INTERIOR BOARD OF LAND APPEALS

Rio Grande Rapid Transit

161 IBLA 225 (April 22, 2004)

RIO GRANDE RAPID TRANSIT

IBLA 2000-285 Decided April 22, 2004

Appeals from a Record of Decision for the Final Rio Grande Corridor Coordinated Resource Management Plan issued jointly by the State Director, New Mexico State Office, the Field Manager, Taos (New Mexico) Field Office, and the Field Manager, La Jara (Colorado) Field Office, Bureau of Land Management, establishing criteria for boating use on segments of the Rio Grande River, and from special recreation permit stipulations issued by the Taos Field Office, Bureau of Land Management, for the 2000 commercial season. NM 018-97-012.

Affirmed in part and set aside and remanded in part.

1. Administrative Procedure: Administrative Review--Administrative Procedure: Administrative Record--Public Lands: Administration--Rules of Practice: Generally--Special Use Permits

   A decision imposing stipulations and conditions on special recreation permits to protect lands and resources and the public interest pursuant to the discretionary authority delegated to BLM will ordinarily be affirmed when it is supported by a rational basis. A decision allocating usage on a river by commercial outfitters will be set aside and remanded when the allocation is made on a basis which is inconsistent with the relevant BLM guidelines.

APPEARANCES: Patrick Blumm, Proprietor, Rio Grande Rapid Transit, Pilar, New Mexico.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Rio Grande Rapid Transit (RGRT), a licensed commercial outfitter operating on the Rio Grande River, appeals from a Record of Decision (ROD) issued jointly on January 4, 2000, by the State Director, New Mexico State Office, Bureau of Land

Management (BLM), the Taos (New Mexico) Field Manager, BLM, and the La Jara (Colorado) Field Manager, BLM, approving the Final Rio Grande Corridor Coordinated Resource Management Plan (Final Plan). In addition to providing management guidance for public lands along the Rio Grande River in New Mexico (Taos Field Office) and in Colorado (La Jara Field Office) and amending the Taos Resource Management Plan, provisions of the ROD and Final Plan relevant to this appeal establish criteria for boating use on segments of the river. (ROD, cover letter; see also Final Plan at 1-1.) Appellant also challenges on appeal the "Commercial Floatboating Stipulations" for the 2000 permit season, issued by the Taos Field Office, BLM, and received by RGRT as an attachment to a letter from BLM dated April 20, 2000. These stipulations allocate use and establish restrictions on use for commercial boating under a special recreation permit issued by BLM to RGRT.

Appellant began commercial operations in 1978 on the Lower Gorge segment of the Rio Grande River at issue here. Shortly thereafter BLM required permits to operate tours using public lands for access to the subject section of river. Beginning in March 1984 BLM allocated commercial use and in 1995 instituted "Interim Stipulations" for the Lower Gorge segment due to increased commercial use. A special recreation permit, NM-018-97-012, was issued to RGRT on April 29, 1997, for commercial operations from 1997 through 2001. [1/]

A Draft Plan for the Rio Grande Corridor was published by BLM in July 1997, presenting four alternative approaches to managing the public lands in the Rio Grande Corridor. Following the conclusion of the comment period on the Draft Plan in October 1997 and the subsequent analysis of the comments received, a Proposed Plan and Final Environmental Impact Statement (Proposed Plan/FEIS) was released in September 1998. A protest period for the Proposed Plan ended in October 1998 and, after changes were made in response to the protests, the Final Plan was issued in January 2000.

On February 14, 2000, RGRT filed a notice of appeal with respect to the ROD approving the Final Plan. [2/] Subsequently, BLM issued the final 2000 commercial floatboating stipulations for commercial outfitters on the Rio Grande River with a

---

[1/] At the time, special recreation permits for uses on sites other than developed recreation sites were issued pursuant to the regulations at 43 CFR Subpart 8372 (2002). These regulations were subsequently removed from the CFR and superseded by the regulations at 43 CFR Subpart 2932. 67 FR 61741-45 (Oct. 1, 2002).

[2/] The ROD was also appealed by El Bosque Preservation Action Committee, which appeal was docketed as IBLA 2000-261. The issues raised in that appeal were addressed by a Board decision, cited as El Bosque Preservation Action Committee, 160 IBLA 185 (2003).

cover letter dated March 29, 2000, addressed to "Dear Outfitter." [3/] As noted, these stipulations were also appealed by RGRT, and this appeal has been included in the present case.

In its statement of reasons (SOR) addressing the Final Plan, RGRT asserts that BLM erred in allocating use in a manner which differed significantly from that set forth in the Proposed Plan/FEIS which provides that allocations of use on the Lower Gorge will be based on use figures collected for the 1990 through 1994 seasons. [4/] Appellant notes that no notice and opportunity for comment was provided on this fundamental change in the allocation rules. Appellant contends that the Final Plan has effectively allocated boating use by restricting both the size of groups and the number of launches per day for permittees, despite BLM statements in the Final Plan that no allocation has occurred. It is asserted that the Final Plan effectively discriminates against established outfitters who have worked hard to provide better service to the public and developed a larger clientele. With respect to the appeal of the permit stipulations, appellant also focuses on the issue of allocation of permit use without regard to a permittee's historical use.

As a preliminary matter, we note that approval and amendment of planning determinations, i.e., most management plans, are not actions appealable to this Board. Friends of the River, 146 IBLA 157, 163-64 (1998); Wilderness Society, 90 IBLA 221, 224 (1986). We have held, however, that approval of activity plans or decisions which implement a management plan or amendment are distinguishable from appeals of a management plan or plan amendment and may be appealable to the Board. National Organization for River Sports, 140 IBLA 377, 384-85 (1997); see 43 CFR 1610.5-3(b); Deschute River Landowners Committee, 136 IBLA 105, 107 n.3 (1996).

The ROD in this case actually contains three separate decisions in the text of a single document. [5/] Those decisions are: 1) the decision of the State Director to approve the Taos RMP amendments described in the Rio Grande Corridor Final Plan; 2) the decision of the La Jara Field Manager to approve the Coordinated Resource Management Plan (CRMP) for the La Jara Field Office; and 3) the decision of the Taos Field Manager to approve the CRMP for the Taos Field Office with modifications as set forth therein which "were based upon informal protest responses received in

---

[3/] Appellant apparently did not receive the stipulations initially. A copy of the stipulations was then enclosed with a letter of April 20 received by RGRT.

[4/] Proposed Plan/FEIS at 2-8.

[5/] The ROD was signed by the New Mexico State Director and by the La Jara and Taos Field Managers.

October, 1998." (ROD at 1.) The distinction between these decisions was recognized by BLM at the time of preparing the Rio Grande Corridor Proposed Plan and Final EIS (August 1998). The BLM cover letter states that the "proposed CRMP/FEIS is an integration of several activity-level plans along the Rio Grande in New Mexico (Taos Field Office) and in Colorado (San Luis Resource Area), and also addresses amendments to the Taos Resource Management Plan." (BLM letter dated Aug. 28, 1998). In the cover letter, BLM explains that "protests related to New Mexico RMP-Level Decisions (the yellow pages)" must be filed with the Director, BLM. Id. Regarding specific actions described in Chapter 2, Activity-Level Proposals, on the other hand, BLM stated that an informal protest may be filed with the Taos Field Office. Id.

The distinction between these decisions is also recognized in the Final Plan which provides in the introduction under the heading Purpose and Need:

> [T]his document is a little different than the usual because it includes two very different levels of BLM planning. Through this document the BLM prepared an activity-level coordinated resource management plan for the public land within the Rio Grande Corridor, and also amended the Taos RMP.

(Final Plan at 1-1.) Accordingly, it appears that the Board's jurisdiction has been invoked as to the implementing actions taken in the CRMP as distinguished from the amendment of the RMP over which we have no jurisdiction. Because the ROD implements procedures and rules regarding boating/rafting on the river, jurisdiction exists to review the decision as set forth at 43 CFR 4.1. El Bosque Preservation Action Committee, 160 IBLA at 189; see National Organization for River Sports, 140 IBLA at 384-86.

As noted above, the thrust of appellant's challenge to the boating regulation measures contained in the Final Plan and the stipulations is the allocation of boating use on a basis other than historical use, contrary to the Proposed Plan/FEIS, without supporting explanation by BLM or an opportunity for comment by permittees. Relevant provisions of the Proposed Plan provided:

> Allocations for commercial boating in the Lower Gorge will be based on use figures collected for the 1990 through 1994 seasons. Commercial operators who fail to operate at least one commercial trip in one of the two preceding seasons on any one segment will lose permit privileges for that segment. The figures for the two busiest years for each outfitter will be averaged and used to determine that outfitter's

> allowable use, launch size, and total number of launches. Allocations will be adjusted every five years or as conditions warrant.

(Proposed Plan/FEIS at 2-8). The Final Plan contains similar language regarding allocation of boating use among commercial operators except that the allocation is to be based on the five years prior to the year in which the allocation is to go into effect (rather than the 1990-1994 period). (Final Plan at 4-2.)

With respect to commercial boating on the Lower Gorge of the Rio Grande, the Final Plan states:

> Initially, no specific use allocation will be made for individual outfitters. All outfitted use will be regulated by guidelines described below. Use will be allocated to specific outfitters when thresholds are exceeded on any given day. Once exceeded, that day will be rationed for the following five seasons. Each outfitter will be given a specific number of passengers as their allocation based on their percent of Lower Gorge use for that season and the previous four seasons.

(Final Plan at 4-7, Table 4-2.) Appellant charges that the operative provisions of the Final Plan are not consistent with the assertion that no allocation has been made. Thus, it is pointed out by appellant that outfitter usage on the Racecourse segment is limited to 40 passengers per launch and two launches per day per outfitter or a total of 80 passengers. [6/] Id. Contrasting this with appellant's past usage, RGRT contends:

> [Historically] RGRT accounted for 22% of commercial use on the Lower Gorge of the Rio Grande. We expected, anticipated and planned for 22% [of the] allocation allotted to the commercial sector. We were told it would be in the vicinity of 600 users per day. We projected 20% or 120 users. Now, [under] the RGC Final Plan, by limiting RGRT's launches to a maximum of two, with a maximum group size of 40, RGRT is allocated a maximum of 80 participants per day of the total 600. Our 22% past historical performance and earned market share is reduced to 13%. And that assumes that we operate at 100% capacity 100% of the time. If not[,] that 13% can and will be further reduced.

[6/] Lower Gorge outfitters would be allowed to draw from a pool of 50 per day on weekends and 100 per day on weekdays to increase launch passenger numbers. When passenger numbers on any given day exceed 600 in the Racecourse, the size of the pool may be reduced and/or usage on that day will be allocated for the following five years. Id.

* * * * * * *

> Compare this to other permit holders who have demonstrated less than 1% of actual use who are authorized the same 13% of industry use * * *.
>
> Outfitters who could not demonstrate 40 paid participants for an entire year are given two launches of 40 participants per day. While this outfitter who has demonstrated in excess of 8000 Lower Gorge participants in a single season has his percentage of access radically reduced. This is damaging and unprecedented.

(Mar. 10 SOR at unnumbered 6-8.)

With respect to the pool available to increase numbers of passengers, appellant argues "[t]he BLM pool is taking earned access to reallocate it to those who hope to earn access. It allows access not based upon past performance * * *." Id. at 9. Acknowledging the "opportunity to access a restricted 'pool' for further access," appellant asserts the availability of access to the pool is dependent upon "the luck and timing of a phone call" and the implications to outfitters and their customers are "catastrophic." Id.

Review of the records of rafting operations conducted by appellant in the case file helps to put RGRT's objections into perspective. The use record for the 1991 season shows that RGRT conducted 96 permitted trips on the Lower Rio Grande section of the river, each of which included the Racecourse segment (other segments were also included in many of the trips). RGRT transported 3,808 passengers. Forty-one of the 96 launches involved more than 40 passengers. Nine of the trips involved more than 80 passengers.

In 1992, RGRT conducted 102 trips on the Racecourse segment of the river. Appellant transported 4,955 passengers. Fifty-six of the 102 launches involved more than 40 passengers, including all but five of the launches in July and August. More than 80 passengers participated in 17 of the trips.

In 1993, RGRT conducted 113 trips transporting 5,754 passengers through the Racecourse segment of the river. Sixty-seven of the launches involved more than 40 passengers, including all those in July and two-thirds of those in August. More than 80 passengers participated in 23 of those launches.

In 1994, RGRT conducted 119 trips on the Racecourse segment of the river. A total of 8,112 passengers were transported, with 83 of the 119 trips involving more

than 40 passengers, including 21 of the 30 days in June, 29 of the 31 days in July, and all 31 days in August. Of those trips, 40 included more than 80 passengers. Only 13 trips in August involved less than 100 passengers.

In 1995, RGRT began to employ multiple trip launches on many days in the Racecourse segment of the river. The records show that appellant carried 6,916 passengers on 247 trips through the Racecourse. On eight different days, RGRT launched four trips totaling in excess of 80 passengers per day (trips on one of those days involved in excess of 90 passengers and trips on the other days totaled in excess of 100 passengers per day). In the same year, appellant operated three launches on the same day on 25 occasions with passenger counts exceeding 80 on all except seven of those days. RGRT did not operate on the river in 1996, citing too little water flow.

Appellant ran 215 trips carrying 5,183 passengers through the Racecourse segment of the river in 1997. Four trips were launched on a single day on nine occasions and three trips were launched on 19 occasions. More than 80 passengers were carried on 10 of those multiple-launch days. Appellant continued to operate more than two launches on numerous days in 1998.

Thus, it is clear from the record that the revised BLM conditions for commercial outfitters on the Rio Grande appearing for the first time in the Final Plan will have a significant impact on the operations of outfitters such as RGRT which have a recent history of providing a substantial number of trips to its customers. In the Draft Plan, BLM articulated reasons why such allocation might be called for in the public interest. Thus, it noted that "BLM will allocate commercial and non-commercial recreational use where necessary to protect resource values and to ensure quality recreation experiences." (Draft Plan at 1-12.) Further, BLM stated that "[t]hrough its use allocation and permitting, the BLM will support resource conservation and reduced social conflict." Id. Regardless of the legitimacy of the reason for the restrictions implemented, they have the effect of substantially limiting appellant's historical use. Despite the assertion in the Final Plan that no allocation has taken place, it appears that commercial outfitting use has been effectively allocated without consideration of historical use, contrary to the terms of the Proposed and Final Plans.

[1] Special recreation permits are issued and administered pursuant to the authority of the Secretary of the Interior to regulate the use of the public lands pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA). 43 U.S.C. § 1732(b) (2000). Regulations for special recreation permits authorize imposition of stipulations and conditions to "meet management goals and objectives and to protect lands and resources and the public interest." 43 CFR 2932.41; see 43 CFR 8372.5(b) (2002). Included in the discretionary authority to

issue permits is the authority to impose stipulations and conditions on permits. Osprey River Trips, Inc., 83 IBLA 98, 101 (1984); see 43 CFR 2932.41. A decision imposing conditions or stipulations in the exercise of this discretion will be upheld when it is supported by a rational and defensible basis. Four Corners Expeditions, 104 IBLA 122, 125 (1988); Andrew H. L. Anderson, 32 IBLA 123, 127 (1977). In the Anderson case we noted that while the Board is not limited to the "arbitrary and capricious" standard which applies on judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (2000), we will not ordinarily substitute our judgment for that of BLM officials delegated the authority to exercise discretion merely because there is more than one legitimate point of view on a subject. 32 IBLA at 127, quoting Rosita Trujillo, 21 IBLA 289, 291 (1975):

> Appellant's contentions are neither erroneous nor unreasonable. They represent only another point of view; a different side of the ongoing controversy over the identification and priority of concerns which comprise the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal.

In the present case, RGRT does not challenge the limitation of the number of daily commercial boating passengers on the Racecourse segment of the river. Rather, appellant argues BLM has violated its own guidelines in allocating that usage among outfitters. No explanation has been provided by BLM for the failure to follow its established guidelines for consideration of historical use levels when allocating limited use among outfitters. The contention that use has not yet been allocated does not withstand scrutiny, as seen above. Accordingly, we set aside and remand the BLM decision to the extent it allocates limited use of the Racecourse Segment to all permittees in equal amounts without regard to historical use.

Several other contentions have been made by RGRT on appeal. With respect to BLM's determination to eliminate late-afternoon commercial launches, RGRT explains its concern as follows:

> For 15 years RGRT has operated an afternoon 4 pm launch. When the Taos BLM initiated the Emergency Interim Stipulations in 1985, RGRT made a good faith effort to assist in what BLM described as potential overcrowding. RGRT attempted to move a portion of its use from the earlier and busier 9am and 12:30 launch times. We did this by actively promoting our 4pm launch and offering reduced prices to the public for selecting this later timeframe.

> In 1994, RGRT's 4pm launch accounted for approximately 11% of our use. By 1998, we had increased it to about 18% of Lower Gorge use. Now we are told this significant portion of our use can no longer be utilized.
>
> When asked why the 4pm launch was revoked the River Ranger stated, "We wanted a time when privates (self outfitted users) could experience the river after work without having to deal with commercials (outfitted users)."

(Mar. 10 SOR at 9-10.) As noted above, we will not substitute our judgment for that of BLM when they have articulated a rational basis for their exercise of discretion. Accordingly, we find appellant has shown no basis of error in this determination.

Appellant also complains that BLM has virtually eliminated its practice of conducting 3-hour tours on the Racecourse segment by mandating that tours begin at the Quartzite Launch Area. It explains that its 3-hour tours were started in the past at varying access points, dependent upon the river's water flow. Although appellant disagrees with this aspect of the BLM decision, it has not shown error in BLM's exercise of its discretion.

Finally, we consider RGRT's challenge to BLM's 2000 Stipulations with respect to a flat fee assessment of $1.15 per person (half-day trips), a requirement for Swiftwater Rescue qualified personnel (beginning in 2000 with 70% of the trips on class IV or greater rapids), and the reapplication requirement for outfitters on probation. Appellant argues that these provisions were added without opportunity for the industry to comment and lack supportive reasoning. With respect to the fees assessed for RGRT's special use permit, such fees are established under 43 CFR 2932.31 (formerly 43 CFR 8372.4). Appellant has shown nothing improper in the application of fees here. As for Swiftwater Rescue qualifications, the relevant regulation provides that BLM may impose stipulations and conditions to protect lands and resources and the public interest. 43 CFR 2932.41 (formerly 43 CFR 8372.5(b)). Thus, BLM is well within its authority in this area when it employs measures that will promote public safety in a dangerous activity. Appellant has not demonstrated that this stipulation is without a reasonable basis or that BLM erred in adding it as a condition of the permit. Further, there is nothing in appellant's presentation to show that requiring outfitters on probation to reapply is improper. Appellant suggests that this is not how it would handle such a situation. The fact that appellant has a difference of opinion does not establish error in the BLM exercise of its broad discretion in managing such uses of the public lands and resources. See Blue Mountains Biodiversity Project, 139 IBLA 258, 265 (1997).

To the extent that appellant has made other arguments not expressly addressed in this opinion, they have been considered and rejected.

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 in part and set aside and remanded in part.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge