

SOUTHERN UTAH WILDERNESS ALLIANCE
AMERICAN RIVERS

IBLA 94-853

Decided April 19, 1995

Appeal from a document issued by the Dixie Resource Area Manager, Bureau of Land Management, reporting certain Wild and Scenic River eligibility findings.

Appeal dismissed.

1. Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Land Appeals--Federal Land Policy and Management Act of 1976: Land Use Planning--Rules of Practice: Appeals: Jurisdiction

The Board has no jurisdiction over appeals from the approval or amendment of an RMP, but only over actions implementing such a plan. 43 CFR 1610.5-2; 43 CFR 1610.5-3. A "Planning Update" distributed by a BLM resource area manager which was relative to the resource management planning process and was preliminary to issuance of a final RMP is not subject to administrative review by the Board of Land Appeals because actions described therein are not actions implementing an RMP or some portion thereof. 43 CFR 1610.5-3(b).

APPEARANCES: Heidi J. McIntosh, Esq., Salt Lake City, Utah, for appellant Southern Utah Wilderness Alliance; Barbara G. Hjelle, Esq., St. George, Utah, for intervenor Washington County Water Conservancy District; A. Scott Loveless, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Southern Utah Wilderness Alliance (SUWA) and American Rivers have appealed a report of certain Wild and Scenic River (WSR) eligibility findings which appeared in a document issued by the Dixie Resource Area Manager, Dixie Resource Area Office, Bureau of Land Management (BLM), St. George, Utah, entitled "The Dixie Resource Area Management Plan, A

Planning Update (July 29, 1994)." By order dated February 13, 1995, the Washington County Water Conservancy District (District) was granted leave to intervene as a party to the action.

Initially, we note that while American Rivers is named as an appellant in the notice of appeal, there is no indication in the record that any other document was filed on its behalf. Accordingly, the appeal of American Rivers is summarily dismissed pursuant to 43 CFR 4.402(a) for failure to file a statement of reasons for appeal.

On November 15, 1994, SUWA filed a motion requesting that the Board consider the matter for expedited review, alleging that "the negative impact of the challenged decision is immediate and potentially irreparable." On February 2, 1995, BLM filed a response and a motion to dismiss the appeal for lack of jurisdiction. In its motion to dismiss, BLM alleges that the matter is not ripe for review, and even if it were, the appropriate avenue for appeal would be pursuant to protest procedures set forth at 43 CFR 1610.5-2(b). We grant SUWA's motion for expedited review, and for the reasons set forth below, we also grant BLM's motion to dismiss.

The challenged document in this appeal is a "Planning Update" pertaining to the revision and updating of the Draft Dixie Resource Management Plan and Environmental Impact Statement (DRMP/EIS) issued by the Dixie Resource Area Office. The initial text of the document states: "This planning update is designed to help you stay informed and to let you know how to provide comments on the DRMP/EIS."

With respect to information about the status of wild and scenic river eligibility determinations, the document states, in pertinent part:

Wild and Scenic Rivers (WSR): In the May 1993 Planning Update, we asked for your input concerning the eligibility of rivers in the planning area for potential Congressional wild and scenic river designation. We received 32 comments in response to that update. We appreciate your input and want you to know that we used the information we received.

Eligibility. The Dixie Resource Area has since taken a further hard look at all rivers in the planning area. In order to do this, an interdisciplinary team, comprised of resource area specialists, reassessed river values. They used the criteria and definitions in BLM 8351 Manual, visited the rivers, considered the public input and took into account that the 40 percent rule is no longer in effect. As a result, the river segments, on the attached table have been found eligible and will be analyzed further in the DRMP/EIS for suitability considerations. The reasons for the eligibility determinations will be included in the DRMP/EIS. [Emphasis in original.]

The update continues by listing the criteria used to determine suitability, the level of management protection given to eligible rivers pending their determination as "suitable" or "unsuitable," and informing the recipient of how to participate in the resource management planning process.

SUWA argues that the Board should not grant BLM's motion to dismiss because BLM's arguments "contradict the weight of applicable law" (SUWA Brief in Reply to BLM Motion to Dismiss at 1). Specifically, SUWA asserts that under Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), and Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985), where the practical effect of a BLM action is to fix rights and obligations, that action is a final decision and is ripe for review. SUWA also argues that the action undertaken by BLM embodies such practical effect, as it eliminates certain rivers from consideration for protection under the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1271 (1988).

In response, BLM argues that the action described in the planning update is not a final action by the Department, and thus is not an appealable action. "The action appealed from amounts to an inventory decision that most nearly equates to a preliminary screening to determine which rivers should be considered further as to their suitability for potential congressional designation," BLM maintains (BLM Response at 3). If the action taken were a final action by the Department, BLM continues, then it would defend its action in the appropriate forum by arguing that the action undertaken falls well within the discretion granted BLM under section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (1988). BLM asserts that WSRA protects only rivers which have been designated such by an Act of Congress, and has no bearing upon those rivers inventoried by the Department for potential WSRA status (BLM Rebuttal Brief at 2).

BLM further argues that SUWA incorrectly relies on a line of case law developed under the Wilderness Act and section 603 of FLPMA, 43 U.S.C. § 1782 (1988). Id. at 4-7. That case law, BLM maintains, is not pertinent to BLM action undertaken pursuant to powers granted by the WSRA, which provides a procedure for WSR classification that is distinct from how lands are classified under the Wilderness Act.

The District argues that BLM's "Planning Update" is not a decision and thus not subject to review by the Board, citing 43 CFR 4.410, which provides that the Board may only hear appeals from persons adversely affected by a decision of an officer of BLM. The District contends that the "Planning Update" is a public relations brochure, not a final decision, as indicated by the fact that the update invites continued public participation in developing the RMP, and by the fact that it is preliminary to the draft RMP, which would also be subject to public comment and thus preliminary to a final decision (District Answer at 4). The District further alleges

that SUWA has no standing to appeal because it has failed to show that any of its members have been "adversely affected" by the Planning Update, as required by 43 CFR 4.410. *Id.* The District distinguishes the Supreme Court's holding in Abbott, supra, arguing that the facts in Abbott related to a final rulemaking, where a regulation had been promulgated, but not yet enforced. The District contends that in this case, "as yet, there has been no definitive agency statement of its intent to act or not act" (District Answer at 7 (emphasis in original)).

[1] It is well settled that the Board has no jurisdiction over appeals from the approval or amendment of an RMP, but only over actions implementing such a plan. 43 CFR 1610.5-2(b); Southern Utah Wilderness Alliance, 128 IBLA 52, 66 (1993) and cases cited therein. This is because such plans are, by definition, "designed to guide and control future management action" rather than to implement decisions that affect specific parcels of land or the rights of individuals to use Federal lands. 43 CFR 1601.0-2, 1601.0-5(k); see Joe Trow, 119 IBLA 388, 393 (1991). The review of an RMP is by regulation 43 CFR 1610.5-2 subject to review only by the Director, BLM, whose decision is final for the Department of the Interior. Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23 (1987).

The protest procedures set forth at 43 CFR 1610.5-2 state, in relevant part:

(a) Any person who participated in the planning process and has an interest which is or may be adversely affected by the approval or amendment of a resource management plan may protest such approval or amendment. A protest may raise only those issues which were submitted for the record during the planning process. [Emphasis supplied.]

The planning update under appeal is a document prepared for distribution to multiple parties interested in the resource management planning process. As such, it is on its face preliminary to both draft and final RMP's for the Dixie Resource Management Area. Thus, under 43 CFR 1610.5-2(a), the appropriate forum at this point for SUWA's objections to the eligibility determinations BLM has reported in the planning update is the Dixie Resource Area Office, rather than this Board. Under that regulation, once an issue has been submitted for the record during the planning process, a party has preserved the matter for protest. An RMP is approved by the State Director, and a protest subjects the State Director's approval to review by the Director, BLM.

Moreover, the resource management planning regulations clearly distinguish between development, approval or amendment of an RMP and implementation of some portion of such plan or amendment. 43 CFR 1610.5-3(b) provides for appeal to the Board pursuant to 43 CFR 4.400 by persons

adversely affected by a specific action at the time of implementation.
The Board has entertained such appeals. E.g., Wilderness Society, 90 IBLA 221 (1986).

SUWA, however, argues that the planning update implements a de facto decision eliminating all rivers not determined to be eligible from WSR consideration, and cite Abbott Laboratories v. Gardner, supra, and Sierra Club v. Watt, supra, in support of its that the planning update is ripe for review by the Board.

In Abbott Laboratories, supra, the Supreme Court held that a challenge to a final rule promulgated by the Food and Drug Administration presented a case "ripe" for judicial resolution, as the regulations in question came within the purview of "final agency action" set forth in section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 704 (1988).

In Sierra Club v. Watt, supra at 317, the Eastern District of California quoted the Abbott case, stating: "The question of ripeness turns on the 'fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" The facts in Sierra Club involved a Secretarial order affecting the status of approximately 1 million acres of lands previously classified as wilderness study areas under section 603(a) of FLPMA, 43 U.S.C. § 1782(c) (1988). The district court held that the removal of certain lands from wilderness study areas by Secretarial order was a final and reviewable action, and that review of that action was not premature, as the effect of the Secretary's action was "to preclude wilderness designation for these lands no matter what management protocol is eventually determined by the BLM state directors." Id. at 318.

We distinguish Abbott on its facts, in that the court in Abbott was ruling on the ripeness for review of an agency promulgation of a final rule "which as a practical matter, require[d] the plaintiff to adjust his conduct immediately." Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990). The Lujan court also distinguished Abbott, finding it an exception to the general rule that, absent statutory permission, broad regulatory or programmatic endeavors do not serve as "agency action" under sections 10(a) and 10(c) of the APA, 5 U.S.C. §§ 702 and 704 (1988). In Lujan, the Supreme Court held that a "land withdrawal review program," which did not refer to a single BLM order or regulation or group of orders or regulations, but was "simply the name by which petitioners have occasionally referred to certain continuing (and thus constantly changing) BLM operations regarding public lands," and which at the time extended to approximately 1,250 individual decisions, was not a final agency action and therefore was not ripe for judicial review pursuant to section 10(c) of the APA. Lujan v. National Wildlife Federation, supra at 873. We further distinguish both cases cited by SUWA because they concern judicial review

of final agency actions, and have no bearing upon the jurisdiction of this Board, which is determined by 43 CFR 4.1.

In summary, we conclude that the planning update distributed by BLM was preliminary to the issuance of a final RMP for the Dixie Resource Management Area. As such, it is not subject to administrative review by this Board because the actions described therein are not actions implementing an RMP or some portion thereof. 43 CFR 1610.5-3(b).

Accordingly, pursuant to the authority of the Board of Land Appeals granted by the Secretary, 43 CFR 4.1, BLM's motion to dismiss this appeal is granted.

John H. Kelly
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge