

INTERIOR BOARD OF LAND APPEALS

Klamath-Siskiyou Wildlands Center

153 IBLA 110 (August 7, 2000)

Title page added by:
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KLAMATH-SISKIYOU WILDLANDS CENTER

IBLA 99-276

Decided August 7, 2000

Appeal from a Decision Record/Finding of No Significant Impact approving amendment of a special recreation permit to allow a jet boat race on a Federally-designated wild and scenic river. MRP-251.

Affirmed.

1. Environmental Quality: Environmental Statements—Federal Land Policy and Management Act of 1976: Permits—National Environmental Policy Act of 1969: Environmental Statements—National Environmental Policy Act of 1969: Finding of No Significant Impact—Public Lands: Special Use Permits—Special Use Permits—Wild and Scenic Rivers Act

An appellant must demonstrate that, when finding that its proposed action will not result in significant adverse impact on the human environment, BLM erred in its analysis or acted contrary to any law to prevail on appeal. A BLM decision to approve amendment of a special recreation permit to authorize a jet boat race on a Federally-designated wild and scenic river will be affirmed when the record adequately supports the decision, demonstrates that BLM took a hard look at the potential environmental impacts of its decision, and makes a convincing case that no significant impact will likely result, in accordance with section 102(2) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2) (1994).

APPEARANCES: Peter Leone, Klamath-Siskiyou Wildlands Center, Williams, Oregon, for appellant; Ron Wenker, District Manager, Medford District, Oregon, Bureau of Land Management, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Klamath-Siskiyou Wildlands Center (KSWC) has appealed a March 16, 1999, Decision Record/Finding of No Significant Impact (DR/FONSI) issued by

the Area Manager, Grants Pass Resource Area, Oregon, Bureau of Land Management (BLM), amending special recreation permit (SRP) No. MRP-251, issued to the Grants Pass Active Club (Club), for the "Boatnik Hydroplane Race." The decision was based upon Environmental Assessment (EA) No. OR-110-99-03, dated March 16, 1999, which was prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), to assess the environmental consequences of amending the SRP to permit the Club to run a proposed 2-day jet boat race as part of the 1999 Boatnik racing event, and alternatives thereto (including no action).

The Boatnik Hydroplane Race is an annual racing event, which has taken place on a 13-mile stretch of the Rogue River, Josephine County, Oregon each year since the 1950's. In recent years it has drawn approximately 40,000 spectators. In 1998, the Club sought to amend its SRP for the 1999 Boatnik Hydroplane Race, seeking to continue its 13-mile hydroplane race held on Memorial Day (May 31, 1999), and add a 28-mile race on a section of the river from Grants Pass to the Alameda Bar, near Galice, Oregon. This new 4-hour jet boat race would take place on 2 days, Saturday (May 29, 1999), and Sunday (May 30, 1999), and involve 25 American Power Boating Association Class A through C and unlimited class boats each day. ^{1/} As described in the EA:

Boats would leave Riverside Park [in Grants Pass] and run to Alameda Bar. The first start times on both days will be 9:00 a.m.. There will be an approximate one-minute interval between each boat as they start. They will proceed down river to Alameda Bar. It should take 30 to 40 minutes for all of the boats to reach Alameda. When they reach Alameda they will restage. They will check all equipment, refuel etc., and wait to start the upriver return run. The return run will start at 12:00 noon, with the event ending at 1:00 p.m.

(EA at 5.) The jet boat race has been held on two prior occasions, in 1997 and 1998. Id. at 1-2.

On October 2, 1968, Congress designated an 84-mile section of the Rogue River and its adjacent land part of the National Wild and Scenic Rivers System, pursuant to section 3(a)(5) of the Wild and Scenic Rivers Act (WSRA), Pub. L. No. 90-542, 82 Stat. 906, 907-08 (1968), codified at 16 U.S.C. § 1274(a)(5) (1994). The designation was made because the Rogue River and its immediate environment possess "one or more 'outstandingly remarkable scenic, recreational, * * * or other similar values.'" Sierra Club v. Babbitt, 69 F. Supp.2d 1202, 1252-53 (E.D. Cal. 1999) (quoting from 16 U.S.C. § 1271 (1994)).

^{1/} BLM describes the boats as follows: "The unlimited class jet boats are 16 to 22 feet long[,] [T]hey are powered by gas or methanol engines that can develop over 450 hp and can go as fast as 120 mph. The other classes are limited in performance by varying degrees." (EA, dated Mar. 16, 1999, at 5.)

A 23-mile section of the proposed 28-mile jet boat racecourse is in a section of the wild and scenic river classified, by the Department of the Interior, as a "recreational river area." ^{2/} 16 U.S.C. § 1273(b) (1994); see 16 U.S.C. § 1271 (1994); Sierra Club v. Babbitt, 69 F. Supp.2d at 1253; 34 Fed. Reg. 17300, 17305 (Oct. 24, 1969). This section of the river is closely paralleled by well-travelled roads on one or both of its shores, and its shoreline is highly developed at several locations. 34 Fed. Reg. at 17305.

In his March 1999 DR/FONSI, the Area Manager approved the proposed amendment to the 1999 special use permit for the Boatnik racing event, thus permitting the jet boat races to be held on May 29, and 30, 1999. Relying on the EA, the Area Manager also held that no significant impact was likely to result from amendment of the SRP, and thus BLM was not required by section 102(2)(C) of NEPA to prepare an environmental impact statement (EIS), before permitting the race. KSWC appealed and sought a stay of the decision. In an Order dated May 26, 1999, the Board denied KSWC's petition to stay the effect of the Area Manager's March 1999 DR/FONSI, pending the Board's final resolution of the appeal, thus permitting the amended 1999 Boatnik racing event to go forward.

It might be argued that this appeal is moot because the races have been run. However, when an appeal raises issues which are capable of repetition, but yet of evading review, it is proper to adjudicate the appeal even though the relief sought by an appellant cannot be granted for the particular event. Coalition for the High Rock/Black Rock Emigrant Trail[s] National Conservation Area, 147 IBLA 92, 94-95 (1998); Wildlife Damage Review, 131 IBLA 353, 355 (1994); Checker Motorcycle Club, 126 IBLA 251 (1993); Southern Utah Wilderness Alliance, 114 IBLA 326, 329-30 (1990); Southern Utah Wilderness Alliance, 111 IBLA 207, 208-10 (1989). Boatnik is an annual event, and we can assume that the additional race will be held in future years. Thus, the issues raised by this appeal are capable of repetition. The issues are also likely to evade review, as the decision approving the SRP amendment authorizing the race goes into immediate effect pursuant to 43 C.F.R. § 8372.6(b). Coalition for the High Rock/Black Rock Emigrant Trail[s] National Conservation Area, 147 IBLA at 95; Curt Farmer Pack Llamas, 132 IBLA 42, 43 (1995). Thus, even if a stay petition is filed, the race may well occur before the Board is able to act on a stay petition or fully consider the appeal on its merits. It is appropriate to adjudicate this appeal to afford KSWC the administrative review which it would otherwise be denied. Coalition for the High Rock/Black Rock Emigrant Trail[s] National Conservation Area, 147 IBLA at 95; Southern Utah Wilderness Alliance, 111 IBLA 207, 208-10 (1989).

We now turn to the merits of KSWC's appeal.

^{2/} A recreational river area is defined as all or part of a river that is "readily accessible by road or railroad, that may have some development along [its] shoreline[], and that may have undergone some impoundment or diversion in the past." 16 U.S.C. § 1273(b)(3) (1994).

In its notice of appeal/statement of reasons for appeal (NA/SOR), KSWC contends that BLM violated section 102(2)(C) of NEPA, by failing to adequately consider the individual and cumulative environmental impacts of its decision upon threatened and endangered (T&E) species, other fish and wildlife, and water quality. It also argues that BLM is also required to prepare an EIS because the race is likely to have a significant impact to commercial rafting permit holders and that BLM failed to allow the public to comment on the EA once it was finalized, in violation of section 102(2)(C) of NEPA. KSWC asks the Board to reverse the Area Manager's March 1999 DR/FONSI, and to remand the case to BLM for preparation of an EIS, or at least a new EA, properly addressing the environmental issues, followed by a period for public comment and a new decision.

[1] BLM is required by section 102(2)(C) of NEPA to consider the potential environmental impacts of a proposed action in an EIS if the proposed action is a "major Federal action" which may "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1994); Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985). A determination that an EIS is necessary is made following an EA of the impacts of the proposed action. When there is no major Federal action or if, based upon the EA, there is a finding that the proposed action would result in no significant environmental impact, an EIS is not necessary. A decision to proceed without having prepared an EIS will be held to comply with section 102(2)(C) of NEPA if the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. Headwaters, 146 IBLA 230, 231 (1998); Rebecca S. Andersen, 145 IBLA 206, 218 (1998).

An appellant seeking to overcome a BLM decision that it is not necessary to prepare an EIS has the burden of demonstrating, with objective proof, that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. Headwaters, 146 IBLA at 232; Rebecca S. Andersen, 145 IBLA at 218.

KSWC contends that BLM failed to adequately assess the potential environmental impacts of issuing the SRP, contending that "BLM is now attempting to amend a permit that never went through the NEPA process." (NA/SOR at 9.) KSWC has appealed BLM's decision to amend the SRP to allow an additional race, and we need not consider or address the propriety of the underlying SRP.

On appeal, KSWC argues that BLM failed to adequately consider the potential impacts of amending the permit in violation of section 102(2)(C) of NEPA. It first contends that BLM recognized the presence of bald eagles, a Federally-designated T&E species, in the proposed racecourse area but failed to properly assess the impact of the race on the eagles.

It states that BLM did not undertake an additional survey for nesting sites along the race course, and "admits it does not know where bald eagles are nesting or what effect the jet boat race may have on them." (NA/SOR at 7.)

When BLM prepared its EA, it noted that bald eagles had frequently been observed along the proposed race course: "[A]dult bald eagle pairs have been observed at several locations within the Boatnik racecourse and include the following locations: Ennis Riffle, Robertson Bridge and Centennial Gulch." (EA at 7.) BLM stated that, "[b]ased on this, it is suspected that these birds may represent nesting pairs." Id. It noted, however, that there was a nest 1-1/2 miles from the river, but that there were no known nesting sites in the race course area: "[P]revious surveys have failed to document nests associated with these pairs." Id. BLM concluded that the proposed jet boat race complied with the "Pacific Bald Eagle Plan," and that it was not likely that bald eagles would be adversely affected by the race. 3/ Id. at 10.

BLM did state that it intended to undertake additional surveys of nesting sites within the proposed racecourse area, following issuance of the EA: "The emphasis of these surveys will be to document the presence of nests associated with the bald eagle pairs observed in the vicinity of the Boatnik racecourse." (EA at 10.) However, contrary to KSWC's allegations, BLM never acknowledged "that * * * nesting sites are potentially in the project area." (NA/SOR at 7.) At most, it stated that the observed birds might represent "nesting pairs." (EA at 7.) It did not state that they were likely to be nesting in the proposed racecourse area.

The contemplated survey would have provided additional information about the bald eagle population in the area of the race. However this survey was not required to properly reach the decision on appeal. (NA/SOR at 7.) No nesting sites were found in that area during prior surveys, and KSWC has provided no evidence that there were actually nesting sites in the area. Thus, there is no evidence that BLM did not have sufficient information to make an informed decision regarding the likely impact of the proposed jet boat race on bald eagles, or that it erred in its assessment.

KSWC also asserts that BLM's failure to conduct a further survey for bald eagle nesting sites in the proposed race area violated the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531–1544 (1994), by undermining the requirement to consult with the U.S. Fish and Wildlife Service (FWS). 4/ (NA/SOR at 8.)

3/ BLM noted that the Pacific Bald Eagle Plan precluded low level aircraft and other disturbing human activity within 400 meters of active nests, and regulated activity within 800 meters if eagles had line-of-sight vision. (EA at 10.)

4/ KSWC also asserts that BLM failed to consider the potential impact on Coho salmon, a candidate T&E species, and Steelhead trout, a proposed T&E species, under the ESA. (NA/SOR at 12.) BLM found that there had been no material change in the conditions since a Mar. 18, 1997, Programmatic

BLM was not required to undertake formal section 7 consultation with FWS, pursuant to section 7(a)(2) of the ESA, as amended, 16 U.S.C. § 1536(a)(2) (1994) prior to issuing its decision. 16 U.S.C. § 1536(a)(2) (1994); 50 C.F.R. § 402.14(a); National Wildlife Federation, 126 IBLA 48, 65-66 (1993); Southern Utah Wilderness Alliance, 122 IBLA 165, 173 (1992). It had concluded that amendment of the SRP was not likely to adversely affect bald eagles or any other T&E bird species, or their critical habitat. (EA at 7-10; Biological Assessment, dated March 10, 1999; Memorandum to Board from District Manager, dated April 26, 1999, at 2.) FWS concurred with BLM "because it is unlikely that there are any nesting or foraging birds within the racecourse that will be disturbed by the participating boats." (Letter to BLM from FWS, dated March 30, 1999, at 3; see id. at 1-3; Memorandum to Board from District Manager, dated April 26, 1999, at 2.) Nor was BLM required to reinitiate informal consultation merely because an additional survey might possibly locate a nesting site.

KSWC also argues that BLM failed to properly assess the potential impact upon osprey nesting along the affected river segment (20 sites), or to great blue herons, which have rookeries at three locations near that segment. (NA/SOR at 7-8.) It argues that when BLM concluded that the ospreys would not be disturbed by the passage of one boat it failed to consider the impact of an entire race:

It is not sufficient to say that because one boat did not disturb the [o]sprey that the * * * jet boat race will not disturb them. It is a far different matter to send 25 boats, one after another, through their nesting range. These birds may not choose to come back and nest in this area.

Id. at 8. Further, KSWC finds no scientific support for BLM's conclusion that, because great blue herons are habituated to the disturbance caused by the passage of a single boat, they would not be affected by the race: "It is an assumption that these birds are habituated to human disturbances. This is not at all a scientific statement." Id.

We agree that the passage of several boats is a "different matter" than the passage of one boat. However, BLM did not rely on "one boat" evidence. It assessed the total impact of permitting the race, concluding

fn. 4 (continued)

Biological Opinion (BO) prepared by the National Marine Fisheries Service (NMFS), U.S. Department of Commerce. (DR/FONSI at 4-5.) In its BO, NMFS had concluded that motorized boating activity was not likely to jeopardize the continued existence of listed, candidate, or proposed T&E anadromous salmonid species, or result in the destruction or adverse modification of their critical habitat, and thus complied with section 7(a) of the ESA. Id. KSWC has submitted no evidence to the contrary and has not demonstrated that BLM's analysis was incomplete or incorrect.

that it was not likely that the ospreys and great blue herons would be more than temporarily disturbed, as, during past Boatnik races, these birds had continued to fish after the motorized boats had passed:

FINDING: Herons were observed to stand on a side channel and fish as the boats passed. Sometimes they would fly off as the boats passed, sometimes they would not. If they flew, they would return in a short while. It appears that they were not as disturbed as when passed by a float craft. Osprey were observed to fish before and after the boats pass[ed]. They were not disturbed.

(EA at 2 (emphasis added); see DR/FONSI at 4.) BLM's findings were derived from monitoring the 1997 and 1998 Boatnik races. It did not rely on evidence gathered from the passage of a single boat, in assessing the likely impact of the proposed race on ospreys and great blue herons. (EA at 1 ("[F]indings from the two previous events [are presented]"); DR/FONSI at 4.) BLM was aware of the osprey nests and great blue heron rookeries and found no material adverse impact resulting from motorized boat traffic. (EA at 2, 8-9.)

We are persuaded that the birds' refusal to depart the area when subjected to motorized boats during the course of earlier races indicates a considerable degree of habituation to human disturbance. BLM's findings were based on observations made by its wildlife experts, and thus are clearly based on their professional scientific expertise. (EA Cover Sheet, dated March 16, 1999.) KSWC has submitted no evidence to the contrary, and has offered no evidence that the race will cause these birds to permanently leave the area of the proposed race, or adversely impact their nests or rookeries. We find no evidence that BLM erred in its assessment of the likely impact of the race on ospreys and great blue herons. 5/

KSWC also argues that BLM did not, in its EA, properly assess the potential adverse impact of the proposed race on quality of the water in the Rogue River, resulting from diesel fuel spill, stating that "[t]here

5/ We find no indication that BLM's decision to permit the race will violate the prohibition found at page 48 of the Medford District's June 1995 Record of Decision and Resource Management Plan (ROD/RMP). This section prohibits "[h]uman disturbances that may disturb or interfere with nesting * * * [which are] within one-quarter mile of active nesting areas [of raptors and great blue herons] between approximately March 1 and July 15." While KSWC mentions this prohibition, it does not allege a violation in the case of ospreys. (NA/SOR at 8.) In the case of great blue herons, KSWC states that there will be a violation, but admits that it is "unclear how close" the nesting sites will be to the race, since they may be changed every year. Id. Absent evidence that there is a site within 1/4 mile of the race course, we cannot conclude that there would be a violation.

is a significant risk of water pollution and increased toxicity [to aquatic life] * * *. Pollution can increase mortality among aquatic organisms, including * * * fish, and potentially affect the entire riverine food chain." (NA/SOR at 9.) It states that the EA "does not even mention" the possibility of such spills. Id. at 12.

BLM considered the likely impact of the proposed race on the Rogue River's water quality, finding that there would be no material adverse impact. (EA at 9.) In response to specific concern regarding release of fuels or other hazardous materials during an accident or refueling operations, BLM concluded: "The boats are built with careful attention to design requirements that all but eliminate the chance of * * * the spilling of hazardous materials." 6/ Id. at 2. In addition, as a mitigation measure, BLM required that the Club have a contingency plan for dealing with "emergency spills or leaks by hazardous materials" in place before any permitted activities began. Id. at 6. On the basis of the boat requirements and mitigation measures BLM found that no significant adverse impact to water quality was likely to occur. (DR/FONSI at 5.) KSWC has submitted no evidence that would cause us to conclude that BLM erred in its analysis, or that there may be any material adverse impact to water quality or associated aquatic resources.

KSWC also argues that BLM failed to adequately consider the potential cumulative impact of permitting the additional race, taking into consideration the impact of the other activity authorized by the SRP on fish, wildlife, and water quality in the Rogue River area. (NA/SOR at 5-6.)

It is well established that BLM must consider the likely cumulative impacts of a proposed action and any other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7; see Park County Resource Council, Inc. v. United States Department of Agriculture, 817 F.2d 609, 623 (10th Cir. 1987); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992), aff'd, Keck v. Hastey, No. S92! 1670! WBS! PAN (E.D. Cal. Oct. 4, 1993).

As can be expected, the primary focus of the EA was the environmental impacts of the proposed race. However the cumulative effects were addressed in the EA under the heading "Site Specific and Cumulative Beneficial or Adverse Effects of the Alternatives." See EA at 9-12. KSWC has not identified what other past, present, and reasonably foreseeable future actions might, together with the proposed action at issue here, have a cumulative impact not addressed in the EA. Nor has it specifically identified a material cumulative impact not addressed. KSWC has not presented any inadequacy in BLM's consideration of cumulative impacts sufficient to warrant either reversal or remand of BLM's decision.

6/ BLM required that all boats have "spill proof gas tanks" and that the engines be "attached directly to the boat hull * * * so that [they] will not be ejected from the boat[s] in [the] case of a mishap." (EA at 6.)

Next, KSWC contends that BLM failed to properly consider the no action alternative because that alternative was not analyzed in as great a detail as the proposed action, and detailed consideration is required by BLM Handbook H-1790-1 (BLM Manual (Rel. 1-1547 (Oct. 25, 1988)) (NEPA Handbook). It states that the no action alternative was "barely considered at all" and that "there was no analysis of the positive or negative effects of implementation in the short or long term." (NA/SOR at 9.)

BLM is required by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1994), to consider the environmental consequences of "appropriate alternatives" to a proposed action. ^{7/} See 40 C.F.R. §§ 1501.2(c) and 1508.9(b); City of Aurora v. Hunt, 749 F.2d 1457, 1466 (10th Cir. 1984); Howard B. Keck, Jr., 124 IBLA at 53. One of the proposed alternatives that must be considered is the no action alternative. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989); Southern Utah Wilderness Alliance, 122 IBLA 334, 338-39 (1992).

We are not persuaded that BLM failed to properly consider the no action alternative. KSWC is mistaken that BLM's NEPA Handbook requires the no action alternative to be "analyzed in as much detail as the proposed action." (NA/SOR at 9 (emphasis added).) The portion of the NEPA Handbook cited by KSWC provides: "If the no-action alternative is being analyzed, it must also be defined to the same level of detail as the proposed action." (NEPA Handbook at IV-4 (emphasis added).) There is no suggestion that it must be analyzed to the same level of detail.

We also note that the cited Manual section then states that this required definition is fairly simple. When the proposed action has been initiated by a party outside BLM, as was the case here (by the filing of KSWC's SRP amendment request), "the no-action alternative generally means that the proposed activity will not take place." (NEPA Handbook at IV-4.) BLM clearly followed this directive: "The requested permit amendment would be denied and the event would be run as currently permitted. The currently permitted event is for small hydroplanes. They race on Memorial [D]ay (Monday, May [31]) from Riverside [P]ark in Grants Pass to Robertson Bridge and turn around." (EA at 7.)

In its analysis of the no action alternative BLM briefly discusses the likely impacts of the no action alternative, which consist, for the

^{7/} KSWC states that BLM specifically violated 40 C.F.R. § 1502.14, which required it to "[r]igorously explore and objectively evaluate all reasonable alternatives." See NA/SOR at 9-10. KSWC specifically alleges that the no action alternative was not "treated as a realistic and practicable alternative." Id. at 10. This regulation applies to agency consideration of alternatives in an EIS, and is not applicable to an EA. Nonetheless, we find that BLM considered and examined the no action alternative as a viable alternative, consistent with 40 C.F.R. §§ 1501.2(c) and 1508.9(b).

most part, of the absence of impacts considered likely to occur if the race took place. (EA at 8, 12.) We find no instance in which BLM overlooked or unjustifiably minimized the positive/negative, short/long-term, or other aspects of the actual potential impacts of the no action alternative, or that its analysis was otherwise deficient. Nor does KSWC identify a deficiency. We find no violation of section 102(2)(E) of NEPA.

KSWC contends that BLM violated section 102(2)(C) of NEPA by not preparing an EIS, before permitting the race, arguing that the race will significantly impact the environment. (NA/SOR at 11–12.) Noting that, if the permit is modified, the holders of commercial river rafting permits will be precluded from using the river during the event, which occurs during one of the busiest commercial rafting weekends, KSWC states that "[a]ny proposal that modified all current special use permits should be considered significant." Id. at 11. It argues that the race will cause "economic hardship" for certain permit holders, "such as Sundance Kayak School & Expeditions and other outfitters." Id.

BLM considered the impact of closing the river to other recreational use during the race, and the effect it would have of displacing other users (including commercial rafting permittees). BLM was particularly cognizant of the fact that the Memorial Day weekend is "one of the busiest weekends of the year for recreation along this stretch of the Rogue River," and that displacing other users, particularly rafters, would be extended from the usual 1 day to portions of 3 days. (EA at 11.) As a result, BLM designed the permit amendment to accommodate rafters:

The event starts at 9:00 a.m. This start time will close the river from 9:00 to 10:00 a.m. Since most rafters put on the river at about 10:00 a.m., they should not be inconvenienced by the first event. The second half of the event will start at 12:00 noon and the river will be closed until 1:00 p.m. This portion of the event will take place when many rafters pull off of the river and have lunch. These changes will minimize the disruption to their float. These people will probably have a good experience, but it will be slightly encumbered. The recreationists that are interested in watching the event will be able to start their trip before 9:00 a.m. and have excellent viewing position choices for both heats.

Id. at 11–12; see DR/FONSI at 4 ("Race organizers have adjusted race times and implemented processes to have a minimum affect on other permit holders and other traditional uses"). Although there is no doubt the jet boat race will affect a number of permittees and other members of the general public who will be precluded from using the commercial outfitters, the race will only last for a portion of 2 days. We find no reason to conclude that

this impact meets the criteria for significance, set forth at 40 C.F.R. § 1508.27. ^{8/} Nor does KSWC attempt to demonstrate that it does.

We will not entertain the argument that there are likely to be significant impacts to fish, wildlife, water quality, or other aspects of the environment simply because there is "no data to suggest [otherwise]." (NA/SOR at 11.) BLM concluded that there is not likely to be any significant environmental impact, providing a convincing case in support of that conclusion. (DR/FONSI at 5.) To demonstrate that BLM was wrong, KSWC must show, with objective proof, that BLM overlooked an impact or unjustifiably minimized an impact which is likely to be significant. Rebecca S. Andersen, 145 IBLA at 218–19. It has failed to do so.

Next, KSWC contends that BLM's failure to provide a public comment period following issuance of its EA violated the letter and spirit of section 102(2)(C) of NEPA. (NA/SOR at 5.) KSWC cites no particular portion of the statute or its implementing regulations addressing a public comment period. ^{9/} See Southern Utah Wilderness Alliance, 122 IBLA at 341. However, it refers to BLM's NEPA Handbook, at page IV–6, in support of its argument that a 30–day public comment period is required. It argues that, absent an opportunity for comment, once it is finalized, BLM does not have the benefit of public input in its analysis of environmental impacts, undermining informed decisionmaking, which is an express purpose of section 102(2)(C) of NEPA.

BLM's NEPA Handbook does not require a public comment period in all instances when an EA is finalized. The responsible BLM decisionmaker "must determine if the EA and FONSI should be made available for public review (usually a 30–day review period) before making a final determination on the [proposed] action." (NEPA Handbook at IV–6 (emphasis added).) The primary purpose of public review is to allow the public to comment on BLM's determination that no significant impact is likely to occur. "A public review of the EA and FONSI is usually only necessary under certain limited circumstances as defined in CEQ [(Council on Environmental Quality)] regulations (40 C.F.R. § 1501.4(e)(2))." (NEPA Handbook at IV–6.) The regulation at

^{8/} The contemplated closing of the river to other recreational use does not rise to the level of significance merely because the river is a wild and scenic river protected by section 10(a) of the WSR, 16 U.S.C. § 1281(a) (1994). (NA/SOR at 11–12.) The protected values may still be enjoyed. While the use by one segment of the public is decreased during the race, the race affords an increased use and enjoyment of the river by a broader range of the public, including those who are unable to experience a river float.

^{9/} KSWC cites the 40 C.F.R. § 1505.1(c) requirement that public comments and agency responses be included in the administrative record. See NA/SOR at 5. BLM complied by incorporating its responses in the EA.

that section sets out when a FONSI (and supporting EA) must be made available for public review:

- (i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to [40 C.F.R.] § 1507.3, or
- (ii) The nature of the proposed action is one without precedent.

40 C.F.R. § 1501.4(e)(2); see Southern Utah Wilderness Alliance, 122 IBLA at 341.

We find nothing in BLM's NEPA procedures (adopted pursuant to 40 C.F.R. § 1507.3) requiring an EIS when deciding whether to issue or amend an SRP for a boat racing event, or when taking similar action. Nor is the nature of the proposed jet boat race without precedent. The same race has been held on two prior occasions, and similar events have been staged on the Rogue River for many years. There is a clear line of precedence for finding that there have been events of a similar "nature."

This case does not fall into one of the two circumstances when a FONSI and supporting EA must be made available for public review. A period for public comment is not required by 40 C.F.R. § 1501.4(e)(2), or by BLM's NEPA Handbook. Further we have found no independent requirement, in either the regulation or NEPA Handbook, requiring public review and comment upon the underlying EA before BLM may make a final determination on the proposed action.

Notwithstanding this finding, section 102(2)(C) of NEPA and its implementing regulations generally require BLM to encourage and facilitate public involvement in its NEPA process. Therefore BLM should demonstrate a "compelling reason for not providing any public comment period during the EA process." Southern Utah Wilderness Alliance, 122 IBLA at 342 (citing 40 C.F.R. § 1500.2(d)).

During the initial scoping process in preparation of the EA members of the public were encouraged to comment on the Club's proposed 1999 jet boat race. KSWC and other members of the public were notified by letter dated December 11, 1998, and given until January 28, 1999, to identify likely environmental impacts which they believed should be addressed in the EA, and their general observations regarding the races held the previous 2 years. (EA at 15.) When preparing the EA BLM and the public had the benefit of two EA's prepared by BLM for the previous events and, to that extent, the public was able to submit comments regarding BLM's analysis of the potential environmental impacts of the current proposal. KSWC submitted a comment during that period, and had the opportunity to "address the agency findings and to contribute what [it] c[ould] to ensure the most sensible alternative is implemented." (NA/SOR at 5.)

It is true that KSWC and other members of the public were not afforded the opportunity to comment on the final EA prior to the DR/FONSI decision. However, the objective of encouraging and facilitating public involvement in the NEPA process was satisfied by BLM's solicitation of comments during the scoping period. Compare Fort Belknap Community Council, 144 IBLA 92, 101-02 (1998), with Southern Utah Wilderness Alliance, 122 IBLA at 335-37.

KSWC contends that BLM's decision to amend the SRP to permit the additional race violates section 10(a) of the WSRA, because BLM failed to protect the outstandingly remarkable recreational values which led to designation of the Rogue River, and its related adjacent land, as a wild and scenic river. It argues that "[m]any rafters, rafting permittees and other recreational users of the river [are] excluded for the time that the race [i]s held." (NA/SOR at 11.) It notes that BLM acknowledges that this could potentially affect "approximately 1,500 to 2,000 rafters and other water based recreational users per day." Id. at 11 (quoting from EA at 3).

We find no violation of section 10(a) of the WSRA. That section of the statute provides, in relevant part, that

[e]ach 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.

16 U.S.C. § 1281(a) (1994). The aim of the statute is, plainly, to protect and preserve the outstandingly remarkable values of a river and its immediate environment, which resulted in designation, so as to ensure their public use and enjoyment. 16 U.S.C. § 1271 (1994); H.R. Rep. No. 1623, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 3801, 3803; Deschutes River Public Outfitters, 135 IBLA 233, 234 (1996).

In the specific case of a portion of a wild and scenic river classified as "recreational river areas," the statute is designed to generally protect and preserve the "recreational opportunities they afford." H.R. Rep. No. 1623, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 3801, 3803. When it classified the section of the Rogue River upon which the race would be run the Department said:

Management objectives for the recreational river area will be to provide opportunities for engaging in a wide range of recreation activities which are enhanced by its free-flowing nature. Other resource uses and activities will be permitted so long as they do not lower the quality of the recreation experience, degrade the setting, or damage the fishery and wildlife habitat.

34 Fed. Reg. at 17305 (emphasis added).

The statute does not require BLM to ensure that all manner of recreational use or any single recreational use will be available in all places and at all times, or preclude it from restricting use of the river. There is no question that some of the forms of recreational river use (especially, motorized and nonmotorized) are not always compatible, and the conflicting uses should be regulated to avoid or minimize conflict, when possible. See Deschutes River Public Outfitters, 135 IBLA at 240-45. As the Department stated, in establishing management principles for designated wild and scenic rivers:

Public use will be regulated and distributed where necessary to protect and enhance (by allowing natural recovery where resources have been damaged) the resource values of the river area. Public use may be controlled by limiting access to the river, by issuing permits, or by other means available to the managing agency through its general statutory authorities.

* * * * *

* * * Motorized travel on * * * water is generally permitted in * * * recreational river areas, but will be restricted or prohibited where necessary to protect the values for which the river area was designated.

47 Fed. Reg. 39453, 39459 (Sept. 7, 1982). The Department recognized the various uses when it classified the portion of the river in question as a recreational river, and noted that motorboat use was permitted, but would be regulated. It stated: "Areas for * * * activities such as speed boat testing and organized racing will also be identified and marked." 34 Fed. Reg. at 17305.

In its approval of the permit amendment while imposing restrictions on the time and manner of use BLM acted to regulate recreational use of the river in a manner which would avoid or minimize conflict, balance the various recreational activities associated with the Rogue River, and promote a "diversity of recreational experiences." (DR/FONSI at 4.) BLM may permit nonmotorized use to the exclusion of motorized use, and similarly, it can permit motorized use to the exclusion of nonmotorized use. To allow one but not the other would exclude a legitimate recreational river use, which would be contrary to the Department's classification of the river as a recreational component of the National Wild and Scenic Rivers System, to provide a "wide range of recreation activities." 34 Fed. Reg. at 17305. The jet boat race "adds a new dimension to the recreation value." (EA at 12.)

The statute requires that the "values" which caused the river to be designated shall be protected and enhanced. 16 U.S.C. § 1281(a) (1994). For a recreational river area the values are outstanding recreational and scenic values. 16 U.S.C. § 1271 (1994). The statute does not require protection or enhancement of a particular use beyond the broad category

of recreational use. Thus, limiting use and enjoyment of the Rogue River to one segment of the public for a reasonable period of time to allow another segment of the public an opportunity to enjoy the river is in compliance with the statutory intent. The end result is that the outstandingly remarkable recreational values are fully protected and enhanced for all. We agree with BLM's conclusion that issuance of the SRP "will not jeopardize the outstanding remarkable features for which the river was designated under the [WSRA]." (DR/FONSI at 3.)

Finally, KSWC contends that BLM's decision to amend the SRP, and preclude other river use during the race, authorizes an "exclusive de facto right of use," contrary to the policy pronouncement set out in BLM's March 1997 "Commercial Outfitter Operating Plan for the Hellgate Recreation Section of the Rogue National Wild and Scenic River" (Operating Plan): "BLM is aware of the fact that the river will need to be closed [by the Josephine County Marine Deputy] if the permit is granted, and that they knowingly allow exclusive use to the permittee[]." (NA/SOR at 10.)

The Operating Plan was written to govern issuance of SRP's for commercial use of the portion of the Rogue River designated a recreational river in BLM's Medford District. The Operating Plan provides, in relevant part: "The Special Recreation Permit does not create an exclusive right of use to the regulated area by the permittee. The permittee shall not interfere with other valid uses of the public land by other users." (Operating Plan at 12 (emphasis added).) The clear intent of this language is that a permittee may not, by virtue of holding a permit, utilize a portion of the river in a manner that would exclude other valid uses. The grant of a permit does not in and of itself grant a right of exclusive use. The Operating Plan does not preclude BLM from authorizing a particular use, even though the effect of the grant is to limit or exclude conflicting uses for a limited period of time. If not specifically stated in a grant document, the authorization would not create a right in the permittee to use the river to the exclusion of others.

Recognizing that, as a necessary consequence of its decision, the Josephine County Marine Deputy, the local official responsible for managing river use, would, as he had in previous years, close the river to other use during the event BLM specifically stated that:

The Boatnik permit does not grant exclusive use rights, nor does it amend any other permit.

All marine events[,] such as Boatnik, must be authorized by the Oregon State Marine Board under a marine event permit. This permit stands alone and contains its own stipulations. A permit such as this has been obtained yearly throughout the history of the Boatnik event. Every year the permit has stipulated that the Josephine County Marine Deputy institute appropriate safety measures in the conduct of the event. Every

year, the Marine Deputy [in consultation with the Marine Board] closes the river **during** the event. The Marine Deputy has the authority to close the river at any time of the year if the safety of river users may be compromised for whatever reason.

(EA at 4; see id. at 1–2; DR/FONSI at 1–2.) The amendment of the permit to allow the additional race did not violate the Operating Plan.

Except to the extent that they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by KSWC are rejected on the ground that they are contrary to the facts and law or are immaterial.

There has been no showing that BLM failed to abide by section 102(2)(C) of NEPA or any other law, and the Area Manager properly approved the amendment of the Club's SRP for the 1999 Boatnik race to permit the additional jet boat race described in that permit and discussed in this Decision.

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 decision appealed from is affirmed.

R.W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge