

FOUR CORNERS EXPEDITIONS ET AL.

IBLA 88-267, 88-287,
88-290, 88-322

Decided September 1, 1988

Appeals from decisions of the Montrose, Colorado, District Manager, Bureau of Land Management, denying commercial use permits for the Dolores River for the 1988 season. Special Recreation Use Permits CO-030-SRUP-85-8S, CO-030-SRUP-84-7S, CO-030-SRUP-87-7, CO-030-SRUP-87-6S.

Affirmed.

1. Special Use Permits

The issuance of a special recreation use permit is discretionary with the authorized officer, and where necessary, BLM may restrict use on the Dolores River during the 2-year period it is developing a management plan for the river, by issuing a limited number of special recreation permits. Where there is a reasonable basis for the selection process implementing its moratorium policy, the BLM decision will be affirmed.

APPEARANCES: Reed Dils, Buena Vista, Colorado, for Four Corners Expeditions; Stephen Saltsman, Durango, Colorado, for Flexible Flyers; Steve Harris, Terlingua, Texas, for Far Flung Adventures; David M. Burch, Colorado Springs, Colorado, for Echo Canyon River Expeditions, Inc.; Lowell L. Madsen, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

In January 1988, the Area Manager, San Juan Resource Area, Colorado Bureau of Land Management (BLM), issued a general letter to various river outfitters notifying them that a new management plan was being prepared for a portion of the Dolores River (Dolores). Therein, BLM stated that the purpose of the plan was to determine carrying capacities, address possible allocation of use, and describe management objectives, among other tasks. The letter also informed the outfitters that until a new plan was in place "a moratorium [on issuance of special recreation permits (SRP)] is necessary to maintain a fairly steady level of use until carrying capacity studies can be completed." BLM then announced the following policy:

We will accept applications from only those companies that had BLM permits for the Dolores River in 1987 and had declared user-days for those permits. We will also require strict adherence to an April 1, 1988, deadline for submitting use fees, permit applications, and other required documents to our office. BLM WILL NOT issue an SRP to an outfitter who fails to meet this deadline.

Four Corners Expeditions (Four Corners), Flexible Flyers, Far Flung Adventures, and Echo Canyon River Expeditions, Inc., are river outfitters who filed protests of BLM's policy. In separate decisions dated February 12 and 23, and March 2, 1988, BLM's Montrose District Manager denied these appellants' requests to be allowed commercial permits for the Dolores in 1988. These appeals followed. 1/

Four Corners operated Dolores trips in the 1981 through 1986 seasons. Reed K. Dils, President of Four Corners, explains in his protest that he ran no Dolores trips in 1987 because of the McPhee Dam, construction of which created doubt in the minds of both outfitters and consumers as to whether a successful season could be run. He also outlined his use of the river since 1976. Four Corners ran 1-day trips in 1976, one 5-day trip each in 1978 and 1979, six commercial trips in 1980, and three trips each in 1982, 1983, and 1984. Four Corners has filed a petition for stay of the decision, asserting that the moratorium prevents it from operating a tour on the Dolores which was planned prior to the moratorium and alleging that BLM's action is contrary to 43 CFR Subpart 8372. 2/

According to BLM's decision issued to Flexible Flyers, the latter's most recent permitted use of the river occurred in 1986 and consisted of 12 total user-days. Flexible Flyers asserts in its protest that it was unable to apply for a 1987 permit because of a 2-week lapse in its insurance (between April 1 and April 15, 1987). Flexible Flyers states that it has operated as an independent contractor and has had Dolores permits since 1984.

Far Flung Adventures asserts that BLM's moratorium is arbitrary and provided inadequate notice to outfitters. Appellant contends that 1 year is generally not considered an adequate basis for making allocation decisions. Far Flung Adventures contends that BLM's action denies it future access to the river in that it arbitrarily denies permit renewal to a certain class

1/ The captioned appeals with their assigned docket numbers are: Four Corners Expeditions, Inc., IBLA 88-267; Flexible Flyers, IBLA 88-287; Far Flung Adventures IBLA 88-290; Echo Canyon River Expeditions, Inc., IBLA 88-322. Because these appeals involve common issues of fact and law, we have consolidated them for consideration.

2/ The regulations at 43 CFR Subpart 8372 govern special recreation permits for areas other than developed recreation sites.

of operators – those without demonstrated use in 1987. Thus, appellant argues, the moratorium is unfair to operators with historical use but without 1987 use. Far Flung Adventures suggests that the basis for a decision such as BLM's moratorium should be a longer period of use (not just one season) to account for fluctuations in the business cycle. Far Flung Adventures has also petitioned for a stay of decision.

David M. Burch (Echo Canyon River Expeditions, Inc.) states that the illness of his wife forced cancellation of scheduled trips on the 1987 permit. He notes also that construction of the McPhee Dam resulted in a 60-percent reduction in bookings. With his protest, appellant included documentation illustrating 9 years of river use. Appellant contends his historical use should have been a "major consideration as it has been for most river allocation systems."

In a general letter to outfitters dated March 25, 1988, BLM explained that the moratorium did not constitute allocation, but "merely leaves things in status quo pending the final river management plan". In its answer, BLM gave the following reasons for not providing advance warning of the moratorium:

By announcing the moratorium as we did, we hoped to avoid opportunities for outfitters to "pad" their use. While we did not provide prior warning to outfitters regarding the moratorium, experience indicates that many outfitters hasten to accrue "historical use" once such warnings are given. That is exactly the situation we hoped to avoid concerning the Dolores.

Also, Dolores permits have always been issued on an annual basis only, to allow for changing conditions affecting BLM's manageability of the resource.

Permitted outfitters on the Dolores increased from 24 in 1985 to 33 in 1987. There were approximately 5,800 commercial user-days documented in 1987.

Of the 30 outfitters who had documented use in 1987: 2 had over 400 days; 6 had 200 to 400 days; 11 had 100 to 200 days; and 11 had 1 to 100 days. BLM states that Western River Guides Association specifically requested it to maintain use at the 1987 level until a management plan is completed. BLM chose 1987 as a benchmark because it was the year with

the most outfitters and the largest amount of use in the history of the Dolores. Therefore, BLM argues, its moratorium was fairest to the majority of operating outfitters.

In defending its decision against appellants' charges that the moratorium policy was arbitrary and capricious, BLM gave the following reasons to justify its action:

We chose to hold use to '87 levels because 1987 was the year with the most outfitters and the largest amount of use in the

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history of the Dolores. We could have chosen any year from the past; 1987 was most fair to the majority of the operating outfitters.

Because we only issue one year temporary use permits on the Dolores, we chose not to use a combination of several years' use. This method is consistent with the way the moratorium was enacted on the Gunnison River.

(Attachment 3 to BLM Answer).

Some outfitters asked that 1987 Dolores permittees who failed to declare use in 1987, but who had documented use in previous years, be allowed permits in 1988. Of the three outfitters falling in this category (Steve Harris, Reed Dils and Dave Burch), only Dils has previous BLM-permitted use between 1984 and 1986. Since our Dolores permits have always been issued strictly on an annual basis, we believe a prior permit does not automatically entitle a company to the following year's permit. There are several other outfitters who held permits in previous years but are excluded in 1988. In order for BLM to maintain commercial use during the moratorium at the 1987 level, we are using the most logical, reasonable method we could think of -- allow use in 1988 by those who had use in 1987.

(Attachment 1 to BLM Answer). BLM anticipates that the management plan will be completed by September 1989 and implemented during the 1990 river season. While the management plan is being developed, no additional outfitters will be permitted on the river.

[1] Special use permits are issued under the general 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, 43 U.S.C. § 1732(b) (1982). The issuance of a special use permit is discretionary, and the Department may accept or reject a permit application in furtherance of the objectives, responsibilities, and programs for management of the public lands involved. Don Hatch River Expeditions, 91 IBLA 291 (1986); see also National Public Lands Task Force, 70 IBLA 214 (1983); Cascade Motorcycle Club, 56 IBLA 134 (1981). The exercise of Secretarial discretion to issue special use permits also includes the authority to set permit conditions. Osprey River Trips, Inc., 83 IBLA 98 (1984).

Herein, BLM decided to impose a moratorium limiting the number of permits to be issued for the 1988 season, and further decided to accept applications for SRP's only from those outfitters who had permits and documented use in 1987. The choice of action was clearly one committed to BLM's discretion. However, where a decision is made in the exercise of discretion, it must be supported by a rational and defensible basis or it will be found

arbitrary and capricious. Hugh A. Tipton, 55 IBLA 68 (1981); Kenneth H. Earp, 50 IBLA 235 (1980); Andrew H. L. Anderson, 32 IBLA 123 (1977); Claudio Ramirez, 14 IBLA 125, 127 (1973). The question presented is whether the BLM decision is arbitrary and capricious so as to constitute an abuse of discretion.

The moratorium will limit the number of outfitters on the river during the 1988 season to 30 and the number of user-days to approximately 5,800 based on the 1987 season. Only those outfitters who obtained SRP's and had documented use during the 1987 season may apply for SRP's in 1988. Commensurate with its management responsibility, BLM may properly restrict the number of commercial use permits it issues and user-days it authorizes, and determine the criteria for issuing the limited number of permits. While BLM could have used only documented user-days during 1987, and approved all applications for 1988 permits apportioning the documented user-days at the 1987 level among the permittees, we can discern no compelling reason to modify or reverse that aspect of the decision which limits the number of permittees on the river to 30. Having analyzed its 1987 records BLM knows that the river resources can accommodate that level of activity, thus it makes good management sense to maintain that level until a river management plan is developed.

Once it was determined that 30 permits should be issued, BLM proceeded to implement the policy by utilizing a selection process which eliminated appellants from consideration. The record before us details BLM's reasoning for choosing the criteria it did to issue SRP's for the 1988 season. The purpose of the moratorium is to maintain the status quo of the river at its 1987 level of use. Limiting the number of permits and user-days accomplishes this goal. While BLM goes further, and imposes the moratorium in a manner that maintains the status quo with respect to the particular outfitters permitted in 1987 who had documented use, we cannot conclude that this selection process lacks a reasonable basis.

The selection process devised by BLM is to accept applications for SRP's for the 1988 season only from those outfitters who had documented use in 1987, and to permit their 1988 use at the 1987 use level. While prior use has never been a consideration in the issuance of permits on the Dolores, beginning in 1988, BLM initiated the process of developing a management plan for the river. Documented use on the river during the 1987 season was a reasonable criterion to utilize when developing a procedure to determine eligibility for the issuance of a limited number of permits.

Appellants complain because BLM chose the historical use of the 1987 season as opposed to another year or a combination of years. In its answer BLM states that it investigated numerous methods by which to undertake the moratorium but felt it chose the most logical and reasonable, "that being to allow use in 1988 by those who had use in 1987." BLM's approach may seem unfair to appellants who are otherwise qualified to operate on the river,

however fairness must be judged in light of the goal to be achieved. Appellants' statements of reasons constitute no more than a disagreement with BLM's decision, offering suggestions of other ways BLM could have implemented the moratorium so that they would be eligible for a SRP during the 1988 season.

BLM clearly has the discretion to reject SRP applications where such an action is supported on a rational basis. This is especially true in cases involving a weighing of priorities or matters of policy as opposed to a finding on the evidence. This was expressed by the Board in Rosita Trujillo, 21 IBLA 289 (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.

21 IBLA at 291. Hence, in the context of the present appeals the question is whether the record establishes a rational basis for the decisions on appeal.

In the absence of any guidance in the regulations, we note that BLM has published a SRP policy. 49 FR 5300 (Feb. 10, 1984). Unlike the SRP's at issue in this case, the policy provides that commercial permits are ordinarily issued for a 5-year term. | D.1., 49 FR 5305. The policy further provides that only multi-year commercial permits may be renewed. | D.2., 49 FR 5305. ^{3/} Where an area's desired use level has been reached, the policy dictates no additional permits may be issued except as new permits become available when, e.g., an old permit is terminated. | B., 49 FR 5304. Further, the policy provides that new commercial permits may be: "(1) Awarded according to historical use, (2) limited to existing permit-holders, (3) awarded by a competitive system, or (4) awarded by a combination of methods." Id. Historical use is "generally defined as the average of the highest two use seasons in the preceding five-year period." 49 FR 5306 note 3.

The decision of BLM to limit 1988 permits to 1987 permit holders with documented use in that year is consistent with criteria recognized in the SRP policy. Thus, BLM has utilized a combination of the first two standards to determine eligibility for 1988 permits. Although historical use

^{3/} Subject to certain conditions, the policy accords a preference to the prior permittee on renewal. Id.

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was limited to the 1987 season rather than two of the five preceding seasons, we do not find this arbitrary where, as in this case, permits are issued on an annual rather than a 5-year basis.

The record establishes a rational basis for imposition of the moratorium on new SRP's pending completion of a study of the carrying capacity of the river. Further, a rational basis exists for limiting SRP's to 1987 permittees which had documented use during that year.

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

Gail M. Frazier
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member