

INTERIOR BOARD OF LAND APPEALS

Oregon Natural Desert Association

148 IBLA 100 (March 29, 1999)

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OREGON NATURAL DESERT ASSOCIATION

IBLA 96-325

Decided March 29, 1999

Appeal from a decision of the Central Oregon Resource Area Manager, Bureau of Land Management, EA OR-054-2-044.

Affirmed.

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 of resource management planning, but only over actions implementing such planning. 43 C.F.R. § 1610.5-2; 43 C.F.R. § 1610.5-3. Those portions of a Coordinated Resource Management Plan which are not final implementation decisions are not appealable to the Board.

2. Environmental Quality: Environmental Statements-- National Environmental Policy Act of 1969: Environmental Statements

A resource management planning implementation decision will be affirmed on appeal where the decision is based on an evaluation sufficient to support informed judgment. Such determination may not be overcome by a mere difference of opinion. Such decision will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest, and where no reason for disturbing the decision is shown on appeal. An appellant has the burden of showing error in the challenged decision and supporting its allegations with evidence demonstrating error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice.

APPEARANCES: Jack Sterne, Esq., Camp Sherman, Oregon, for the Oregon Natural Desert Association; Harry R. Cosgriffe, Central Oregon Resource Area Manager, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Oregon Natural Desert Association (ONDA/Appellant) has appealed from a February 21, 1996, decision of the Central Oregon Resource Area Manager, Prineville District Office, Bureau of Land Management (BLM). The decision appealed from was issued as the Decision Record Sutton Mountain Coordinated Resource Management Plan (DR/CRMP) in March 1996. This multifaceted planning and decision document contains decisions based upon the March 1995 Sutton Mountain CRMP Environmental Assessment (EA) OR-054-2-044, with a Finding of No Significant Impact.

A portion of this appeal pertains to livestock grazing and range improvements. BLM treated that portion of the appeal as a protest and, on April 17, 1996, issued a notice of final decision affirming that portion of the DR/CRMP. A separate livestock grazing appeal to the Hearings Division of this Office was filed pursuant to 43 C.F.R. § 4.470.

ONDA requested a partial stay of the remainder of the BLM decision, asking BLM not to irrigate 12 agricultural fields in the Sutton Mountain planning area. On June 11, 1996, the Board denied ONDA's request for a stay of BLM's decision to irrigate agricultural fields, stating that Appellant had not shown that a stay would effectively preserve the rights of the parties pending appeal. Oregon Natural Desert Association, 135 IBLA 389 (1996).

Appellant's notice of appeal claimed numerous inadequacies within the DR/CRMP. It challenged BLM review of access, leasable minerals, buildings, cultural and paleontological resources, noxious weeds, recreation, special status plants, wildlife habitat, wilderness study areas, visual resource management, upland vegetation manipulation, water rights and agricultural lands, and monitoring. (Notice of Appeal at 2.) However, not all of these are subject to review by the Board.

[1] The DR/CRMP included a combination of proposed and final decisions as well as planning information. To the extent the appeal challenged the DR/CRMP as a resource management plan (RMP), the Board is without jurisdiction. The Board only has jurisdiction over actions implementing such planning. 43 C.F.R. § 1610.5-2(b); Southern Utah Wilderness Alliance, 128 IBLA 52, 66 (1993), and cases cited therein. The reason the Board lacks jurisdiction over RMP development is because the RMP is "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 C.F.R. §§ 1601.0-2, 1601.0-5(k); see Joe Trow, 119 IBLA 388, 393 (1991). Those portions of the DR/CRMP which constituted resource management planning were subject only to review by the Director of BLM, whose decision is final for the Department of the Interior. 43 C.F.R. § 1610.5-2.

The DR/CRMP states that its "final decisions" are subject to appeal to this Board. (DR/CRMP at 35.) A decision which is subject to Board review must be "a final implementation decision" which would not "require further specific plans, process steps, or decisions under specific provisions of law and regulations." 43 C.F.R. § 1601.0-5(k). Resource management planning regulations distinguish between development, approval or amendment of resource management planning and implementation of that planning. The regulation at 43 C.F.R. § 1610.5-3(b) provides for appeal to the Board pursuant to 43 C.F.R. § 4.400 by persons adversely affected by a specific action at the time of implementation of the RMP. Wilderness Society, 90 IBLA 221, 224-25 (1986).

In order to determine which portions of the DR/CRMP are subject to review by the Board, the Board requested additional briefing in an Order dated March 24, 1998. The Order requested that BLM

state, with respect to the matters identified as "final decisions" (part IV.A of the CRMP/EA at 35), whether all or any part of the CRMP/EA is an RMP, an activity plan or some other plan described by BLM regulations, and whether all or any part of the "final decision or decisions" constitute a planning decision or an implementation decision, so that this Board can resolve the question of our jurisdiction to review the issues raised by the ONDA in this case.

(March 24, 1998, Order at 2.)

BLM responded that the CRMP was an activity plan designed to allow some direct implementation of some portions without the need for further analysis and decision documents, while other parts would require additional analysis. BLM identified the areas which it would analyze further before issuing a final decision: wilderness study areas, most leasable mineral activity, buildings and evaluation of structures on public lands, campground and trail development, surveys for special status plants, ecosystem management in view of sensitive plant species and quantitative monitoring, potential Areas of Critical Environmental Concern designations, compliance with design standards for visual resource management, and some livestock grazing and recreational activities. In the absence of final implementation decisions, issues related to these areas are not appealable to the Board.

BLM identified the areas for which the DR/CRMP contained final decisions allowing direct implementation: access roads and road closures, no surface occupancy for leasable mineral activities within 1/4 mile of certain streams, cultural and paleontological resource surveys and directions for evaluation and management of these resources, four directives for the management of noxious weeds, special status fish and wildlife species and habitat analysis, upland vegetation seeding methods, continuation of existing monitoring studies and evaluation, and all DR/CRMP determinations for water rights and agricultural lands. In these remaining areas

for which the DR/CRMP contained final decisions, Appellant has presented detailed objections to fish and sheep habitat analyses and water rights and irrigation of agricultural lands.

Appellant's Notice of Appeal also lists challenges to final implementing decisions concerning access, cultural and paleontological resources, noxious weed treatment, and recreation. Appellant has not elaborated upon its reasons for challenging these, however. The Board's rules of practice require the filing of a statement of reasons (SOR) for the appeal which states affirmatively the error in the decision from which the appeal is taken. Mustang Fuel Corp., 134 IBLA 1, 4 (1995), and cases there cited. See 43 C.F.R. § 4.412. The Board cannot consider Appellant's objection to a DR/CRMP determination on which no SOR has been filed.

Appellant's primary objection in this appeal is to BLM's authorization of irrigation of agricultural land using water from streams which have excessively high temperatures for fish. BLM has acquired eight separate water rights through a land exchange. The DR/CRMP outlined BLM's decision to maintain the water rights in order to use the water obtained for irrigation and instream flow. The DR/CRMP identified the eight fields to be leased for irrigated crop production using water from Bridge Creek, Gable Creek, and the John Day River. The DR/CRMP states that BLM will initiate change-of-use for water rights appurtenant to the agricultural fields. Irrigation stipulations would specify minimum instream flow levels developed by the State of Oregon for Bridge Creek and the John Day River below which irrigation would cease. (DR/CRMP at 15-16, 25.) Agricultural leases would require riparian buffer filter strips between fields and flood plains. (DR/CRMP at 16.)

In its SOR for appeal, Appellant asserts that water temperatures in affected streams are too warm for anadromous fish even when BLM appropriates water for less than half the fields it has now authorized for irrigation. (SOR at 3-4.) Appellant disputes BLM's contention that irrigation could contribute to cooler summer water temperatures by adding to stream baseflow. Appellant asserts that the Sutton Mountain DR/CRMP authorizes reduction of instream flow in violation of state water quality standards, CRMP goals and objectives, the Wild and Scenic Rivers Act, 16 U.S.C. § 1281 (1994), and BLM guidelines. Id.

BLM counters that its actions are designed to help improve stream flow over the long term, both by instream use and by baseflow contribution from irrigation water. BLM has acknowledged the need to lower instream temperatures to improve fish habitat. (Response at 3-4.) BLM states that it has been monitoring water temperatures and that it issued the DR/CRMP in part to satisfy state mandates, including an action plan to improve water instream conditions. Revised state criteria were to become effective July 1, 1996. (Response at 4.)

BLM has considered the effects of irrigation on stream temperature and stipulated flow requirements and early season crops. Appellant incorrectly

asserts that BLM would remove additional instream flow. Instead, previously allocated water rights were transferred to BLM, and BLM approved less irrigation for less time than had occurred prior to issuance of the CRMP. (Response at 9.)

In particular, Appellant found BLM to be in violation of the "PACFISH" guidelines, an interim strategy for anadromous fish management in the Northwestern states that BLM and the U.S. Forest Service adopted in 1995. (SOR at 4-6.) Appellant did not submit these guidelines to this Board on appeal, however. Appellant states that the PACFISH guidelines not only call for maintenance of low water temperatures in migration, rearing and spawning anadromous fish habitat, but also for BLM to avoid issuing leases and otherwise acting in a manner which would retard or prevent attainment of its riparian management objectives. Appellant insists that BLM cannot substitute planned watershed and habitat restoration for prevention of habitat degradation. (SOR at 6-8.)

