



FRIENDS OF LIVING OREGON WATERS *ET AL.*

171 IBLA 271

Decided May 21, 2007

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IBLA 2004-315

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Appeal from a Record of Decision of the Medford District Office, Bureau of Land Management, approving the Hellgate Recreation Area Management Plan. 8351(OR-117).

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--Wild and Scenic Rivers Act

As a general rule, the Board of Land Appeals has authority to review decisions by BLM relating to the use and disposition of the public lands. *See* 43 C.F.R. § 4.1(b)(3), 4.410(a). However, the Board does not have jurisdiction to review appeals of decisions to approve or amend a resource management plan, which is designed to guide and control future management actions.

2. 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--Wild and Scenic Rivers Act

Whether the Board of Land Appeals exercises jurisdiction over a BLM action as an implementation decision depends upon the effect of that action. If it is in the nature of a direction to BLM's employees, so that an action would be required to produce an adverse effect, the Board does not have jurisdiction. Thus, a BLM decision adopting a management plan providing for guidance and direction

regarding recreation activities along a wild and scenic river is not within the jurisdiction of the Board of Land Appeals because it does not implement those actions.

APPEARANCES: Dan Serres, M.S., and Joe Serres, Esq., Grants Pass, Oregon, for appellants; Brad Grenham, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Friends of Living Oregon Waters and Rogue Group Sierra Club (appellants) have appealed the July 16, 2004, Record of Decision (ROD) issued by the District Manager, Medford District Office, Bureau of Land Management (BLM), and the Field Manager, Grants Pass Resource Area, BLM, for the Hellgate Recreation Area Management Plan (Hellgate RAMP) for the Rogue National Wild and Scenic River (Rogue WSR), Hellgate Recreation Section.¹ The ROD states that the Hellgate RAMP was being issued to replace the *1978 Rogue National Wild and Scenic River Activity Plan for the Hellgate Recreation Section*, and to provide direction and guidance on the management of the Hellgate Recreation Area pursuant to the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271-1287 (2000). The RAMP was intended to conform with management direction contained in the *1995 Medford District Record of Decision and Resource Management Plan* and to “maintain a mix of river recreation uses and users common to the river since its designation in 1968 as a National Wild and Scenic River to the extent consistent with the [WSRA].” ROD at 5. The ROD was published in the Federal Register on July 16, 2004, and provided for a 30-day appeal period following the date of publication. 69 Fed. Reg. 42766, 42767. Appellants filed a timely appeal and statement of reasons (SOR).

BACKGROUND

The Hellgate Recreation Area comprises 27 miles of the Rogue WSR and is classified as a recreational river area. RAMP at 1, 50. The ROD provides for an administrative division of the Hellgate Recreation Area into two reaches, the Applegate Reach and the Dunn Reach. The Applegate Reach, which begins at the confluence of the Applegate River and ends at Hog Creek, and covers 12.8 miles, is used primarily by motorized tour boats (MTBs) and by boat and bank anglers. The Dunn Reach, which begins at Hog Creek and ends at Grave Creek, is used primarily

¹ In 1968, Congress designated the Rogue River as one of the first national wild and scenic rivers under the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1274(a)(5) (2000); *see also Rogue River Outfitters Association*, 63 IBLA 373, 375-76 (1982) (discussing background of Rogue River designation).

for white water rafting, although a small amount of power boat use occurs there. See Answer at 2.

In describing the Hellgate Recreation Area, BLM states that “[t]he Rogue River flows through a dramatic rockform area called Hellgate Canyon, with near vertical, dark gray basalt bluffs almost completely devoid of vegetation,” and that the river is surrounded by “bedrock and steep mountainsides, creating drastic vertical relief and complete enclosure of the view.” Answer at 2-3; Hellgate RAMP at 2-3. BLM states that “[t]he Rogue River offers a blend of motorized and nonmotorized boating in a setting that is unique in North America,” with “[r]ecreacionists commonly us[ing] the river for both motorized and nonmotorized recreation.” Answer at 4. Three types of power boats are used in the Hellgate Recreation Area: MTBs, boats for commercial motorized angling, and private motorized boats. MTB “use makes up the majority of the motorized use,” and while “[p]rivate motorized boats are not limited, their use is not substantial when compared to other uses.” *Id.* In addition, “[r]ecreational floating in the planning area is accomplished in a wide variety of watercraft, including inflatable rafts, hard shell and inflatable kayaks, canoes, and inner-tubes.” *Id.* at 5, *citing* Final Environmental Impact Statement (FEIS) at 3-33. BLM explains that the RAMP is needed because of a “substantial increase in river use in the Hellgate Recreation Area,” which “has resulted in increased conflicts among river users, particularly between jet boaters and floaters during the summer months and between jet boaters and anglers during the fall fishing season.” *Id.*

