

BUREAU OF LAND MANAGEMENT WILD AND SCENIC RIVERS SUITABILITY DESIGNATION PROCESS

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In 2008, The Utah Bureau of Land Management finalized six Resource Management Plans for public lands in approximately half of the state. As part of this planning process, BLM evaluated the state's rivers and streams for protection as Wild and Scenic Rivers. The Wild and Scenic River planning process proceeds in three phases, as defined in the Wild and Scenic Rivers Act of 1968, as amended. In the eligibility phase, the planning agency determines whether a river segment meets a set of well-defined minimum criteria for inclusion in the National Wild and Scenic Rivers System. Eligible river segments are then evaluated by the planning agency with regard to suitability for inclusion, usually through its general land use planning process. Suitable segments are then considered for formal inclusion by Congress, though they are managed according to the standards of the WSRA until Congress either passes or rejects the segment. BLM proposed designating a very limited number of river segments as suitable for protection.

Summary

This report analyzes the basis for suitability designations of Wild and Scenic Rivers in BLM Resource Management Plans. It uses publically available policy documents and internal planning documents from the Vernal, Price, and Monticello Field Offices between 2003 and 2008 obtained through a Freedom of Information Act request by the Utah Rivers Council to determine the standards for proposed suitability findings by the BLM field offices. The study finds that:

1. BLM procedures for evaluating potential Wild and Scenic Rivers generally provide no guidance for operationalizing, evaluating, or comparing suitability factors or for making a determination of suitability on the basis of such factors.
2. Under WSRA and BLM policy, political opposition is in itself insufficient cause for a finding of nonsuitability.
3. Both within BLM and across other federal agencies involved in WSR designation processes, there is significant disparity regarding the overall intent of the suitability phase and how the suitability factors are to be evaluated relative to each other.

BLM, therefore, has considerable administrative discretion in proposing suitability findings, in contrast to eligibility findings. This makes challenging the proposed suitability findings quite difficult either through administrative or judicial processes.

Statutory and Regulatory Standards

WRSA. The Wild and Scenic Rivers Act requires that the Departments of Agriculture and of the Interior determine the suitability of Congressionally designated river segments for inclusion in the NWSRS. Section 1275(d) specifies the criteria to be used in determining suitability:

1. The characteristics which do or do not make the area a worthy addition to the system.
2. The current status of land ownership and use in the area.
3. The reasonably foreseeable potential uses of the land and water which would be enhanced, foreclosed, or curtailed if the area were included.
4. The agency by which it is proposed the area, should it be added to the system, be administered.
5. The extent to which it is proposed that such administration, including the costs thereof, be shared by State and local agencies.
6. The estimated cost of acquiring necessary lands and interests in land and of administering the area.

Section 1276(d)(1) authorizes the secretaries of Agriculture and of the Interior to identify additional segments for potential inclusion, which must be evaluated on the basis of the same criteria as congressionally identified segments.

BLM Manual. The BLM Manual defines the process for making suitability determinations, and expresses a preference for doing so in the process of developing the RMP/EIS. BLM establishes eight criteria for determining suitability based on WSRA §1275(d) (BLM Manual 8351.33):

1. Characteristics which do or do not make the area a worthy addition to the NWSRS.
2. Status of landownership, minerals (surface and subsurface), use in the area, including the amount of private land involved and associated or incompatible uses.
3. Reasonably foreseeable potential uses of the land and related waters which would be enhanced, foreclosed, or curtailed if the area were included in the NWSRS, and the values which could be foreclosed or diminished if the area is not protected as part of the NWSRS.
4. Federal, public, State, tribal, local, or other interests in designation or nondesignation of the river, including the extent to which the administration of the river, including the costs thereof, may be shared by State, local, or other agencies and individuals.
5. Estimated cost, if necessary, of acquiring lands, interests in lands, and administering the area if it is added to the NWSRS.
6. Ability of the agency to manage and/or protect the river area or segment as a WSR river, or other mechanisms (existing and potential) to protect identified values other than WSR designation.
7. Historical or existing rights which could be adversely affected.
8. Other issues and concerns, if any.

Only two of these criteria are further detailed. Cost estimates are constrained by WSRA §6 limitations on land acquisition processes. With regard to land ownership, the Manual notes that limited BLM jurisdiction makes the protection of Outstandingly Remarkable Values (ORV) difficult. Thus where “the

BLM is unable to protect or maintain any identified outstandingly remarkable values, . . . river segments may be determined suitable *only if* the entity with land use planning responsibility supports the finding and commits to assisting the BLM in protecting the identified river values.” (BLM Manual 8351.33A2, emphasis added)

Interagency Wild and Scenic Rivers Coordinating Council standards. The Interagency Council, of which BLM is a part, has adopted somewhat different language and organization of a substantively similar set of suitability standards in its explanation of the WSR system and process. These standards are not used explicitly in the RMP/EIS documents but may have informed decisions to the extent that they operationalize or provide standards for evaluating the standards. There are two such clarifications.

1. Land ownership and jurisdictional control. The Council essentially restates the qualification regarding jurisdictional control in BLM Manual section 8351.33A2, though it states that “segments *may not be suitable* for designation without assistance” (emphasis added) from agencies with land use planning authority rather than the required find of nonsuitability in the BLM Manual.
2. Other government interest. The Council notes that “Controversy exists in WSR studies. The mere presence of controversy will not preclude a river segment from being studied. The final recommendation as to whether a particular segment should or should not be recommended suitable for designation is determined only after a complete evaluation, public review, and impact analysis.” (FOIA 2.1-9)

A technical report on the study process notes that the process is a judgment-based one that must take into account the specific needs of the particular river. It also states that controversy in itself is not sufficient grounds for eliminating a river from suitability consideration. (FOIA 2.1-22)

Restatement of standards. The BLM Manual standards are restated in a series of documents:

1. Utah BLM Instruction Memorandum No. UT 94-173, Appendix 1 restates the Manual standards as those to be used in the process of of the WSR review.
2. Utah BLM Instruction Memorandum No. UT 2006-101 states that the suitability appendix to the administrative record regarding WSR determinations should “address in as much detail as possible” the Manual standards and the *Interagency Guide to Wild and Scenic River Review* (included as FOIA 2.1-8 and 2.1-9) for each segment, and should not make suitability determinations prior to the ROD. (FOIA 1.2-G)
3. In response to controversy over designation of the Virgin River system in the 1996 Dixie RMP, an agreement was signed among BLM, United States Forest Service (USFS), and National Park Service (NPS) regarding WSR planning specifically in Utah. The agreement reiterated the Interagency Council criteria with the addition of “feasibility and timeliness of designation.” (FOIA 2.1-28) The agreement expired in 2002; however, BLM instructed that it “will continue to be followed until it can be formally re-established.” (FOIA 4.1-13)

None of these documents provides any elaboration on the standards.

Agency Guidance

Wild and Scenic Rivers Planning Guidance. Utah BLM Instruction Memorandum No. UT-94-173, clarifies the process of making WSR decisions. The bulk of the document elaborates standards for determining eligibility. Only three considerations are raised in relation to suitability, all of which relate to evaluating suitability decisions within the RMP/EIS process. No mention is made of the suitability criteria in WSRA §1275(d) or BLM Manual section 8351.33A. The document specifically states, “Do not draw conclusions as to the suitability or nonsuitability of rivers. This is done in the ROD [Record of Decision].” (FOIA 1.1-8)

Model Reports. In an April 2003 email, BLM recommended the Southeast Oregon and Three Rivers RMPs as models for Utah RMPs, and suggests including suitability studies in tables or appendices. (FOIA 4.1-12) The 2001 Southeast Oregon RMP did not include analysis of specific suitability factors, and was struck down by the 9th Circuit Court of Appeals in July, 2008 on grounds not specifically related to its WSR analysis. (*Oregon Natural Desert Association v. Bureau of Land Management*, No. 05-35931, slip op. [9th Cir. July 14, 2008]) The 1991 Three Rivers RMP follows a text format similar to that used in the Monticello PRMP/FEIS but provides no further development of suitability standards. (Burns Field Office 1991)