BLM properly points out that the DR/CRMP approved mechanisms to lower water temperature and improve stream habitat. One such mechanism is encouragement and restoration of riparian vegetation to diversify the stream channel and provide shade to lower water temperatures. BLM stated that the majority of its water rights for the Sutton Mountain CRMP planning area would be used for restoration and recovery. (Response at 12-13.)

The John Day River was designated a Wild and Scenic River in 1988. Pub. L. No. 100-577, 102 Stat. 2782, 2784. The Wild and Scenic Rivers Act requires that such a river be managed to protect and enhance its values. 16 U.S.C. § 1281(a) (1994). Appellant argues that BLM proposes to withdraw additional water and degrade this river in violation of the Act. However, BLM does not propose to withdraw additional water beyond what was already being taken. BLM has articulated its plan to use the water rights to enhance this river in the future and has described its plan to continue irrigating over the short term to preserve water necessary for long term enhancement. (Response at 14.) The Board does not find this to be a violation of the Wild and Scenic Rivers Act.

Appellant disputes BLM's assertion that it stands to lose the water rights it has acquired if it does not continue to use them for irrigation in the short term. Appellant asserts that Oregon law would exempt BLM's water rights from abandonment in cases where BLM, a "holder of a water right[,] is prohibited by law from using the water." (SOR at 8, citing ORS § 540.610(j).) Appellant, however, does not identify a law prohibiting BLM from using this water.

Appellant also accuses BLM of being dilatory in applying for permanent conversion of the water rights, and impliedly accuses BLM of bad faith in intending to continue irrigation. (SOR at 8-9.) The Board does not find evidence of this.

Appellant has charged BLM with a lack of consideration of a potential habitat for Rocky Mountain Bighorn sheep, in violation of the multiple use

management mandate in the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732 (1994). The DR/CRMP detailed a plan for domestic sheep grazing, instead of the reintroduction of bighorns. Appellant considers the DR/CRMP explanation inadequate:

[O]ne of the limiting factors for bighorn sheep in any analysis is the presence of exotic or domestic sheep. At the present time, and for the foreseeable future, there are domestic sheep grazing private lands immediately adjacent to the Sutton Mountain block. These domestic sheep are less than seven miles from any point on Sutton Mountain. As such, the likelihood that domestic and any reintroduced bighorn sheep would come in physical contact is high, greatly increasing the risk of disease transmission.

(DR/CRMP at 41.) This Board finds it reasonable for BLM to decline serious consideration of bighorn reintroduction as long as domestic sheep graze on nearby private land. BLM noted that the Sutton Mountain area was historically inhabited by California bighorn sheep and not by the Rocky Mountain bighorn subspecies. BLM has also added on appeal that the DR/CRMP does not preclude future bighorn reintroduction if neighboring landowners decide not to raise domestic sheep, which has happened in another area on the lower John Day River. (BLM Response to SOR at 17.)

[2] This Board has held that BLM resource management planning implementation decisions will be upheld on appeal where such decisions are based on an evaluation of the environmental impacts sufficient to support an informed judgment. Defenders of Wildlife, 79 IBLA 62 (1984); SOCATS (On Reconsideration), 72 IBLA 9 (1983).

Review of the CRMP EA, the DR/CRMP and other supporting documents in this record establishes that BLM clearly set forth available alternatives. This record reflects careful consideration and a thorough examination of reasonable alternatives.

Appellant has not established error in BLM's implementation decisions regarding water rights and irrigation, or its decision not to reintroduce bighorn sheep to Sutton Mountain at this time. Appellant's primary arguments appear to represent differences of opinion with BLM as to the proper timing of changes in water use. Such differences of opinion are insufficient to overcome BLM's determinations when there is ample support in the record. See Curtin Mitchell, 82 IBLA 275 (1984).

Resource management planning implementation decisions will be affirmed on appeal where such decisions are based on an EA which reflects an evaluation of reasonable alternatives and is sufficient to support informed judgment. Such determinations may not be overcome by mere differences of opinion. Such decisions will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal. An appellant has the burden of showing error

in the challenged decision and supporting its allegations with evidence demonstrating error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice.

It appears that Appellant and BLM have similar long term goals and concerns. Their primary dispute is over the timing of changes in water use. BLM has presented a reasonable explanation for the delay in ultimate implementation of the instream water augmentation, which BLM could not accomplish if it lost the water rights.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

T. Britt Price
Administrative Judge