The Hellgate RAMP reflects the culmination of a lengthy and involved planning process which BLM initiated in 1990. See ROD at 18. BLM considered five alternatives (denominated A through E) which were developed by an interdisciplinary team of specialists from the Medford District and Oregon State Offices of BLM in response to issues identified at internal and public scoping meetings.² *Id.* at 3. BLM evaluated the five alternatives and selected Alternative E as the “Environmentally Preferable Alternative” by applying the six criteria embodied in section 101 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 (2000).³ BLM explained that Alternative E meets the goals of section 101 to

² BLM analyzed these alternatives in the FEIS for the Rogue National Wild and Scenic River: Hellgate Recreation Area, issued in March 2003.

³ According to the Council on Environmental Quality (CEQ), “the environmentally preferable alternative is the alternative that will promote the national environmental policy” as expressed in section 101 of NEPA. CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations” (Question 6a),

(continued...)

the highest degree and “provides the best overall direction in support of protecting the environmental resources and the outstandingly remarkable values [ORVs] while allowing the widest range of public uses in the Hellgate Recreation Area, and is the Environmentally Preferred Alternative.”⁴ ROD at 7.

BLM explained that Alternative E involves a series of management “decisions” which will be issued for later implementation of the Hellgate RAMP. For our present purposes, we need only state that Table 2 of the ROD, entitled “Management Decisions to be Implemented,” provides two columns, one captioned “Type of Use” and the other “Decisions.” The “Type of Use” column lists various categories of use, including, *inter alia*, non-motorized floating, private motorized boating, and commercial motorized tour boating, and the “Decisions” column specifies the corresponding topics for which BLM contemplates the later issuance of decisions to be implemented, including, *inter alia*, the times and locations of permitted boat trips. ROD at 10-11.

³ (...continued)

46 Fed. Reg. 18026-18038 (Mar. 23, 1981). Section 101 establishes the following goals:

- 1) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- 2) Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- 3) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- 4) Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, whenever possible, an environment which supports diversity and variety of individual choice;
- 5) Achieve a balance between population and resource use which will permit high standards of living while sharing of life’s amenities; and
- 6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

ROD at 7, *quoting* section 101 of NEPA.

⁴ BLM’s application of the six CEQ goals to each alternative is set forth in Table 1 of the ROD, with + denoting compliance with the CEQ goal to the least degree and +++ denoting compliance with the CEQ goal to the highest degree. BLM determined that Alternative E “meets each goal to the highest degree.” ROD at 7-8.

APPELLANTS' ARGUMENTS

In their SOR, appellants request a “full remand” of the Hellgate RAMP and related FEIS. They contend that the RAMP fails to “protect and enhance” the ORVs of the Hellgate Recreation Area portion of the Rogue WSR as required by the WSRA. They stress that under section 10 of the WSRA, 16 U.S.C. § 1281(a) (2000), BLM must administer the Rogue WSR “in such a manner as to protect and enhance the values which caused it to be included” in the national wild and scenic river system, with its primary emphasis being to protect the river’s “scenic, historic, archaeological, and scientific features.” SOR at 3. Appellants’ principal argument is that by “authorizing motorboat uses that degrade wildlife, scenery, fisheries, and other natural values,” BLM has failed in its duty to protect and enhance the values of the Rogue WSR. *Id.* at 4. Appellants state that “[t]he size, engine power, speed, noise and passenger-capacity of commercial motorized tour boats that use the Rogue [WSR] have all increased dramatically since 1968,” when the WSRA was enacted, and that such commercial tour boats create large wakes that extend from “river bank to river bank,” harming “riparian vegetation, adversely impact[ing] sand recruitment and retention, and harm[ing] fish and wildlife.” *Id.* Appellants assert that “[t]he type and volume of jetboat use allowed by the RAMP demonstrates that the BLM has skewed its analysis to weigh the value of one specific type of recreation (motorized tourboating) more heavily than other uses and values that suffer from this activity.” *Id.* at 5.

Appellants contend that the management decisions listed in the RAMP for implementation will not be beneficial to the planning area, as claimed in the Hellgate ROD, and that “[t]he proposed RAMP . . . is particularly inadequate in protecting [ORVs] in conflict with motorized tourboat use.” *Id.* They claim that “[t]he fundamental problem with the RAMP is that it fails to realize the requirements of the WSRA,” and that “it is not based upon a protection and enhancement-based management plan to guide the decisions it makes related to development and motorized boat use.” *Id.* Appellants fault the RAMP for not providing a “detailed plan” for the protection of the identified ORVs, and for not “providing management direction to which all other planning efforts and agency actions must comply.” *Id.* at 6. They state that Alternative E fails “to address the significant adverse effects of jetboats on ORVs of the river,” and that the RAMP does not include “an alternative that fully addresses that issue in a manner compliant with the WSRA.” *Id.* In their view, “[t]he RAMP acknowledges that motorized jetboaters cause adverse impacts to other users such as floaters and fishers, and that this conflict is central to the RAMP, but the preferred alternative fails to limit jetboat use in any real meaningful way.” *Id.* at 7. They claim that “BLM has failed to adequately limit the size, number, type, speed, noise, and overall impacts of motorized tourboats/jetboats to ensure protection of ORVs.” *Id.*

Appellants also contend that the RAMP violates section 102(2) of NEPA, 42 U.S.C. § 4332(2) (2000), by analyzing a range of alternatives which is inadequate for “foster[ing] informed decision-making and full public involvement.” *Id.*, citing *Robertson v. Methow Valley Citizen’s Council*, 490 U.S. 332, 349 (1989), and 40 C.F.R. § 1508.9(b). They claim that the “alternatives proposed are inappropriately narrow with respect to the possible range of jetboat usage in the Hellgate Recreation Management Area.” SOR at 7. In their view, “BLM has failed to present the public with an adequate analysis of a minimum motorized use alternative, wherein the use of motorized tourboats would be strongly limited.” *Id.* at 8. They state that “the reasonable alternative of minimal motorized tourboat use was excluded from detailed study without sufficient analysis or rationale.” *Id.* “The RAMP,” according to appellants, “illegally fails to consider the alternative of limiting jetboat use to the use levels present in 1968 when the river was designated.” *Id.* at 9. They assert that “BLM falsely concluded that [the] proposed action is environmentally preferable.” *Id.* at 10.

Appellants further argue that BLM failed to “disclose and examine all potential environmental impacts to the proposed action” in violation of NEPA. *Id.*, citing 40 C.F.R. § 1500.1(b) and *Inland Empire Public Lands v. U.S. Forest Service*, 88 F.3d 754, 758 (9th Cir. 1996). They assert that BLM failed to take a “hard look” at the environmental consequences of the Hellgate RAMP, thereby violating NEPA. SOR at 10, citing *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983). In particular, appellants contend that BLM “has unsatisfactorily analyzed the detrimental effects that the proposed RAMP might have on salmon species,” and that BLM failed to adequately weigh “recent studies” indicating that intense jetboat use is harmful to salmon habitat. SOR at 10, citing, e.g., T.D. Satterthwaite, *Effects of Boat Traffic on Juvenile Salmonids in the Rogue River* (1995); G.E. Horton, Master’s Thesis, Univ. of Alaska, Fairbanks (1994).

Finally, appellants contend that the mitigation measures proposed by BLM are inadequate under NEPA, given that they have not been “studied and explicitly connected to the outcomes they intend to produce.” SOR at 12. They argue that “the mitigation measures are not sufficient to support the BLM’s claim that the selected alternative is environmentally preferable, nor has the BLM accounted for evidence that suggests that these mitigations may not be adequate to substantially diminish erosion and salmon habitat disturbance.” *Id.* The RAMP provides a list of mitigation measures, appellants assert, but fails to analyze them in “detail or explain how effective the measures would be for the purposes intended.” *Id.* They state that BLM has failed to clearly identify “those features or practices intended to avoid or minimize environmental harm.” *Id.*

ANALYSIS

[1, 2] This Board's authority to review the merits of a BLM management plan, such as the Hellgate RAMP, is circumscribed. For the reasons that follow, we conclude that the Hellgate RAMP constitutes a management plan that describes a series of decisions to be implemented eventually in accordance with BLM's long-term management strategy, and is accordingly not subject to this Board's jurisdiction.

In *Petroleum Association of Wyoming (PAW)*, 133 IBLA 337 (1995), the Board stated that it "has long recognized the regulatory review distinction between an RMP [resource management plan] and an activity plan or implementation decision." *Id.* at 341, citing *Lawrence V. Smart Trust*, 129 IBLA 351, 357 n.1 (1994). The Board articulated the following framework:

An RMP is a land use plan "designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses," 43 C.F.R. § 1601.0-2, and "not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." 43 C.F.R. § 1601.0-5(k); see, e.g., *Animal Protection Institute of America*, 117 IBLA 208, 218 n.4 (1990); *California Association of Four Wheel Drive Clubs, Inc.*, 108 IBLA 140, 141 (1989). Decisions approving an RMP or amendment of an RMP are subject to review only by the Director, BLM, whose decision is final for the Department. See 43 C.F.R. § 1610.5-2; *Lawrence V. Smart Trust*, *supra*; *Animal Protection Institute of America*, *supra*; *California Association of Four Wheel Drive Clubs, Inc.*, *supra*; *Wilderness Society*, [90 IBLA 221, 224-25 (1986)].

133 IBLA at 341-42.⁵

⁵ The Board stated that "[t]he Bald Eagle HMP [Habitat Management Plan], while not the final implementation for all the identified actions, . . . expressly defines itself as an activity plan designed to implement various aspects of the PRRA RMP [Platte River Resource Area RMP] and its impacts were evaluated in an EA [Environmental Assessment] rather than in an EIS as required for an RMP. See 43 C.F.R. § 1601.0-6." 133 IBLA at 342. The Board concluded that its review of BLM's approval of the HMP is not precluded by 43 C.F.R. § 1610.5-2, but dismissed appeals brought by various parties on the related basis that adoption of the HMP did not constitute a "final BLM action adversely affecting appellants." *Id.* at 344. The Board stated:

When and if specific implementation decisions are made,
adversely affected parties will have the opportunity to challenge those

(continued...)

Our ruling that the Hellgate RAMP constitutes a management decision requiring subsequent implementation that is thus beyond this Board's review authority, is supported by our analysis in *Friends of the River (Friends)*, 146 IBLA 157 (1998). The BLM decision before the Board in *Friends*, in adopting an "interim strategy for managing anadromous fish-producing watersheds on lands administered by the Forest Service and BLM," determined that further planning was necessary. *Id.* at 159. BLM and the Forest Service "would apply seven 'management measures to all proposed or new projects and activities and ongoing projects and activities . . . during the interim period.'" *Id.*, quoting BLM Decision.

The wide-ranging and unresolved nature of the seven management measures contained in the planning decision in *Friends* calls to mind the planning goals identified in the Hellgate RAMP now before the Board. The Board agreed that it "does not have jurisdiction to review appeals of decisions to approve or amend a Resource Management Plan (RMP) which is 'designed to guide and control future management actions' rather than implement decisions on actions that affect specific parcels of land or rights to use Federal lands." 146 IBLA at 163, citing 43 C.F.R. §§ 1601.0-2, 1601.0-5(k), and *Harold E. Carrasco*, 90 IBLA 39 (1985). The Board concluded that the planning decision in *Friends* amounted to a "land management action that does not directly affect members of the public but serves to provide direction to BLM employees," and which was "designed to guide and control future actions and did not take specific action or implement a decision or action." 146 IBLA at 166.

The Board further discussed its ruling in *National Organization for River Sports*, 140 IBLA 377 (1997), in which it "more clearly articulated how planning decisions were to be distinguished from implementation decisions." The Board stated:

We first noted that if the decision under appeal constitutes the approval or amendment of an RMP, it is not appealable to this Board because its approval is subject only to protest to the Director of BLM, whose decision is final for the Department. 43 C.F.R. § 1610.5-2. If the decision is another type of planning action by BLM, . . . the question is whether that decision contains implementation actions. If so, those implementation actions are appealable to the Board. For example, in

⁵ (...continued)

decisions either before this Board or before the Director, BLM, and the adequacy of the environmental analysis underpinning those final implementation decisions, including the sufficiency of the EA and HMP to the extent BLM relies on those documents as justification for its decisions, will then be reviewable.

Id.

Wilderness Society, 90 IBLA 221, 224-25 (1986), the Board entertained an appeal from a recreation management plan to the extent it contained a decision opening a new area to off-road vehicles. On the other hand, as noted above, where an organization challenged a desert tortoise HMP, the Board dismissed the appeal because it found that the management actions identified in the plan were “not the type of specific actions or land-use decisions which are appealable to the Board” because they were not final implementation decisions. California Association of Four Wheel Drive Clubs, Inc., [108 IBLA at 142-43].

146 IBLA at 164.

Pertinent to our analysis, the Board further explained that in *Wilderness Society*, “BLM’s adoption of a recreation management plan opening an area to off-road vehicle use was subject to appeal to this Board because the adverse effect of BLM’s action upon those whose use of the area would be impaired by opening it to off road vehicles was neither remote nor speculative.” 90 IBLA at 224-25. There are components of the Hellgate ROD and RAMP which result in setting parameters for motorized boat use in the Recreation Area, resulting in effects claimed by appellants to be adverse and which could be viewed, under the *Wilderness Society* rationale, as “neither remote nor speculative.” See SOR at 4-5. However, our review of the Hellgate RAMP and related FEIS shows that, for the time being, BLM is maintaining the status quo regarding recreation in the Recreation Area. The essence of appellants’ complaint against the RAMP is that it allows continued motorized use of the Rogue River at existing levels, which they view as much too high, rather than curtailing such use to levels extant when the Rogue River was designated a wild and scenic river in 1968.

In this case, the Hellgate RAMP defines itself as a document intended to “provide direction and guidance on the management of the Hellgate Recreation Area.” ROD at 5. The environmental impacts of the RAMP were evaluated in the Hellgate FEIS. We have referred to Table 2 of the ROD, which lists the various types of “uses” in the Hellgate Recreation Area for which management decisions will be issued and implemented. See Hellgate ROD, Table 2, at 7. The RAMP states that its purpose is to “outline management goals, objectives, and direction, which create a framework for future planning and decision making,” and that “[t]he degree to which these specific management decisions are carried out depends upon priorities, available personnel, funding levels, and completion of further environmental analysis and decision making, as appropriate.” Hellgate RAMP at 2; see also Proposed RAMP/EIS at 1-14. The RAMP then outlines the management goals and direction for various categories of recreational use and related issues, including “all motorized use,” *i.e.*, private and commercial; non-motorized floating; non-motorized boat angling; private motorized boating; commercial motorized angling; commercial

motorized tour boating; special boating events; boater fees and permits and user fees; day-only use areas; watchable wildlife areas; camping; and public access. *Id.* at 2-7. The RAMP further provides “management direction statements” which “explain how the management objectives for the river will be met.” *Id.* at 7. These statements cover soil and watershed; fish and wildlife; minerals; protection, *i.e.*, the prevention, direction, detection, and suppression of wildfire and disease or insect infestations; recreation; acquisition of scenic easements; timber management; improvements such as new developments or resource improvements; transportation, *i.e.*, roads and bridges; utilities; visitor information stations; grazing; and bordering lands. *Id.* at 7-13.

The RAMP provides for a monitoring process which will track the “implementation and effectiveness of [the] land use plan,” and thereby “ensure protection and enhancement of the [ORVs], provide a mechanism to address user capacities, ensure activities are occurring in conformance with the plan, determine if activities are producing the expected results, and determine if activities are causing the effects identified in the RAMP/EIS.” *Id.* at 17. Such monitoring “will be utilized to ensure that decisions and priorities conveyed by the plan are being implemented, that progress toward identified resource objectives is occurring, and that mitigating measures and other management direction are effective in avoiding or reducing adverse environmental impacts.” *Id.* The RAMP provides that “specific mitigation measures will be addressed as projects are analyzed.” *Id.* BLM’s future management of the Hellgate Recreation Area is subject to modification based upon the ongoing monitoring and evaluation measures contained in the RAMP. BLM states that “[a]ll protective measures and other management direction identified in the RAMP will be taken to avoid or mitigate adverse impacts,” that “[t]hese measures will be taken throughout implementation,” and that “[a]ll practical means to avoid or reduce environmental harm will be adopted, monitored and evaluated, as appropriate.” Hellgate ROD at 17. What appellants are challenging is a planning document in which BLM set forth its goals and priorities for the future management of the Hellgate Recreation Area while also maintaining the status quo.

The Hellgate ROD shows that decisions to be implemented will set forth the seasons and locations for various types of recreational use. For example, the season of use for private motorized boating is year-round; the season of use for commercial motorized angling in the Applegate Reach is December 1 through September 30 and in the Dunn Reach September 1 through May 31; and the season of use for commercial MTBs is May 1 through September 30, allowing 19 trips per day in the Applegate Reach and 8 trips per day in the Dunn reach. As noted, in appellants’ view, these parameters allow far too much motorized recreation activity in the Hellgate Recreation Area.

BLM's task is to administer the Hellgate Recreation Area so as to protect and enhance its wild and scenic river values and, at the same time, to allow public use and enjoyment of these values. We view the Hellgate RAMP as a management action that provides direction to BLM employees in balancing the sometimes conflicting interests of the many sectors of the public who enjoy and use the resources and values of the Hellgate Recreation Area. As with the management plan in *Friends*, we conclude that the Hellgate RAMP is a management document which "is designed to guide and control future actions and [does] not take specific action or implement a decision or action." 146 IBLA at 166.

Permits allowing future use of the Hellgate Recreation Area's resources will be issued in accordance with the Department's regulations, subject to limitations and mitigations to be imposed in accordance with the ongoing results of BLM's monitoring measures. Notwithstanding that the Hellgate ROD provides that it is appealable to this Board, we conclude that the Hellgate RAMP provides broad management direction similar to that found in RMPs, and that appellants' fundamental challenge—that allowing commercial boating in the Hellgate Recreation Area at any level is contrary to the WSRA—is beyond the scope of this Board's review authority.

However, even if we deemed appellants' appeal to be properly before the Board by virtue of their argument that the Hellgate RAMP sets MTB use at too high a level, resulting in impacts that are "neither remote nor speculative" under *Wilderness Society*, we would nevertheless affirm BLM's decision. Section 10(a) of the WSRA, 16 U.S.C. § 1281(a) (2000), in expressly requiring a balancing process in managing a wild and scenic river, provides: "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."

In *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170 (2000), the Court of Appeals for the Ninth Circuit applied section 10(a) in reviewing a Forest Service management plan that provided specified periods for motorized water craft use on both wild and scenic sections of the Rogue River, with Hells Canyon Alliance arguing that the plan unduly curtailed motorized boating and the Hells Canyon Preservation Council claiming that use levels of motorized water craft allowed by the plan violated the WSRA. In describing the difficulty in applying the WSRA to motorized boat use, the Ninth Circuit began by stating:

This appeal brings to mind the maxim that you can please some of the people some of the time, and some of the people all of the time, but you can't please all of the people all of the time. . . . Balancing

the competing and often conflicting interests of motorized water craft users, including jet boaters, and the non-motorized water craft users, such as rafters and kayakers, is no easy task. The legislative framework contemplates not only that such craft are legitimate recreational uses in the Hells Canyon but that the area should be preserved and conserved for the public benefit.

227 F.3d at 1172-73. Recognizing that the “Forest Service’s decisions with respect to what uses are inconsistent with the protection and enhancement and ‘substantially interfere’ with the river corridor’s values must be accorded substantial deference,” the court then held that

the mere existence of some decline in scenic value does not establish that motorized use substantially interferes with this value, nor does it show that the agency’s chosen limitations in striking a balance between the recreation value—which expressly recognizes the legitimacy of motorized boating—and the scenic value are arbitrary and capricious or fail to protect and enhance the river’s value.

Id. at 1178. The court went on to reject the Preservation Council’s claim that motorized boat use must be limited to the levels that existed at the time the river was designated as a wild and scenic river. *Id.* at 1180 (“Nothing in the Forest Plan or the statute requires any particular numeric level or ratio of motorized and non-motorized uses.”)

Similarly, in *Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173 (D. Or. 2002), river advocacy groups challenged the authorization of motorboat use within sections of a designated wild and scenic river,⁶ contending that such use degraded the river’s values. Based upon section 10(a) of the WSRA, the Ninth Circuit decision in *Hells Canyon Alliance*, and the Forest Service’s acknowledgment of conflicts between motorized and non-motorized use, as well as potential impacts on fish and wildlife, the Court held that “[a]bsent evidence that commercial motorized recreation ‘substantially interferes’ with other values of the river, the court must defer to the agency’s balance of river values,” noting that “[u]ltimately, it is the agency’s role—not the court’s—to balance competing recreational uses.” 228 F. Supp. 2d at 1183-84.

Here, BLM prepared multiple studies, *see, e.g.*, Rogue River Boating Safety and Conflicts Study, June 1995, and prepared an extensive EIS which evaluated

⁶ The WSRA defines a “wild” river as “free of impoundments and generally inaccessible except by trail, with watershed or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.” 16 U.S.C. § 1273(b)(1) (2000).

motorized boat use, possible environmental impacts from such use, and potential conflicts between and among various types of non-motorized and motorized boat use, including MTBs. Based upon these analyses and evaluations, the ROD approved the RAMP and established maximum use levels for MTBs, which it characterized as providing “the best overall direction in support of protecting the environmental resources and outstanding remarkable values while allowing the widest range of public uses in the Hellgate Recreation Area.” ROD at 7. Our review of the ROD, RAMP, FEIS, and the record indicates that BLM attempted to craft a reasoned balance between competing and permissible uses. Appellants have failed to persuade us by argument or evidence that BLM failed to consider required factors or that its management scheme for these river segments is arbitrary, capricious, or unreasonable.⁷

⁷ As for appellants’ challenge to the Hellgate RAMP on NEPA grounds, *i.e.*, that BLM should have included an alternative which reduced motorized use to 1968 levels, when the Rogue River was designated wild and scenic. Though couched in NEPA’s terms, it is clear that appellants fundamentally challenge the balance of competing uses struck in the RAMP. We note that the Ninth Circuit rejected a similar challenge in *Hells Canyon Alliance*. The Ninth Circuit stated that such a limitation would have been “too low to satisfy the agency’s reasonable goal of striking an appropriate balance between recreational and ecological values; as such the Forest Service had no obligation to consider this alternative in the FEIS.” 227 F.3d at 1181. Moreover, contrary to appellants’ argument, BLM provided a rather detailed rationale for eliminating from further discussion the alternative of no MTBs and a return to 1968 levels. FEIS at 2-24. Our review of the record shows that BLM in fact considered an array of alternatives, providing for a variety of emphases for the river ranging from “fewer watercraft and less visitor use” and “maximum watercraft and visitor use.” *Id.* at 2-51. As summarized by BLM, “[t]he range of alternatives considered in the FEIS allowed different MTB trip levels in different reaches and the ROD provided for different authorized levels in each reach.” Answer at 19. We would reject appellants’ NEPA argument in accordance with the Ninth Circuit’s analysis.

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 dismissed.

James F. Roberts
Administrative Judge

I concur:

James K. Jackson
Administrative Judge