Jurisdictional Considerations Criterion. Prior to December 1993, BLM Manual sec. 8351.31D required that segments in which less than 40% of the land was under BLM jurisdiction would be ineligible for further consideration in the eligibility phase. (Buffalo Field Office 1994; see also FOIA 3.1-8, which was withheld from the FOIA request by BLM as outside of the scope of the request) In a memorandum regarding a Wild and Scenic Rivers meeting in Ranglely, Colorado on May 28, 1993 regarding designation of segments of the White River, an environmental analyst from the BLM White River Resource Area office stated, “according to BLM Handbook 8351, [BLM] jurisdiction less than 40 percent will receive a low priority for study. In this case, the majority landowners must demonstrate significant advocacy for a river designation, and a willingness to assume an important role in planning and management, in order for the BLM to make a suitability determination.” (FOIA 1.1-6) This rule was then rescinded, and jurisdictional considerations were to be considered in the suitability phase in accordance with revised section 8351.33A2 (the land ownership suitability criterion). (FOIA 1.1-7)

To the extent that a field office is using such a rule of thumb for proposing suitability determinations, they are not doing so on the basis of any existing BLM rule or policy. Such a rule cannot be an operationalization of the land ownership criteria as elaborated. The criteria does not specify that suitability designations should be constrained by land ownership itself but by the effects that limited agency jurisdiction would have on the ability to protect ORVs. It is possible that the ORVs could be protected even in the absence of agency jurisdiction, particularly if the ORVs were historical or related to endangered species (thereby protected by other laws in addition to WRSA) or recreational (thereby more likely to be compatible with private ownership). Adequate operationalization of this criteria would have to address ORVs and not ownership directly.

Administrative Law and Statutory Intent

Legal considerations in standards application. In an undated brief by the Sierra Club Legal Defense Fund regarding the experience of Forest Service WSR evaluations, several legal issues regarding suitability were identified. In addition to several procedural matters regarding NEPA documentation and individual analysis of each river segment, two clarifications of the suitability standards were identified.

1. An exaggerated expectation of public opposition is insufficient grounds for designation as unsuitable. Where outreach and education efforts can correct misunderstandings regarding the WSR process and the effects of designation, especially with regard to existing lifestyles and property rights, this process can overcome initial opposition and build the kind of support envisioned especially in BLM Manual sec. 8351.33A2.
2. Existing proposals for water resources projects do not automatically bar designation as suitable. Since the aim of the WSRA is to preserve some rivers from water resources development, suitability determinations are choices between development and preservation, and it is within the agency's purview to choose to bar proposed water developments in order to preserve the WSR characteristics of the segment. (FOIA 2-1.14)

Perception of Suitability. Both within BLM and across agencies, there is significant disparity regarding the overall intent of the suitability phase and how the suitability factors are to be evaluated. Three competing standards are present.

1. Best use. The Manti-La Sal National Forest states that suitability addresses, as a primary question, what the best use of the corridor is including whether protection of the ORVs is trumped by other, more important uses. (FOIA 4.1-Q) The 1997 Utah interagency agreement states that suitability is determined by “considering tradeoffs between corridor development and river protection.” (FOIA 2.1-28) The USFS/NPS Wild and Scenic Rivers Guidelines, however, holds that “balancing the need for protection versus development will be considered by Congress in deciding whether or not to designate the river area.” (FOIA 1.1-3)
2. Best management practice. The Manti-La Sal National Forest states that suitability addresses as a second question, whether WSR designation is the best method of protection. (FOIA 4.1-Q) These are two of three criteria established by a technical report of the Interagency Council, the third being demonstrated support from “nonfederal entities who may be partially responsible for implementing protective management.” (FOIA 2.1-22) The Natural Bridges National Monument FEIS states, “The suitability phase of the study evaluates whether designation as a national wild and scenic river would be the best way to manage eligible rivers.” (FOIA 4.1-R).
3. Balancing criteria. In a 2004 Confirmation/Report of Conversation, Todd Berkenfield of MFO stated that “Suitability is the place to evaluate all the differing impacts, projects, and demands; it is the place of ‘the sum of all the parts’, [sic] and where decisions are made that there are too many other issues to recommend as a WSR.” (FOIA 4.1-Q)

Conclusion

The standards elaborated in BLM Manual sec. 8351.33A are the only guidance available to field offices in evaluating the suitability of eligible river segments. These criteria are not in themselves operationalized. No standards are given for the evaluation of the of these criteria individually or collectively. While the necessarily particularistic and judgmental nature of suitability determinations is universally recognized, there exist no clear standards for what judgments are to be made and how one is to make them, and there is considerable variation in how different agencies and field offices perceive those judgments. The sole exception to this is the clear and consistent guidance in Interagency Coordinating Council documents against using political opposition as the sole criteria for proposing designation of a segment as unsuitable.