United States Department of the Interior

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KEVIN DIEKER D/B/A RIO RAFTING, LLC

IBLA 2013-143 Decided June 1, 2015

Appeal from a decision of the Field Manager, Deschutes Resource Area, Pineville District Office (Oregon), Bureau of Land Management, rejecting an application for a commercial special recreation permit on the Lower Deschutes River. 2930 (ORP060).

Decision set aside; remanded for further consideration.

1. Special Use Permits--Public Lands: Administration--Wild and Scenic Rivers Act

BLM has discretionary authority to issue commercial SRPs pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b), and the Federal Land Recreation Enhancement Act, 16 U.S.C. § 6802(h). A decision approving, denying, or rejecting an SRP application must have a rational basis that is stated in the decision and supported by facts of record, which demonstrate it is not arbitrary, capricious, or an abuse of discretion. It is appellant's burden to show, by a preponderance of the evidence, that a challenged decision is in error.

APPEARANCES: Kevin Dieker, Bend, Oregon, *pro se*; Michael A. Schoessler, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Kevin Dieker, doing business in the State of Oregon as Rivers In Oregon (RIO) Rafting, LLC, has appealed from a March 22, 2013, decision of the Field Manager, Deschutes Resource Area, Pineville District Office (Oregon), Bureau of Land Management (BLM), rejecting his application for a commercial special recreation permit (SRP) to run guided boat trips on the Lower Deschutes River. For the reasons discussed below, we find BLM's rejection of that application was inconsistent with the

applicable resource management plan (RMP) and, therefore, set its decision aside and remand this matter for further consideration.

Background

In 1988, Congress designated the lower 100 miles of the Deschutes River as a National Wild and Scenic River pursuant to the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271-1287 (2012), which required BLM to prepare a comprehensive plan for managing public use on this protected portion of the River under 16 U.S.C. § 1274(d).[1] *See National Organization for River Sports*, 140 IBLA 377 (1997). BLM jointly issued the Lower Deschutes River Management Plan in 1993. *See* Administrative Record (AR) 16, Lower Deschutes River Management Plan and Environmental Impact Statement (LDRMP).[2]

The LDRMP addresses recreational and commercial use on and along the River and targeted recreational use at 1990 levels, to be achieved by indirect and voluntary management actions for an initial 3-year period, with a "limited entry system" to be phased in if those actions were unsuccessful at reaching and maintaining those use levels. LDRMP at 49; *see id.* at 55 ("managing agencies will aggressively pursue all

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[1] 16 U.S.C. § 1274(d)(1) provides, in relevant part, that

> [T]he Federal agency charged with the administration of each component of the National Wild and Scenic Rivers System shall prepare a comprehensive management plan for such river segment to provide for the protections of the river values. The plan shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of this chapter. . . . The plan shall be prepared after consultation with State and local governments and the interested public.

See 16 U.S.C. § 1281(e) (Cooperative agreements with State and local governments); *National Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 27-41 (D.D.C. 1999).

[2] The LDRMP was prepared jointly by BLM, the Bureau of Indian Affairs (BIA), Confederated Tribes of Warm Springs Reservations, Oregon Parks and Recreation Department, Oregon Department of Fish and Wildlife, Oregon Marine Board, Oregon State Police, the City of Maupin, plus Waco, Sherman, and Jefferson Counties. *See* LDRMP at I. For ease and simplicity, we collectively refer to these parties and plan proponents as "BLM." They each have management responsibilities along the Lower Deschutes River and make up the Management Committee under the LDRMP, which also has Working Group composed of "special interest groups that discuss river management issues and provide guidance to the Managers Group." Answer, Ex. 1, Declaration of Molly Brown, BLM Field Manager, Deschutes Resources Area, at ¶ 2.

reasonable measures during the 3-year period to avoid the need to implement a permit system"), 70 ("managing agencies will continue to coordinate permit requirements and regulatory controls"). The LDRMP directed publication of a report "detailing the management actions taken, monitoring data and trends, and an evaluation of the success of non-permit measures" and required managing agencies to design a permit system, evaluate various allocation methods, and make an allocation decision "before the end of the 3-year period." *Id.* at 55, 56. The LDRMP was approved by BLM on February 1, 1993. *See* AR 15, Record of Decision.

