

INTERIOR BOARD OF LAND APPEALS

Michael T. Duley, d.b.a. Action Anglers, et al.

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MICHAEL T. DULEY, D.B.A. ACTION ANGLERS, ET AL.

IBLA 97-369, etc.

Decided August 4, 1999

Appeals from a decision of the Deschutes Area Manager, Prineville District Office, Oregon, adopting revised permit stipulations for the 1997 season for special recreation use permits for the Lower Deschutes River.

Affirmed.

1. Appeals: Generally—Rules of Practice: Appeals: Standing to Appeal—Special Use Permits

Special recreation use permit holders who file appeals from a decision adopting special stipulations for their permits are parties to the case within the meaning of 43 C.F.R. § 4.410, even though they did not participate by offering written comments on the proposed stipulations.

2. Public Lands: Administration—Wild and Scenic Rivers Act

A determination to restrict and regulate commercial use of a designated component of the national system of wild and scenic rivers in conformance with a Management Plan designed to achieve a balance between the protection and enhancement of river values and the maintenance of reasonable levels of commercial recreational opportunities will be affirmed where the decision maker identified the problems, considered all relevant factors, and the person challenging the determination fails to provide any compelling reasons for modification or reversal.

APPEARANCES: Michael T. Duley d.b.a. Action Anglers, Sandy, Oregon; John T. Hazel d.b.a. John Hazel & Company, Maupin, Oregon; Mark Hughey d.b.a. Renegade River Rafters, Stevenson, Washington; Larry J. Rocha, Sr., d.b.a. Share-A-Raft, Gresham, Oregon; Dave Slover d.b.a. All Star Rafting & Kayaking, Maupin, Oregon; John T. Smeraglio d.b.a. Deschutes Canyon Fly Shop, Maupin, Oregon; Michael W. Smith d.b.a. M & G Outfitters, Bend, Oregon; Kent Wickham d.b.a. Ouzel Outfitters, Bend, Oregon; Carl R. Zapffe d.b.a. Whitewater Fishing Trips, Tygh Valley, Oregon, pro sese; Eric W. Nagle, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Michael T. Duley d.b.a. Action Anglers (IBLA 97-369); John T. Hazel d.b.a. John Hazel & Company (IBLA No. 97-371); Mark Hughey d.b.a. Renegade River Rafters (IBLA No. 97-372); Larry J. Rocha, Sr., d.b.a. Share-A-Raft (IBLA No. 97-374); Dave Slover d.b.a. All Star Rafting & Kayaking (IBLA No. 97-375); John T. Smeraglio d.b.a. Deschutes Canyon Fly Shop (IBLA No. 97-376); Michael W. Smith d.b.a. M & G Outfitters (IBLA No. 97-377); Kent Wickham d.b.a. Ouzel Outfitters (IBLA No. 97-380); and Carl R. Zapffe d.b.a. Carl Zapffe Guide Service (IBLA No. 97-381), are holders of outstanding Special Recreation Use Permits (SRUP's) authorizing their commercial use of the Lower Deschutes River who have appealed from a decision of the Deschutes Area Manager, Prineville District Office, Prineville, Oregon, Bureau of Land Management (BLM), dated March 24, 1997. ^{1/}

A detailed narrative on the historical background of the use and management of the Lower Deschutes culminating in the challenged decision is provided in BLM's answer.

The Lower Deschutes River is a 100-mile stretch of the Deschutes River between the Pelton Dam and its confluence with the Columbia River. The State of Oregon designated the Deschutes River as a scenic waterway in 1970, pursuant to the Oregon Scenic Waterways Act, Or. Rev. Stat. §§ 390.805-390.925 (1992). In October 1988, Congress designated the Lower Deschutes as a recreational river, pursuant to section 102 of the Omnibus Oregon Wild and Scenic Rivers Act, Pub. L. No. 88-557, 102 Stat. 2782, 2783 (1988); 16 U.S.C. § 1274(a)(73)(E) (1994). In doing so, Congress made the Lower Deschutes part of the national wild and scenic rivers system under the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. § 1271 (1994).

Under the WSRA, BLM must protect and enhance the values that caused the Lower Deschutes to be designated as part of the national system. 16 U.S.C. § 1281(a) (1994). The values identified by Congress in the WSRA as deserving of protection are "outstandingly remarkable" scenic, recreational, geologic, fish and wildlife, historic, cultural, or similar values. The WSRA further requires BLM to prepare a comprehensive management plan for the protection of the river values, including consideration of user capacities. 16 U.S.C. § 1274(d)(1994). In its administration of the river, BLM is required to give "primary emphasis" to "protecting its esthetic, scenic, historic, archaeological, and scientific features." 16 U.S.C. § 1281(a) (1994).

In 1988, BLM began working with other Federal, state, local, and tribal agencies to develop a comprehensive management plan for the river. As part of the planning process, BLM and the other cooperating agencies

^{1/} By order dated Oct. 8, 1997, the Board granted BLM's motion to consolidate these appeals.

prepared draft and final environmental impact statements, in compliance with the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1994).

The draft Environmental Impact Statement (DEIS), issued in May 1991, documented a trend of increasing recreational use of the Lower Deschutes, with a concomitant impact on the scenic and recreational values of the river.

The DEIS assessed a variety of approaches for addressing the problems associated with increasing recreational use of the Lower Deschutes. Among these were: various "limited entry systems" for allocating use; a moratorium on issuance of new guide permits and a reduction, through attrition, of the number of existing commercial permits from 138 to 80; and limits on group sizes for guided parties. (DEIS at 59-64, 79-81.)

In January 1993, the Final EIS/Lower Deschutes River Management Plan (LDRMP), developed by BLM the Bureau of Indian Affairs, Confederated Tribes of the Warm Springs Reservation of Oregon, Oregon Parks and Recreation Division, Oregon Department of Fish and Wildlife, Oregon State Marine Board, Oregon State Police, Deschutes River Management Committee, Sherman County, Wasco County, Jefferson County, and the City of Maupin, was issued with an accompanying EIS. The stated goal of the Plan was to

manage the lower 100 miles of the Deschutes River canyon on a segment-by-segment basis to protect and enhance the river's outstandingly remarkable and related values while allowing the continuation of compatible existing uses, including a wide range of public outdoor recreation opportunities and minimizing user conflict. These recreation opportunities will be provided in a manner that does not substantially impair the natural beauty of the river canyon, diminish its esthetic, fish, and wildlife, scientific and recreational values and take into account the rights and interests of private landowners and Tribal treaty rights.

(LDRMP at 26.)

The LDRMP did not immediately impose a limited entry system. Instead, the LDRMP proposed targets, pegged at the 1990 use levels, for overall boating use during the high season (May 15 to September 15) for each of the four river segments.^{2/} (LDRMP at 44-48.) The LDRMP also proposed daily boater use targets, in order to redistribute use from peak weekends

^{2/} For management planning purposes, the LDRMP divided the river into four sequential segments: Segment 1, 41 miles, from the Pelton Reregulating Dam to the Deschutes Club's locked gate; Segment 2, 15 miles, from the locked gate to Sherars Falls; Segment 3, 21 miles, from Sherars Falls to Macks Canyon; and Segment 4, 23 miles, from Macks Canyon to the confluence of the Lower Deschutes River with the Columbia River. (LDRMP at 1-2.)

to weekdays or nonpeak weekends. (LDRMP at 44-48.) The targets would be achieved through a set of "increasingly restrictive actions," beginning with "indirect" actions such as confining vehicle parking and limiting overnight camping, and by encouraging voluntary actions by boaters to change their use patterns. Id. at 49-50. If these indirect and voluntary actions did not succeed in achieving the targets after a 3-year trial period, the LDRMP proposed to phase in a "limited entry system" under which all boaters would be required to compete for a limited number of permits during peak periods. Id. at 51-54. The goal of this system would be to reduce both the daily levels on peak weekends, and the overall seasonal use level on each segment. Id. BLM adopted the LDRMP in a Record of Decision on February 1, 1993.

The "Supplement to [LDRMP,] Evaluation of Indirect and Voluntary Management Actions," dated March 1996, at 20-23 included boating statistics for 1993-1995 which showed that seasonal use levels generally fell below the 1990 target for most segments of the river, but daily use levels continued to exceed the targets on a regular basis on peak weekends. For example, on Segment 1, one of the two most popular river segments, use in 1995 exceeded the daily target of 550 boaters on 12 days in July and 18 days in August. Id. at 23, Table 5. In light of these data, BLM and the cooperating agencies concluded that the "indirect" measures had not succeeded in reducing use to the target levels. Id. at 23-25. Consequently, the agencies proposed implementation of a "limited entry system" on Segments 1 and 2. Id.

However, BLM and the cooperating agencies did not adopt a limited entry system for the 1996 season. Instead, BLM included in the 1996 commercial permit stipulations a request that permittees voluntarily reduce use on peak weekends by 10 percent from their 1995 use levels. The stipulation stated that, if use data showed that permittees had met this reduction, and that overall river use on peak days fell by at least 5 percent, then BLM would defer adoption of a limited entry system.

By counting 1996 boater passes, BLM determined boater use statistics at the end of the 1996 season which showed that seasonal use on Segments 1 and 2 had once again risen above the 1990 target levels, and daily use levels still routinely exceeded targets. On October 22, 1996, the Area Manager mailed a letter to all commercial boating permittees, inviting them to a meeting on November 23, 1996, for the purpose of discussing possible use restrictions on the Lower Deschutes, advising the permittees that, in booking clients for the 1997 season, they should understand that peak weekend use on Segments 1 and 2 would be restricted.

The record shows that BLM distributed copies of proposed revised permit stipulations at the November 23, 1996, meeting. In addition, on December 20, 1996, the Area Manager sent a letter to all permittees, enclosing proposed 1997 permit stipulations. Those stipulations stated that the caps on commercial use on peak weekends that had been voluntary in 1996 would become mandatory in 1997. Also enclosed with the letter was

a copy of "1997 Non-Permit Measures; Lower Deschutes River," which listed a series of proposed management actions affecting both commercial and noncommercial users, that were intended to address the river crowding issue without the imposition of a limited-entry system. BLM requested that comments be submitted in writing on or before January 31, 1997. ^{3/}

In his March 24, 1997, decision, the Area Manager adopted "Guidelines for Commercial Use of Rivers in the Prineville District (Guidelines)," which included "Special Stipulations for River Related Permits." He also provided a copy of the "1997 Lower Deschutes River Non-Permit Measures."

In his decision, the Area Manager highlighted various measures he felt would be most significant to outfitters and guides:

Each guide permittee with reported use of peak season weekends on Segments 1 and 2 in 1995 has been given a seasonal user day cap for each Segment. This user day limit restricts the total number of people (guides and passengers, whether paying or non-paying) that the permittee may have on each segment on the specified weekend days. This is a total, weekend seasonal limit, not a daily limit. The details of these user day limits is explained in attachment B1 [Guide Permittee Limits]. See stipulation #19.

Each Rental Permittee with documented rental deliveries on peak season weekends in 1995 has been given limits on the number of boats they may deliver to Segment 1 and 2. These boat delivery limits restrict the number of boats that may be delivered on either a daily or seasonal basis for specified weekend days. The details of these boat delivery limits are explained in attachment B2 [Rental Permittee Limits]. See stipulation # 19.

Please review your companies use limits and contact us with in 30 days if you find a discrepancy with your records. If 1995 was an unusual year relative to prior years weekend use, you may contact us until April 15, 1997 to request any adjustments based on actual use data.

^{3/} Slover sent four separate comment letters to BLM. In a letter dated Jan. 3, 1997, he stated: "I agree with the changes planned for the 1997 season on the Lower Deschutes River. The quality of experience will increase as use is limited." Wickham did not comment until after the Jan. 31, 1997, deadline and his only objection was that it was unfair to him to base use limits on 1995 data, rather than on average use over a period of time, because 1995 was not a representative year for his business on Segment 1 of the river. Duley's objection related to a requirement for the John Day River. He did not offer any comments regarding the Lower Deschutes.

Boating parties, including guide trips will be required to check-in with agency personnel at Segment 1 and 2 launch points. If agency personnel are on duty they may attach identification tags to each boat on the trip. If your trip is using a launch site that does not have an agency person on duty, please complete a check-in form and deposit it in one of the self service check-in stations at the primary launch sites. Please use only the authorized launch sites, that are listed on the Post Use Report Form. Use of sites other than the designated sites will subject you to a citation as well as an administrative violation. See stipulation # 19.

The contracting of use has been limited so that the trip leader must be an owner/employer of the permitted business or another permittee owner/employee who is permitted for that river. See stipulation # 21.

The use fees for weekend days have been increased by \$3 per person/day fee in addition to the \$2 boater pass fee. This additional BLM use fee would only be added by the Boater Pass Vendor on Saturday and Sundays for Segment 1 and 2. The other segments and days of the week are not affected by this increase. See stipulation # 30.

Beginning May 15, 1997, commercial guided, multi-day trips are required to carry a human waste carry-out system. * * * See stipulation # 39.

(Decision at 2.)

Appendix B-1 and Appendix B-2 were incorporated by reference as part of Commercial Stipulation #19, Authorized Use. Appendix B-1 (Guide Permittee Limits) provided as follows:

The restricted period in 1997 is all weekends beginning May 23 and ending August 31. This period was determined based on use levels exceeding both the daily and seasonal target in 1996. In Segment 1, this is Friday and Saturday from Memorial Day weekend to Labor Day weekend. In segment 2, this is Saturday and Sunday for the same period.

The user limits are based on each permittee's use during the same weekend in the 1995 season. The limits are set at 95% of the use on each segment.

* * * * *

New permittees in 1996 or permittee with no 1995 weekend use will not receive a user day limit and may not operate on the restricted days.

All permittees would remain unrestricted on non-restricted days in Segments 1 and 2, or any days on Segments 3 and 4.

(Guidelines at 19.)

Appendix B-2 (Rental Permittee Limits) included the same language as Appendix B-1 regarding the restricted period in 1997 and provided:

Boat delivery limits are based on each permittees reported deliveries during the same weekends in the 1995 season.

The seasonal limits are set at 95% of the deliveries to each segment and apply to Segments 1 and 2.

The daily limits are based on the percentage that each permittee delivers of the total deliveries on a segment and apply only to Segment 2. The limits computed by applying this percentage to the average of the total deliveries of the days that were over the daily target. This daily limit is only a maximum number of boats allowed to be delivered on any restricted day and cannot be used as a basis to compute the seasonal limitation.

* * * * *

Boat deliveries outside the restricted days and/or segments are not affected by boat delivery limits.

(Guidelines at 20.)

In its answer, BLM provided the following figures for the peak-weekend use restrictions imposed on appellants 4/ by the 1997 stipulations:

GUIDED TRIPS

(numbers are peak weekend user-days)

<u>Permittee</u>	<u>Segment 1</u>		<u>Segment 2</u>	
	<u>95 Use</u>	<u>97 cap</u>	<u>95 Use</u>	<u>97 Cap</u>
Michael Duley	45	43	0	0
Mark Hughey	16	15	36	34
Larry Rocha	8	8	158	150
Dave Slover	0	0	434	412
John Smeraglio	0	0	8	8
Kent Wickham	30	29	207	197
Carl Zapffe	120	114	60	57

4/ Smith and Hazel are not listed because they did not operate on Segments 1 or 2 in 1995. Smith operates a jet boat outfitting service on Segment 4, and Hazel is a fishing guide who first received his permit in 1996 and who operates primarily on Segment 3.

BOAT RENTALS

(numbers are boats delivered on peak weekends)

<u>Permittee</u>	<u>Segment 1</u>		<u>Segment 2</u>		
	<u>95 Use</u>	<u>97 Cap</u>	<u>95 Use</u>	<u>97 Cap</u>	<u>97 daily</u>
			<u>limit</u>		
			<u>(segment 2)</u>		
Larry Rocha	20	19	80	76	6
Dave Slover	30	29	271	258	20

(Answer at 11.)

In its answer BLM moved to dismiss the appeals of six of the nine appellants, Hazel, Hughey, Rocha, Smeraglio, Smith, and Zapffe, arguing that they lacked standing to appeal. BLM asserted that under 43 C.F.R. § 4.410(a), an appeal may be filed by a "party to a case who is adversely affected" by a BLM decision, and that, by failing to provide written comments to the proposed stipulations, they could not be considered a "party to a case" within the meaning of the regulations.

[1] In an order dated October 8, 1997, we denied that motion stating, as follows:

The Board will dismiss an appeal for lack of standing when an appellant fails to demonstrate, in accordance with 43 C.F.R. § 4.410(a), that he is a "party to [the] case." Edwin H. Marston, 103 IBLA 40, 42 (1988). A party to a case is the responsible party who took the action which is the subject of the BLM decision on appeal, is the object of that decision, or otherwise somehow participated in the decisionmaking process which led up to that decision, such that BLM has already had the chance to consider its concerns or input. See, e.g., James C. Mackey, 114 IBLA 308, 313 (1990); The Wilderness Society, 110 IBLA 67, 72 (1989); Utah Wilderness Association, 91 IBLA 124, 128 (1986); California Association of Four Wheel Drive Clubs, 30 IBLA 383, 385 (1977).

In this case, the Appellants in question are commercial boating outfitters permitted to operate on the Lower Deschutes River. The BLM Decision on appeal adopted revised stipulations for the 1997 season "to alleviate overcrowding on the river during peak summer weekends, by capping the number of passengers and boat rental at 95 percent of each permittee's reported use level for 1995." The mere status of Hazel, Hughey, Rocha, Smeraglio, Smith, and Zapffe as permit holders operating on the river makes them parties to the case.

A permittee's right to appeal a final BLM decision is not conditional on participation in the comment phase of the decision. Clearly, the permit holders were the object of the BLM action challenged by these Appellants such that their status as

parties to the case is implicit. An appellant need not always participate in that process in order to be considered a party to a case. Participation is only necessary when BLM issues a decision which does not adjudicate some action by or is not otherwise particularly directed at the appellant. See, e.g., Commission for the Preservation of Wild Horses, 139 IBLA 24, 28 (1997) (wild horse gather); Committee for Idaho's High Desert, 133 IBLA 378, 379 (1995) (decision to burn public lands). We, therefore, conclude that Hazel, Hughey, Rocha, Smeraglio, Smith, and Zapffe are parties to the case under 43 C.F.R. § 4.410(a), and deny BLM's Motion to Dismiss on that basis. [5/]

(Order at 3-4.)

[2] As a component of the national wild and scenic rivers system, the outstanding qualities and values of the Lower Deschutes are required to be protected, enhanced and preserved to ensure public use and enjoyment of the river. See 16 U.S.C. § 1271 (1994). Pursuant to its responsibilities under the WSRRA, BLM has authority to adopt guidelines, special stipulations and nonpermitting measures for use by commercial outfitters and guides to accomplish this goal. See 16 U.S.C. § 1281(a) (1994). The SRUP's held by the appellants in this case were issued by BLM pursuant to the regulations in 43 C.F.R. Subpart 8372. "A special recreation permit will contain such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 C.F.R. § 8372.5(b). The Board has stated that the exercise of Secretarial discretion to issue special use permits includes the authority to set permit conditions and that the BLM's exercise of such authority will be affirmed in the absence of compelling reasons for modification or reversal. The Exodus Corp., 126 IBLA 1, 4 (1993). In this case, the Area Manager's decision implemented the LDRMP by imposing stipulations designed to protect the outstandingly remarkable values of the Lower Deschutes River.

We will now examine the specific allegations raised by appellants to determine if there is any basis for modifying or reversing the Area Manager's decision.

Duley operates a guided fishing business. In his statement of reasons (SOR), he addresses his objection to the following topics, which he describes as: "PERMIT HOLDERS," "LAUNCH POINTS," "PERMIT FEE," "LAUNCH TIMES and QUOTAS on PEAK USER DAYS," "PORTABLE TOILETS" and "FEES-PARKING AND BOATERS." He does not oppose the minimum use set by the decision, but complains that the "cap on the number of days one can operate is unfair," because "it will drive up prices!" (Duley SOR at 1.) He contends that

5/ While lack of participation in the development of the stipulations may not be considered grounds for dismissal, it clearly would be to the permittees benefit to take an active role in working with BLM in the development of special stipulations.

the closure of several drift boat launches and takeout points which have been used by anglers for years are necessary and should be identified and maintained. Also, he objects that the general public is not required to carry portable toilets. Duley argues that it is unfair to have to his 1997 permit fees based on 1996 usage while his 1997 use is reduced to 95 percent of his 1995 usage. He seeks a refund in accordance with 43 C.F.R. § 8372.4(b)(3).

Duley essentially questions the fairness of the revised stipulations. He offers his opinion on specific areas and suggests alternative methods to accomplish the goals of the LDRMP. His SOR, however, does not establish a basis for modifying or overturning the Area Manager's decision.

Hazel has operated a fly fishing guide business on the Deschutes River for 17 years. In his opinion, the Guidelines discriminate against the professional and recreational angler, concentrating on the problems associated with the recreational and professional rafter. He discusses five "issues specific to the incompatibility of the plan as it affects the angling community." (Hazel SOR at 1.) He disagrees with numbers 5, 9, and 10 of the Non-Permit Measures: Launch Site Restriction, Land Based Access Fee, and Increased Education and Enforcement Related to Drugs and Alcohol respectively. Also, he objects to special stipulations 23, Non-Use, and 25, Motorized Boating.

Hazel objects to the closing of boat launch and take out sites. He opines that overcrowding will result on a small segment of the river due to the concentration of float craft using two "put in" and two "take outs" within 15 miles of the river that parallel public road access. He argues that imposition of a vehicle access fee to the river amounts to double taxation on all commercial guides who also have to pay BLM a Special River Permit Fee. With respect to the Non-Use stipulation, Hazel complains that the minimum number of 20 starts or 60 user days is too low because it is a requirement that every permittee will meet with little effort resulting in increased impact on the river resources. He argues that more stringent requirements should be imposed to maintain a commercial permit, and that the minimum use requirements should differentiate between rafting and kayaking and outfitters and anglers. Hazel complains that the motorized boating regulations are unclear and inconsistent with other boating regulations on other sections of the river.

Hazel has expressed his opinion as to how BLM should attack the problem of overcrowding on the Deschutes River, but he fails to demonstrate that the BLM decision will not effectively result in resolution of the problem. He has failed to provide any basis for modifying or reversing the BLM decision.

Hughey focuses his appeal on the allocation of river permits. He complains that the revised allocation system is unfair to the extent the general public is not subject to the 5-percent reduction of its 1995 use

of the river. He asserts that placing limitations on peak use days based on a business' 1995 number "artificially displaced the free market system." (Hughey SOR at 1.) He argues that the outfitters should be allowed to compete for the market share. Hughey includes data to demonstrate how the seasonal user day cap will result in an economic hardship on his business, concluding that he will need more peak days over the next 2 years to break even.

Hughey has not provided any analysis or supporting data to show any inherent defects in the rationale applied to determine the seasonal user day cap. He has offered his opinion as to what system would be better. However, neither his opinion nor the submission of data projecting an economic hardship on his business supplies a legal justification for modifying or overturning the BLM decision.

Rocha's SOR fails to explain the basis for his appeal. He alludes to an apparent disagreement with a BLM employee regarding whether he should be allowed to make any corrections in his 1995 Post-Use Report. He also describes a disagreement with BLM concerning whether he was entitled to a "shuttle permit;" however, it is unclear whether Rocha is appealing any decision of BLM.

Although Rocha complains that his "rights as a United States citizen are being dictated to," he provides no evidence of any specific error in the Area Manager's decision.

Slover maintains that the BLM decision is adverse to his company's interest, is incorrect, and that the information provided therein is unclear. He states that his appeal concerns changes to section 19 which is the Special Stipulation dealing with authorized use, and Appendixes B1 and B2 which address "Guide Permittee Limits" and "Rental Permittee Limits."

Slover's SOR consists of 14 paragraphs of comments and opinions. He complains that his business plans are jeopardized because BLM has not provided timely information regarding the number of boats and clients it will be allowed to service for the 1997 season. He objects to using the 95-percent of 1995 as a seasonal cap because that year fails to reflect his typical use patterns. He argues that the decision discriminates against the public using outfitters.

Slover argues that his historical use of the river should be considered, that another year or a combination of years should be used as a base for the seasonal use cap and he objects to the dates of peak season.

Slover's discussion regarding the effect the seasonal use cap will have on his business is not of material consideration since the decision was issued to implement the LDRMP which adjusted the use of all permittees

on the same basis. He suggests alternative procedures that could be implemented including allowing permittees to switch from rental use to guide, and contends that no basis exists to close South Junction and Nena launch sites which he uses. ^{6/} Slover challenges the authorized use stipulation as unfairly designed because only the commercial permittee is being regulated.

Slover argues in favor of a use allocation system to benefit his business, and wants to use 1996 as a base year to determine his use. He objects to seasonal limits being placed on guide or rental outfitters' and that historical use is not considered when determining his seasonal use cap.

We have examined Slover's objections and complaints. To the extent they address actions taken in the decision being appealed they amount to a difference of opinion with those actions, which is not sufficient to show error in the challenged decision.

Smeraglio, in his SOR, primarily objects to limitations on access to the banks of the Lower Deschutes River, asserting:

From Maupin there is access to the river by road seven miles up stream and twenty[-]six miles down stream[.] [T]his kind of public access is a rare thing in this country. It enables fishermen who do not float the river to have access to much of the same water as those who float. Limiting access to and charging a fee to enter each time would certainly discourage anglers. Not to mention the retired members of the community who may have limited funds.

(Smeraglio SOR at 2.)

He indicates that limitations on access would impact his permitted use, which involves guiding anglers to locations along the river banks, and thus his business, which is located in Maupin. Smeraglio does not identify anything in the March 1997 decision or in any of its attachments that restrict access to the river by those who desire to fish from its banks, nor do we find any such language. Moreover, with respect to access fees, BLM states in its answer at page 18 that any challenge

^{6/} On the same day that the 1997 permit stipulations and "non-permit measures" were issued, BLM issued an environmental assessment/finding of no significant impact (EA) for a proposal for rehabilitation and management of ten recreation sites along the Lower Deschutes. EA #OR056-97-074 (Exhibit 9). BLM mailed the EA to all commercial permittees. In the final decision on the EA the Area Manager decided that the Nena Site would remain open.

to a land-based access fee "is premature, because BLM has not made a final decision on this proposal."

While Smeraglio, challenges imposition of a fee with respect to access from a road running 7 miles upstream and 26 miles downstream of the town of Maupin, nothing in the March 1997 decision or its attachments would impose a fee for access along that stretch of the river.

Smith objects to the "common pool permit system," which to his knowledge has never been tried in the United States. (Smith SOR at 1.) He argues that it "offers no protection for the commercial outfitter and guide businesses." *Id.* In its answer, BLM states that Smith's discussion suggests he misunderstands how the system is intended to operate. Counsel states that BLM and the cooperating agencies proposed a common-pool permit system in November 1996, but, as of the time of the filing of its answer, that no final decision had been made on any allocation system. (Answer at 27.)

Smith objects to the closure of Segment 2 to powerboats. However, as counsel for BLM points out, closure is consistent with the LDRMP, which closed both Segments 1 and 2 to powerboats. He states that the LDRMP allowed powerboat use to continue on Segment 2 during the off season for 3 years after the plan was adopted, but that "[t]hat period has now ended, and the 1997 permit stipulations do nothing more than implement the closure called for under the plan." (Answer at 27.)

Wickham is President of Ouzel Outfitters which has conducted commercial raft trips on the Deschutes River since 1979. He objects to the basis on which use for the 1997 season was permitted, and requests that "the decisions regarding 'non-permit' allocation of use on the Deschutes be struck down, and a business-as usual status on the Deschutes be utilized for the foreseeable future." (Wickham SOR at 2.) Appellant has personalized the decision, discussing the resulting impacts to his business. However, BLM reconsidered his Segment 1 allocation at his request and more than doubled his cap from 29 user-days to 61. He still complains that the increased usage is far short of his highest years of usage. Apparently, he is of the opinion that his historical use entitles him to preference. He describes it as an injustice that new business on the river get the same consideration as businesses with historical use. He complains that his 19 years on the river has no value because of a nonpermit system that treats all business equally. (Wickham SOR at 1.)

The fact that his use was not permitted according to his request does not demonstrate error. BLM's approach to determining seasonal user day cap was to give established operators equal opportunity to use the river, restricting the use of new companies and companies with limited historical use. BLM used 1995 as a base year to allow consideration of historical use. Outfitters with no reported use for 1995 and new permittees were eliminated from competition for the 1997 season.

Zapffe lists eight reasons for appeal "as they relate to [his] business." (Zapffe SOR at 1.) He questions the accuracy of the counting system utilized to determine the use on the river, but does not offer any evidence to show that errors were committed. He asserts it was arbitrary to use only 1 year as a basis for priority which resulted in denial of historical use of 20 years of running trips. Appellant asserts that, because he ran many of his trips in 1995 on the lower river, determining his seasonal use cap based on his 1995 use was not fair, and contends it was arbitrary to use man days of use instead of start dates.

BLM responds that Zapffe's reference to use of man days as opposed to start dates on the river is directed at the proposed limited entry system which is not a part of the 1997 permit stipulations. Zapffe complains that the allocation limits will make his business financially unfeasible, and that the limitation on use and the change in seasons will interfere with trips booked a year in advance. Also, he complains that the raise in fees after he set prices for customers is unfair. Zapffe objects to the closure of Segment 2 to power boats because access by road has been blocked and asserts that last minute changes have interfered with business, requiring him to change bookings and lose money. We note the record does not substantiate his claims of road closure. See LDRMP at 71-73.

We do not see that Zapffe's objections constitute a basis for the Board to alter the BLM decision. Zapffe has provided his opinion as to how the river should be managed. The fact that his allegations of error address BLM's failure to meet his proposed standard and not a failure to properly implement the LDRMP merely highlights the existence of a difference of opinion as opposed to error.

The appellants herein all seem to recognize that some form of controlled use of the river was warranted to deal with the growing use of the river and its resources. However, no appellant was able to document a specific error to demonstrate that the BLM decision to regulate and restrict commercial use of the Lower Deschutes River by incorporating special stipulations and guidelines into SRUP's was arbitrary and capricious. Appellants do not allege that the stipulations and guidelines are not implemented to achieve the stated goal of the LDRMP. Essentially, what appellants have offered are differences of opinion.

We have reviewed the SOR submitted by appellants and we do not find that they are sufficient to establish that the BLM decision should be reversed or altered in any manner. The record which formed the basis for the decision is thorough in its review of the problems that exist and the attempts to balance protection and enhancement of the river's values with reasonable opportunities for commercial and recreational use. Appellants' disagreement does not justify altering the decision in any manner. See Deschutes River Public Outfitters, 135 IBLA 233, 245 (1996); Rosita Trujillo, 21 IBLA 289, 291 (1975).

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

Gail M. Frazier
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge