

Editor's note: appealed - aff'd, Civ.No. 81-816 (D.Or. Aug. 16, 1982)

WALTER S. HAAS, JR.

IBLA 81-85

Decided June 25, 1981

Appeal from decision of the Oregon State Director, Bureau of Land Management, disapproving the use of powerboats for fishing and recreational purposes on the "wild" section of the Rogue River in Oregon. (OR) 8351.2.

Affirmed.

1. Wild and Scenic Rivers Act

The use of the wild section of a river designated as a wild and scenic river pursuant to the Wild and Scenic Rivers Act of 1968 (Act), 16 U.S.C. § 1271 (1976), for recreational powerboat use is not such an existing right or privilege affecting Federal land so as to be protected by section 12(b) of the Act, 16 U.S.C. § 1283(b) (1976). 43 CFR 8351.2-1(a) authorizes BLM to issue orders restricting recreational use of powerboats on a wild and scenic river.

APPEARANCES: Don S. Willner, Esq., Portland, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Solicitor, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is taken from a decision dated September 22, 1980, by the Oregon State Director, Bureau of Land Management (BLM), which declined to sanction powerboat use for fishing and recreational purposes on a wild and scenic river.

Appellant Walter A. Haas, Jr., is the owner of property 1/ within the "Wild River" area of the Rogue River in Oregon. When Congress enacted the Wild and Scenic Rivers Act of 1968 (16 U.S.C. § 1271 (1976)) it designated 84 miles of the Rogue River as wild or scenic, of which approximately 38 miles (the area involved in this proceeding) are classified as wild. Under 16 U.S.C. § 1273 (1976), a wild river area is an area "free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted."

The administration and management of the component of the Rogue River here at issue were vested in BLM and the U.S. Forest Service (USFS), such management to be coordinated with various Oregon State agencies. 16 U.S.C. § 1281 (1976); 37 FR 13408 (July 7, 1972). The Act provides with respect to state jurisdiction over streams: "The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreation river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration." 16 U.S.C. § 1284(d) (1976).

In 1972 BLM and USFS submitted a management plan to Congress which included a policy restricting the use of powerboats in the wild part of the river. Eventually, a four-agency management group, consisting of BLM, USFS, the Oregon State Marine Board, and the Oregon State Scenic Waterways Office was formed to manage the river. The USFS and the State Marine Board had authority to require and issue permits and it became established on January 1, 1973, that powerboats were not to be allowed between May 15 and November 15 of each year. Adjoining landowners were compelled to give up their use of powerboats completely because they had other means of access to their properties. Appellant's use of a powerboat for access to his property was preserved. 2/ However, appellant continued to use his powerboat not only for access but also for recreation.

In December 1973 appellant and BLM entered into a 50-year management agreement, the purpose of which was to protect the wild and scenic values of appellant's property. The agreement provided for BLM's right to enter the property for such purposes as pruning, planting, erosion control, and debris cleanup. Appellant agreed to certain limitations upon his use. Thus, he could not subdivide the land, was to preserve existing buildings in their present uses, and obligated himself to perform certain maintenance, inter alia. The subject of boating or powerboat use on the Rogue River was not covered by the agreement.

In 1977 the Oregon State Marine Board entered into an agreement with BLM, USFS, and the Oregon State Department of Transportation for cooperative management of the Rogue River. On May 9, 1979, the State Marine Board granted appellant a special permit for powerboat use on

1/ The property includes an historic Zane Grey cabin and mining claim.

2/ Although the record indicates that appellant also has access by air, his chief means of ingress and egress is by water.

the Rogue River. ^{3/} The permit provided not only for access by powerboat, but also for "other traditional uses." BLM, USFS, and the Oregon State Department of Transportation had advised the Marine Board that they would allow appellant the use of a powerboat for access but could not approve the "traditional use" provision. ^{4/} One of appellant's traditional uses is to tow boats upstream and cast them loose to drift fish downstream. No other land owners, other than Frye, were accorded such privileges. BLM and USFS asked the Marine Board to reconsider the special permit issued to appellant, but the Board took the position that it could not revoke the permit in the absence of a violation of its terms.

Appellant requested BLM to recognize his recreational powerboat use and offered in October 1979 to phase out that use over a period of 18 years. BLM declined, but appellant continued to seek what he termed a compromise settlement. Finally on September 22, 1980, the State Director issued the decision appealed herein. He stated therein that in conformance with the objectives of the Act, powerboat use should "be held to an essential minimum in this case, meaning solely for ingress and egress." The decision contains the following conclusions:

I conclude that the Bureau should maintain its present position of not approving powerboat use for fishing and recreation purposes as requested by Mr. Haas. That position recognizes the need for powerboat use by Mr. Haas and Mr. Frye to gain ingress-egress to their properties if that is the means they choose to use. I conclude that I cannot appropriately approve of additional powerboat use for other than ingress-egress purposes during the period of powerboat closure. The Bureau is fully prepared to recognize basic access needs for all landowners along the Rogue River "wild" section, but no extension of powerboat recreation privileges beyond that available to any member of the public fortunate enough to float quietly down this marvelous stretch of river.

Appellant's first argument on appeal adverts to his December 1973 management agreement with BLM. Appellant contends that the decision appealed from violated his contract rights which are protected by 16 U.S.C. § 1283(b) (1976). Appellant points out that nowhere in the 1973 agreement was there a limitation placed on his powerboat use. He contends that this omission in the agreement constitutes a ratification of his use of a powerboat.

^{3/} An identical permit was issued to Gerald Frye, appellant's caretaker, who, like Mr. Hass, has restricted access to his property located a mile down stream.

^{4/} In a memorandum dated Feb. 5, 1980, the State Director asserts that "each agency which was a party to this agreement fully understands that its discretion to take unlimited unilateral action in the Rogue Corridor will be tempered by the common goals of all." The Director quotes item G of the agreement as stating: "The parties to this agreement shall, to the extent permitted by law, endeavor to carry out recommendations made by a majority of the members of the group."

Appellant also contends that the Rogue River is navigable and therefore a Federal public highway on which the use of a powerboat "is a right 'affecting Federal land.'" ^{5/} Appellant asserts emphatically that this traditional right, based on long usage, was recognized by the State of Oregon as an existing right and should be protected under 16 U.S.C. § 1283(b) (1976), and under other provisions of the Act which clearly make management of the River a joint Federal/State project.

Appellant concedes that all the facts necessary for decision are contained in the file. He does not dispute those facts but requests oral argument to clarify the legal issues. The Board is of the opinion that oral argument would contribute nothing to the resolution of the appeal, and appellant's request for same is denied.

Appellant's theories concerning contract rights protected by 16 U.S.C. § 1283(b) do not withstand scrutiny. Appellant's 1973 agreement with BLM specifically enumerated rights granted and restrictions imposed by the parties. The issues of access, powerboat use, or traditional use are not mentioned therein. The fact that the agreement was silent as to such use does not inure to the benefit of appellant. The subject of the agreement was the use of appellant's land, not use of the river.

[1] Appellant employs the terms "existing right" and "existing use" interchangeably. At most it can be said that he and other similarly situated landowners enjoyed a period of unregulated use of powerboats on the Rogue River prior to the 1973 closure. Far from recognizing or sanctioning an "existing right" the Oregon State Marine Board, merely elevated "existing use" to the status of officially sanctioned privilege in its 1979 permit to appellant. In any event, appellant would argue that such privilege is protected by 16 U.S.C. 1283(b) (1976).

16 U.S.C. § 1283(b) (1976) reads in its entirety: "(b) Nothing in this section shall be construed to abrogate any existing rights, privileges, or contracts affecting Federal lands held by any private party without the consent of said party." (Emphasis added.)

Initially, we cannot find that appellant had an existing "right" to use a powerboat for recreation purposes. The granting of the permit by the State was not the recognition of a right, but merely the authorization to operate a powerboat, i.e., the granting of a privilege. However, such a privilege, or even such a right, is not the type of existing right or privilege covered by section 1283(b).

Section 1283(b) specifically relates to existing rights or privileges affecting Federal lands. Appellant's State sanctioned use of a powerboat for recreational purposes on the Rogue River is not a right

^{5/} The Government in its answer to the statement of reasons points out that this fact has not been judicially determined. Whatever the status, it is not pertinent to the disposition of this appeal.

or privilege affecting Federal lands. Section 1283(b) begins with the words "[n]othing in this section." Subsection (a) 6/ of section 1283 refers to the administration by agency or department heads "having jurisdiction over any lands which include, border upon, or are adjacent to any river included within the National Wild and Scenic Rivers System." It requires "such action respecting management policies, regulations, contracts, plans affecting such lands * * * as may be necessary to protect rivers in accordance with the purposes of this Act." The subsection concludes: "Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this chapter."

The specific reference to timber harvesting and road construction indicate the emphasis on land based activities or other activities affecting the land. Subsection (b) would not allow the abrogation of an outstanding timber sale contract, road construction contract or any existing right or privilege affecting Federal lands. The State authorized use of a powerboat on the river for recreational purposes is not protected by section 1283(b).

Despite appellant's arguments, we cannot find that he has any legally recognizable right or privilege to continued powerboat recreational use at a time (May 15 to Nov. 15) when others do not enjoy that opportunity.

When appellant presented his request to BLM in 1979, it had no existing authority to prohibit powerboat use on the Rogue River. However, on September 3, 1980, regulations published in 45 FR 51740 (Aug. 4, 1980) became effective. Those regulations allow the authorized officer of BLM to issue written orders closing or restricting the use of lands and water surface administered by BLM within the boundary of any component of the National Wild and Scenic River System when necessary to carry out the intent of the Wild and Scenic Rivers Act. 43 CFR

6/ 16 U.S.C. § 1683(a) was amended in 1978 and provides:

"The Secretary of the Interior, the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion, in accordance with section 1273(a)(ii), 1274(a), or 1276(a) of this title, shall take action respecting management policies, regulations, contracts, plans, affecting such lands, following November 10, 1978, as may be necessary to protect such rivers in accordance with the purposes of the Act. Such Secretary or other department or agency head shall, where appropriate, enter into written cooperative agreements with the appropriate State or local official for the planning, administration, and management of Federal lands which are within the boundaries of any rivers for which approval has been granted under section 1273(a)(ii) of this title. Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this chapter."

8351.2-1(a). Therefore, while the State Director could reject appellant's request for his 18-year phaseout proposal, any binding prohibition on appellant's powerboat recreational use must come pursuant to an order issued under the authority of 43 CFR 8351.2-1.

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

Gail M. Frazier
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Bruce R. Harris
Administrative Judge