BLM evaluated indirect and voluntary management actions, analyzed several allocation techniques, and proposed a limited entry system, as required by the LDRMP. *See* AR 14, Supplement to LDRMP - March 1996 (LDRMP Supplement). To achieve the 1990 recreational use levels specified in the LDRMP, the supplement identified three alternatives: continue current management (no action); implement a permit allocation system with nontransferable permits (proposed action); and a split allocation system of nontransferable permits (but allow commercial permit transfers to immediate family members and allow for mergers of existing permitees). *Id.* at 62-73.[3] Public policy criteria were developed and applied to each identified alternative (*e.g.,* equitable treatment, minimize disruption to commercial guides/outfitters, and avoid creating a private property value in a public resource). *See* LDRMP Supplement at 97-99. The proposed action would impose a moratorium on new SRPs until their total was reduced to 80, after which "additional permits would be selected by lottery out of a pool of qualified applicants." *Id.* at 68.[4] Although commercial SRPs can be transferred under 43 C.F.R. § 2932.54, BLM proposed making them non-transferable on the Lower Deschutes River because such transfers would defeat its goal of "assuring fair competition for new entrants once the goal of 80 commercial permits is reached." *Id.* at 69. The LDRMP Supplement, its EA, and FONSI were then subject to a 60-day public comment period, which began in March of 1996. *See supra,* note 2.

BLM, BIA, and others who jointly issued the LDRMP decided to adopt the Lower Deschutes River Allocation System in June of 1997, which was incorporated by reference when BLM amended/modified its approved LDRMP. *See* AR 13, Final Decision - LDRMP Supplement (Final Decision on LDRMP) at 26. As a result, the LDRMP was amended and implementation of a limited entry system was delayed

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[3] BLM also addressed "environmental, social and economic impacts projected to occur as a result of implementing each of the three management alternatives" and issued a joint finding of no significant impact (FONSI) with BIA on Feb. 27, 1996. LDRMP Supplement at 74, 96; *see id.* at 74-95.

[4] This proposal included a first-come-first-served common pool entry system under which individual boaters and commercial guides would compete for a limited number of boat pass permits during peak periods. LDRMP Supplement at 51-54.

until 1997, with additional deferrals possible if use targets were met, but if not, an allocation system would be phased in over a 3-year period. *See id.* at 10-11. Although permits were non-transferable, commercial SRPs could be transferred during the permit phase-in period, but only "to existing permitees or immediate family members." *Id.* at 15; *see id.* at 27 (Record of Decision for LDRMP Supplement). BLM then added:

> Until the permit system is phased-in on a given river segment, a moratorium on the issuance of new commercial guide permits on the entire river will be established to support the implementation of non-permit measures and to facilitate transition toward a common pool. When the permit system is implemented on any river segment, the moratorium on the entire river will be removed.
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> The overall number of commercial guide permits will not be administratively capped. However, the number of new guide permits issued per year will not exceed 5 percent of the previous year's total guide numbers. Reduction in guide permit numbers will be determined by market conditions. This is expected to reduce the size of the guide pool. The issuance of commercial permits to guides or outfitters will continue, subject to agency policies and regulations. Consideration will be given to applicants for a new permit who have purchased an existing business.

Id. at 17. BLM explained that its prohibition on permit transfers removes "any potential permit value" and that the "opportunity for new guides to enter business on the Lower Deschutes River is available through applying directly to BLM." *Id.* at 20.

After the Deschutes River Allocation System was phased in and the SRP moratorium was lifted, BLM announced that it would begin issuing SRPs in 2008 "to qualified purchasers of existing businesses holding an SRP." *See* AR 9, Letter to Lower Deschutes Guides and Outfitters, dated Dec. 4, 2007, at 1. As a result, BLM processed its backlog of business and issued 12 new SRPs in 2008, plus 5 more during 2009 and 2012, all to purchasers of businesses that held SRPs. Answer, Ex. 1, Declaration of Molly Brown, BLM Field Manager, Deschutes Resource Area, at ¶ 7. Brown stated BLM would not consider any SRP applications "unless the applicant has purchased an existing business on the Lower Deschutes River that already holds a[n] SRP" and that her policy had been consistently applied and would be continued "[u]ntil the Working Group recommends a new process that the Managers Group accepts." *Id.* at ¶ 5, ¶ 9; *see supra* note 2.

RIO applied for a multi-year, commercial SRP to operate a commercial rafting business on the Deschutes River on March 8, 2013. AR 5.[5] BLM rejected its application in a 1-page decision, dated March 22, 2013 (Decision), because it had not purchased a business holding an SRP for the Lower Deschutes River. *See* Decision at 1; Brown Declaration at ¶ 5. BLM then added:

> Over the years we have compiled a list of individuals desiring a Lower Deschutes Special Recreation Permit. They have been informed of these same policy restrictions and have been given the list of permitted guides and outfitters to see if anyone is interested in selling their business. Many have been successful in finding a willing seller and have successfully acquired a new permit. We have included a list of the current guides and outfitters so that you may contact them to seek out businesses interested in selling.
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> Your request will be kept on file and you will be notified when the opportunity to apply for permits opens to applicants not purchasing an existing business with an SRP.

Decision at 1. RIO timely filed a combined notice of appeal and statement of reasons (SOR); BLM responded by filing its Answer and the Brown Declaration.

Discussion

RIO contends that BLM erred in rejecting its application because the LDRMP does not have an SRP "cap" and expressly allows for "issuance of new guide permits." SOR at 1; *see id.* at 3 ("The requirement to purchase another company, including rafts, requisite equipment, vehicles, trailers, and potentially other property in order to just obtain consideration for issuance of a Special Recreation Permit is unnecessary and unduly burdensome."). BLM contends its decision should be affirmed because it "had a rational basis" and properly interpreted the LDRMP as prohibiting its issuance of a new SRP to anyone who has not "purchased an existing permitted business." Answer at 16.

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[5] Although the 2013 and 2014 rafting season are over, this matter is not moot because it falls within the well-recognized exception for not dismissing appeals based on mootness where the issues on appeal are "capable of repetition, yet evading review." *Thomas S. Budlong*, 165 IBLA 193, 197 (2005) (internal quotation and citations omitted). The issue here presented is likely to arise in the future because BLM "will continue to only consider new SRPs for applications that have purchased an existing business holding a[n] SRP on the Lower Deschutes River." Brown Declaration at ¶ 9.

[1] BLM has discretionary authority to issue commercial SRPs pursuant to rules implementing section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2012), and the Federal Land Recreation Enhancement Act, 16 U.S.C. § 6802(h) (2012); *see* 43 C.F.R. Subpart 2932 (Special Recreation Permits); *Bookcliff Rattlers Motorcycle Club*, 171 IBLA 6, 13 (2006); *Daniel T. Cooper*, 150 IBLA 286, 291 (1999). A decision approving, denying, or rejecting an SRP application must have a rational basis that is stated in the decision and supported by facts of record, which demonstrate it is not arbitrary, capricious, or an abuse of discretion. *See Bookcliff Rattlers Motorcycle Club*, 171 IBLA at 13; *Larry Amos d/b/a Winterhawk Outfitters, Inc.*, 163 IBLA 181, 188 (2004); *see also Shooters-Edge, Inc.*, 178 IBLA 366, 369-70 (2010). Thus, it is appellant's burden on appeal to "show, by a preponderance of the evidence, that a challenged decision is in error." *David L. Antley, Jr., d/b/a High Desert Outfitters, Inc.*, 178 IBLA 194, 197 (2009), and cases cited; *Larry Amos d/b/a Winterhawk, Outfitters, Inc.*, 163 IBLA at 190; *William D. Danielson*, 153 IBLA 72, 74 (2000).

The question presented is whether RIO has met its burden to show BLM erred in rejecting its SRP application, which was based on RIO not having first purchased a business with an SRP. Since the facts are not in dispute, the issue to be decided is whether BLM properly interpreted the LDRMP as prohibiting it from considering RIO's application. We find its interpretation is inconsistent with the LDRMP and, therefore, an insufficient basis upon which to reject this application for a new SRP. Accordingly, we set aside the Decision and remand this matter for further action and a decision under 43 C.F.R. § 2932.26.

BLM completed implementation of its permit entry system and lifted the SRP moratorium on the Lower Deschutes River in 2008. *See* Brown Declaration at 7. These circumstances are expressly addressed in the LDRMP: "Once the permit system is fully implemented on any segment [of the Lower Deschutes River], permit transfers will no longer be allowed, but new permits may be issued up to a limit of 5% of the existing number of commercial permits." AR 13, App. A (Record of Decision) at 2.[6] Moreover, BLM expressly stated: (1) the prohibition on permit transfers would remove "any potential permit value"; (2) the number of commercial SRPs will not be

[6] The nontransferability of permits was also addressed in both action alternatives for BLM's limited access system proposal. *See* LDRMP Supplement at 68 ("When guides discontinue doing business on the Lower Deschutes River their permits would be retired") (new SRPs "would be selected by lottery out of a pool of qualified applicants"), 72 (commercial SRPs could be transferred "to allow for mergers of existing operations") (new SRPs "could be issued by lottery or competitive basis from a pool of applicants that meet specified criteria").

"administratively capped"; (3) the number of outstanding SRPs and SRP reductions "will be determined by market conditions"; (4) new SRPs for any given year "will not exceed 5 percent of the previous year's total"; and (5) new permitees would be selected from a pool of qualified applicants by lottery or competition and that consideration could then be given to those "who purchased an existing business." Final Decision on LDRMP at 16, 17, 20.

BLM construed its ability to consider whether SRP applicants had purchased the business of existing permitees when deciding between applicants for a limited number of new SRPs, as allowing it to reject all other qualified applicants and applications, regardless of quality or experience. *See* Answer at 10 (new SRPs must "be associated with the sale and purchase of existing, permitted business") ("BLM denied [the RIO application because] it was not associated with the sale of any existing business holding a[n] SRP."). In sum and substance, BLM is transferring SRPs on the Lower Deschutes River, notwithstanding the express prohibition on such transfers in the LDRMP. *Compare* Final Decision on LDRMP at 16 *with* 43 C.F.R. § 2932.54; BLM Manual, H-2930-1, Recreation Permit Administration, Rel. 2-295, at 26 (Aug. 7, 2006).[7]

BLM reads the LDRMP as requiring it to "only give consideration to new SRP applications that are from an applicant who has purchased an existing, permitted business" and claims that its rejection of the RIO application is "consistent with the governing [LDRMP]." Answer at 16, 19. We disagree. At most, we read the LDRMP as allowing BLM to consider whether an applicant purchased a permitted business in deciding between qualified applicants competing for a limited number of SRPs. We find no permit purchase requirement in the LDRMP and, therefore, conclude that the Decision lacks a rational basis (or is arbitrary and capricious) because it is inconsistent with express provisions of the LDRMP.

BLM contends its decision should be affirmed because it had a rational basis that was "aimed at reducing congestion on the Lower Deschutes River." Answer at 16 (citing *Outdoor Adventures, S.W.*, 50 IBLA 90 (1980)). While there is a logic to its rationale, it simply does not allow BLM to ignore the LDRMP or its express

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[7] We note that requiring new permitees to purchase permitted businesses may add value to their SRPs, establish a "cap," and reduce the number of SRPs on the Lower Deschutes River, rather than let the market decide, which are facially inconsistent with the LDRMP. *See* Final Decision on LDRMP at 17, 20. If BLM believes the LDRMP should be revised, modified, or amended to limit the number of SRPs, delete the SRP transfer prohibition, and/or require new permitees to purchase permitted businesses, it can take action to do so, but until it does, BLM must act consistent with the LDRMP.

provisions.[8] Accordingly, we set the Decision aside and remand this matter for further consideration by BLM.

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 set aside and this matter remanded for further consideration.

James K. Jackson
Administrative Judge

I concur:

Eileen Jones
Chief Administrative Judge

[8] BLM will continue rejecting SRP applications until permitees on the Working Group recommends (and the Management Committee accepts) allowing it to consider applications from other qualified applicants. *See* Brown Declaration at ¶ 9. This apparent abdication of statutory responsibility may raise a serious question of an unlawful delegation of authority, but our reading and interpretation of the LDRMP avoids that conundrum. *See National Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d at 27-41.