and after the BLM has denied Appellant's protest of that decision. * * * Because the BLM has not yet advertised the timber sale, no decision document has been published and Appellant has not protested such decision, any part of the instant appeal that contains issues dealing with the timber sale portion of this contract is not timely and BLM requests that they be dismissed.

(Response to ONRC at 1; Response to HCPC at 1-2.)

Under the Timber Sale Contract, fuels treatment, commercial thinning, pre-commercial thinning, and road construction would occur in the "Lower Units" in secs. 25 and 35, T. 3 S., R. 40 E., and sec. 1, T. 4 S., R. 40 E., which are in close proximity to the town of Cove, Oregon, within what is known as the "Wildland-Urban Interface" (WUI). Under the Stewardship Contract, all of those activities, as well as shelterwood harvest, would take place farther away from the town, close to the Whitman National Forest, and outside the WUI, in the "Upper Units" in secs. 31 and 32, T. 3 S., R. 41 E., and sec. 5, T. 4 S., R. 41 E.

BLM states that the Timber Sale Contract would involve the harvesting of 153 acres of public land by means of pre-commercial and/or commercial thinning, followed by mechanical treatments and prescribed burns, as well as 0.7 miles of new road construction, and the Stewardship Contract would treat 253 acres to reduce hazardous fuel loads and improve the overall health of several forest stands. According to BLM, the initial phase of the Stewardship Contract would entail 105 acres of commercial thinning, 61 acres of shelterwood harvest, and 75 acres of pre-commercial thinning, followed by mechanical treatments and prescribed burns, as well as 0.8 miles of new road construction. The new roads under each contract would be temporary roads, which would be built using Best Management Practices and closed, water-barred, and revegetated where necessary after the completion of all Project activities.

ONRC's petition for stay is limited to a request that we stay logging and roadbuilding located in sec. 5, T. 4 S., R. 41 E., Willamette Meridian. It contends that the EA failed to address the fact that the area in question is roadless and is Canada lynx habitat. On the other hand, HCPC seeks a stay of the effect of BLM's entire decision, thus precluding all authorized timber harvesting and other fuels treatment and roadbuilding. ONRC's and HCPC's stay petitions are opposed by BLM. A statement of reasons (SOR) for appeal was included in ONRC's notice of

appeal/petition for stay. HCPC has yet to file an SOR. We hereby consolidate the two appeals since they arise from the same facts.

First, we address BLM's requests to dismiss the two appeals to the extent they challenge activities to be undertaken pursuant to the Timber Sale Contract. Based on BLM's representations that it intends to proceed under 43 CFR 5003.2 and 43 CFR 5003.3 with respect to the Timber Sale Contract portion of the Project, we must conclude that the present appeals are premature as to those activities. Accordingly, ONRC's and HCPC's appeals are dismissed to the extent they challenge activities to be undertaken pursuant to the Timber Sale Contract in the Lower Units.

Next, we note that neither ONRC nor HCPC has demonstrated that they or their members have any legally cognizable interest which is adversely affected by BLM's decision to authorize activities under the Stewardship Contract in the Upper Units. Thus, they have failed, to date, to establish their standing, under 43 CFR 4.410(a) and (d), to appeal that portion of the DR. Absent a showing of standing to appeal, an appeal is properly dismissed. Wyoming Outdoor Council, 153 IBLA 379, 384 (2000); Laser, Inc., 136 IBLA 271, 274 (1996).

While only a person with standing to appeal may file a petition for a stay, we will address the petitions for stay filed herein as a preliminary matter, as they relate to the Stewardship Contract, on the assumption (without ruling finally on the matter) that ONRC and HCPC have standing to appeal.

[4] Under 43 CFR 5003.1(b), BLM may make a wildfire management decision effective immediately or on a date certain when it determines that "vegetation, soil, or other resources on the public lands are at substantial risk of wildfire due to drought, fuels buildup, or other reasons, or at immediate risk of erosion or other damage due to wildfire." In the absence of such a determination, 43 CFR 4.21(a) imposes an automatic stay on such a decision, as provided therein, since the applicable regulation, 43 CFR 5003.1(b), does not provide otherwise.^{2/} This construction is supported by a comparison of the proposed rulemaking language of 43 CFR 5003.1(b), which provided that all wildfire management decisions "are in immediate full force and effect" (67 FR at 77015) with the language of the final rulemaking that BLM "may" make such a decision "effective immediately or on a date established in the decision," if it makes the necessary finding required by the

^{2/} The exception to 43 CFR 4.21(a) set forth in 43 CFR 5003.1(a) only relates to forest management decisions arising under 43 CFR 5003.2 and 43 CFR 5003.3. The provisions of 43 CFR 4.21(a) apply, "[e]xcept as otherwise provided by law or other pertinent regulation * * *."

regulation. 68 FR at 33804; see 68 FR at 33796. Regardless, 43 CFR 4.21(b) clearly is applicable to wildfire management decisions whether or not such a decision is made effectively immediately. See 68 FR at 33796, 33798, 33799.

Under 43 CFR 4.21(b)(1), a petition for a stay must show sufficient justification based on the relative harm to the parties if the stay is granted or denied; the likelihood of the appellant's success on the merits; the likelihood of immediate and irreparable harm if the stay is not granted; and whether the public interest favors the granting of the stay. The party requesting the stay has the burden of showing that a stay is warranted by satisfying each of the criteria specified in the rule. 43 CFR 4.21(b)(2); Oregon Natural Resources Council Action, 148 IBLA 186, 188 (1999), and cases cited.

We, thus, proceed to adjudicate appellants' stay petitions, as they relate to the Stewardship Contract. ONRC contends that BLM failed to consider the potential impacts of timber harvesting and roadbuilding on natural resource values in roadless areas of the public lands in secs. 5 and 32, T. 4 S., R. 41 E., Willamette Meridian, Union County, Oregon, which abut the designated roadless areas of the National Forest. ONRC is particularly concerned with impacts on the Canada lynx (Lynx canadensis), which is a designated Threatened and Endangered species under the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531-1543 (2000), and its habitat. (Notice of Appeal and Request for Stay (Stay Request) (ONRC) at 2.) However, despite this contention, it seeks a stay only for "logging and road building located in Section 5, Township 4 South, Range 41 East, Willamette Meridian."

There are seven units in sec. 5 (Units 5A through 5G), ranging in size from 5 acres (Unit 5D) to 38 acres (Unit 5G), totaling 115 acres. (EA at 8, 62 (Map 3)). All the acreage is subject to fuels treatment, but commercial thinning will take place in only four units (Units 5B through 5E) totaling 52 acres. (EA at 8.) The road construction of 0.8 miles is to take place on Unit 5D which contains 5 acres. Id.

Although ONRC asserts that the units encompass "roadless" areas, BLM states: "There are no designated roadless areas in the Project." (BLM Response (ONRC) at 3.) "Designated roadless areas as described by the Appellant are Forest Service [U.S. Department of Agriculture] Designations." Id. at 3-4. Moreover, the areas in question are scattered tracts of public land which are small in size. The road, BLM asserts, is necessary to remove and treat hazardous fuels, designed to minimize impacts, and it is temporary. Id. There is no indication that BLM failed to consider the impacts of logging and roadbuilding in the units in question.

Regarding the impacts of the authorized activities on the Canada lynx, the record shows detailed consideration thereof by BLM and the Fish and Wildlife Service (FWS), U.S. Department of the Interior. In the EA, BLM stated that the Upper Units were adjacent to Forest Service lands designated as a Lynx Analysis Unit (LAU). (EA at 18.) It concluded that “[w]ith the current amount and condition of suitable habitat within the adjacent LAU, timber and fuels activities associated with this alternative (Alternative A) would have insignificant impacts to lynx and lynx habitat.” Id. at 29. This conclusion is supported by two documents prepared for the Project in the case record: a Biological Assessment (BA) and a Biological Opinion (BO). In a June 10, 2003, BA, BLM stated that “[b]ased on survey information the likelihood of lynx occurring in this area is extremely low.” (BA at 9.) Based on that survey information and the amount of habitat to be altered by the Project, BLM stated that the impact to the Canada lynx would be “negligible.” Id. BLM concluded that the Project may affect, but is not likely to adversely affect the lynx. Id. On September 19, 2003, FWS issued a BO, concluding at page 20 that the Project is not likely to jeopardize the continued existence of the Canada lynx. It further stated that “[n]o critical habitat has been designated for this species, therefore, none will be affected.” Id.

ONRC attacks BLM’s justification for the authorized activities, arguing that, because the land in the vicinity of Cove is overwhelmingly private land, the intended reduction of fuels on public lands farther away from the community will have little or no impact in terms of reducing the risk of wildfires to the community. It also notes that, in any event, timber harvesting is not likely to reduce the risk of wildfires, since fires will occur anyway during the most extreme conditions of temperature, humidity, wind, drought, and other factors associated with weather. (Stay Request at 10-11.) ONRC complains that the authorized activities will “cause significant soil damage, wildlife habitat disturbance, and hydrological effects, yet only reduce extreme fire hazard by a small degree across the [P]roject area.” Id. at 11.

ONRC’s allegations provide no basis for granting a stay. It is clear that BLM decided that the authorized activities were necessary to achieve the objectives of substantially reducing fuels and improving the health of forests, at least to the extent that BLM could do so on public lands. The fact that BLM has no jurisdiction to undertake fuels treatment on lands controlled by another agency or on private lands does not alter its fire management responsibilities for public lands. ONRC has offered no legal basis for precluding BLM from undertaking fuels treatments on the Upper Units.

We find that ONRC has failed to show that it has a likelihood of success on the merits of its appeal. For that reason, its petition for stay is denied. We also deny

HCPC's petition for the same reason. HCPC failed to offer any argument or supporting evidence showing a likelihood of success on the merits of its challenge to BLM's Stewardship Contract.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals by ONRC and HCPC are dismissed to the extent they challenge activities to be conducted in the future under a Timber Sale Contract. The petitions for a stay of activities under the Stewardship Contract are denied. ONRC and HCPC are directed to show cause within 30 days of receipt of this decision why their respective appeals should not be dismissed for lack of standing to appeal, as discussed herein.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge