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Washington, D.C. 20240

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Memorandum

To: Director
Bureau of Land Management

From: Solicitor

Subject: Managing Areas Eligible for Protection under the Wild & Scenic Rivers Act

I. Introduction

This memorandum provides guidance on implementing BLM's Manual provisions governing management of river segments eligible for protection under the Wild and Scenic Rivers Act ("WSRA"). In 1992, the BLM issued Manual § 8351, which provided guidance on BLM's identification, evaluation, reporting, and management of potential and existing wild, scenic, and recreational rivers in the National Wild and Scenic Rivers ("NWSR") System¹. This section precipitated inquiries in connection with BLM's preparation of a resource management plan ("RMP") for the Dixie Resource Area, Washington County, Utah, concerning the process for, and timing of, the protection of eligible river segments².

A March 1, 1994, opinion issued by the Regional Solicitor, Intermountain Region, concluded that if applied literally, the Manual provision would conflict with the Federal Land Policy and Management Act ("FLPMA") and other authorities. I concur in that conclusion. The Regional Solicitor's opinion did not suggest, however, that BLM lacked authority to provide

¹ See 57 Fed. Reg. 46043 (1992) (notice of availability of Manual § 8351); see also 56 Fed. Reg. 27967 (1991) (notice of availability of draft Manual section). BLM slightly modified this section on December 22, 1993. Manual Transmittal Sheet, Release 8-62 (Dec. 22, 1993).

² A river area is "eligible" for inclusion within the NWSR System if the stream is free-flowing and "the related adjacent land area possesses outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 U.S.C. § 1273(b) (incorporating 16 U.S.C. § 1271 by reference). An agency's identification of an eligible river segment reflects the agency's determination that the segment has the potential to be included in the NWSR System. Inclusion in the System requires either congressional or, in some circumstances, Secretarial action. See infra note 5.

timely protection to river segments identified as eligible for possible inclusion in the NWSR System. In fact, as discussed below, such authority does exist, although not in the WSRA itself.

II. Analysis

A. BLM Manual Provisions Governing “Eligible” River Segment Areas

The Manual provision at issue (§ 8351.32C) reads as follows:

Protective Management. When a river segment is determined eligible and given a tentative classification (wild, scenic, and/or recreational), its identified outstandingly remarkable values shall be afforded adequate protection, subject to valid existing rights, and until the eligibility determination is superseded, management activities and authorized uses shall not be allowed to adversely affect either eligibility or the tentative classification, i.e., actions that would change the tentative classification from a wild river area to a scenic river area or a scenic river area to a recreational river area. Public notification of protective management shall occur no later than publication and release of the draft RMP, or plan amendment. However, protective management shall be initiated by the authorized officer (Area/District Manager) as soon as eligibility is determined. * * *

This provision, along with subparts .06D and .33A.2 of § 8351 of the BLM Manual, can be interpreted as requiring protection of eligible river segments immediately upon their identification as eligible, whether that identification comes through the RMP or through a separate process.³

The BLM generally evaluates river segments for their eligibility and suitability for WSRA designation during its RMP process. BLM Manual § 8351.06B. But the Manual also makes

³ As § 8351.32C itself provides, the protection remains in effect “until the eligibility determination is superseded.” See also § 8351.52C (“Once a river segment has been determined eligible, BLM’s policy shall be to protect, and where possible, enhance any identified outstandingly remarkable river values pending a subsequent suitability determination and/or designation decision by Congress.”); and § 8351.06D (“BLM shall afford protective management to all river segments as necessary to ensure that the existing qualities upon which their eligibility is based are not degraded.”). Eligibility determinations may be superseded (i.e. the river will no longer receive interim management protection) either by a BLM determination of nonsuitability (usually made in the RMP planning process, see. e.g. § 8351.3 and § 8351.33A), or by congressional action to study the river segment further or to include the river within the NWSR System. § 8351.52C.

clear that BLM may identify eligible river segments prior to the adoption of a final RMP.⁴

Section 202 of FLPMA establishes certain requirements for land use planning, including public participation and the consideration of specific planning criteria. 43 U.S.C. § 1712. If section 8351.32C of the BLM Manual were read to require protection in advance of completion of the RMP/environmental impact statement (“EIS”) process, it would be inconsistent with FLPMA. This is essentially the conclusion of the Regional Solicitor’s March 1, 1994 memorandum to the Utah State Director.

B. Protection of Eligible and Suitable River Segment Areas

The basic management charter for the NWSR System is found in section 10(a):

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.

16 U.S.C. § 1281(a). More specific directives and restrictions are contained in 16 U.S.C. § 1278 (restricting water resource projects on river segments designated by Federal law as components of, and potential additions to, the NWSR System); § 1279(a) (withdrawing public land within components of the NWSR System designated by Federal law); § 1279(b) (withdrawing public lands that constitute the bed or bank, or within 1/4 mile of the bank of a river segment designated by Federal law for potential addition to the NWSR System); § 1280(a) (restricting mining and mineral leasing in components of the NWSR System designated by Federal law); § 1280(b) (provision governing, in part, mining activities in potential additions to the NWSR System designated by Federal law); see also § 1283(a) (requiring protective management of river segments designated by state law and approved for inclusion by the Secretary, and components of, and potential additions to, the NWSR System designated by Federal law).

The BLM Manual provision at issue here was intended to implement section 5(d) of the WSRA, which provides:

In all planning for the use and development of water and related land resources,

⁴ BLM Manual § 8351.2 provides:

All rivers which may have potential for wild and scenic river designation must be identified and evaluated. . . . Identification may also occur at several stages of resource management planning: pre-planning, public scoping of issues, analysis of the management situation, and in public review of the draft RMP or plan amendment.

consideration shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas The Secretary of the Interior and the Secretary of Agriculture shall make specific studies and investigations to determine which additional wild, scenic and recreational river areas within the United States shall be evaluated in planning reports by all Federal agencies as potential alternative uses of the water and related land resources involved.

16 U.S.C. § 1276(d)(1); see also Ralph Page, 8 IBLA 435 (1972)(distinguishing between an agency determination that a river segment be further evaluated and a legislative determination that a river segment be included within the WSRA). Thus, while the WSRA mandates specific protection measures only for river segment areas designated by Congress or the Secretary of the Interior on the petition of a state,⁵ the BLM Manual could be interpreted as reaching beyond the WSRA's directive, requiring protection for non-designated river segment areas.

Nevertheless, BLM has broad authority to protect non-designated river segments through an RMP/EIS. For example, the BLM may manage an eligible river segment for preservation of WSRA values according to the prescriptions and directions of an RMP/EIS and implementing Record of Decision (ROD). See e.g. BLM Manual § 8351.33A. Any protection of the river segment provided through this process, however, is authorized under section 202 of FLPMA, not the WSRA.

Moreover, independent of, or even before a decision is made in, the RMP planning process, BLM may protect wild and scenic river values under FLPMA on a case-by-case basis. For example, BLM typically has considerable discretion whether to grant or deny applications for most uses on the public lands. See e.g. 43 U.S.C. § 1761 (discretionary control over rights of way). Also, even when an RMP authorizes an activity such as mineral development, it typically does not require the issuance of leases, permits or other approvals. That is, so long as BLM acts in conformance with an existing RMP, BLM retains considerable discretion to reject an application for a permit, lease, or use authorization on a case-by-case basis. 43 U.S.C. § 1732(b); 43 C.F.R. § 1610.5-3.

Thus, if a stream segment were found by BLM to be eligible for consideration for the NWSR System, BLM could, in advance of incorporating protection in the applicable RMP, deny an application for a power line right-of-way under 43 U.S.C. § 1761, if approving the application were inconsistent with WSRA values. Alternatively, in appropriate

⁵ The Secretary can include a river segment within the NWSR System without an Act of Congress by accepting the petition of a State. See 16 U.S.C. § 1273(a)(ii). Applicable policy vests the National Park Service (NPS) with the responsibility to recommend to the Secretary whether to include a state-nominated river segment in the NWSR System. NPS Instructions, Procedures for Including State-Administered Rivers in the National Wild and Scenic Rivers System, 45 Fed. Reg. 63148 (September 23, 1980).

circumstances, the application could be approved with protective conditions that would maintain WSRA values. We emphasize, however, that any decision regarding such an application would require a case-by-case analysis and decision in the informed judgment of the authorized officer. Modified, the BLM Manual could direct the authorized officer to give careful attention to the WSRA values in the exercise of such discretion, but the BLM Manual cannot direct the outcome of the RMP process.

In addition, where BLM has before it a proposal that could constitute a “major federal action that significantly affect[s] the quality of the human environment,” the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., requires compliance with its mandates before BLM can act on the proposal. *Id.* at § 4322; 40 C.F.R. § 1506.1. If a proposed activity could affect or foreclose options in an ongoing RMP/EIS process, where the determination of suitability or unsuitability would likely be made, NEPA regulations suggest sequencing the timing of decisions to allow completion of the RMP/EIS prior to making a decision that could affect the suitability determination. See 40 C.F.R. § 1506.1(c)(3) (“Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.”); cf. *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971, cert. denied 405 U.S. 989 (1972))(interpreting the Wilderness Act of 1964 to prohibit the Forest Service from taking action that would undercut the President’s authority to recommend and Congress’s ability to designate an area as wilderness). A contrary sequencing could not only foreclose an opportunity to conduct a meaningful suitability determination, but could also, as a practical matter, require BLM to duplicate river studies as part of the NEPA analysis on the proposed action.

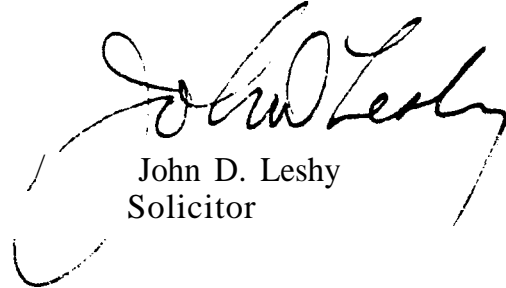
NEPA compliance in the consideration of a particular proposal also may require analysis of the need to protect a river segment BLM identifies as eligible for inclusion in the NWSR System. For instance, when the BLM is considering issuing a lease or permit, or taking some other action within its authority that could result in activities that might degrade a river segment’s eligibility for inclusion in the NWSR System, it may choose not to take the action, or to include appropriate conditions to protect the river segment’s eligibility. Although BLM must structure NEPA compliance to accommodate individual circumstances, where BLM is considering a proposed action that could impact an identified river segment, NEPA would typically require BLM to consider an alternative that preserved or enhanced the river segment. Cf. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973)(holding that the Forest Service must comply with NEPA prior to authorizing logging within a National Forest). At a minimum, the informed decisionmaking process required by NEPA obliges BLM to discuss fully the environmental effects of a proposed action on the river segment.

III. Conclusion

The BLM has considerable authority to protect river segment areas it identifies as eligible for inclusion in the NWSR System. To the extent that the BLM Manual purports to require protective management for all such river segments immediately upon their identification, in

advance of completion of the RMP planning process, it should be amended to reflect this opinion. We would be happy to work with you on the necessary revisions.

This Opinion was prepared with the substantial assistance of Nicholas Targ of the Division of Land & Water.



John D. Leshy
Solicitor