

DURANGLERS

IBLA 88-413

Decided October 28, 1988

Appeal from a decision of the District Manager, Montrose District Office, Bureau of Land Management, denying a protest of the BLM moratorium on the issuance of new special recreation permits for commercial use on the Dolores River.

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: Thomas J. Knopick, Durango, Colorado, for Duranglers; Lowell L. Madsen, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Duranglers has appealed from a decision dated April 6, 1988, by the District Manager, Montrose District Office, Bureau of Land Management (BLM), denying its protest of BLM's decision to place a moratorium on the issuance of new special recreation permits (SRP's) to outfitters for commercial use on the Dolores River.

By letter dated February 11, 1988, appellant requested an SRP for a "commercial venture on the Dolores River from Bradfield Bridge to Slick Rock." Their venture, if permitted, would involve "a plan of operation that would include float fishing along with wade fishing trips," with an estimated 35 to 45 user days per season. In a letter to BLM dated February 19, 1988, appellant thanked BLM for "explaining [its] reasoning for recommending that no new special use permits be issued for floating the Dolores River below Bradfield Bridge." Appellant stated its intention to appeal BLM's decision, asserting that BLM "has not made a distinction of separating out different activities such as floating and fishing." According to appellant, this distinction is essential because "[p]ast commercial use has been limited to whitewater river runners, with no consideration to fishing." Appellant explains that "until the completion

of the McPhee Reservoir there were no fish inhabiting this stretch of water." Appellant's major argument, that BLM must distinguish between float fishing and other types of outfitting activity, is set forth below:

The situation has changed and we do not believe it fair, with this in mind, to now limit use to past permits, when these people solicited for this permit they had no intention of any activity other than whitewater. To ban fishing users at this point and allow whitewater outfitters to expand their operation into this realm without fair competition from specialized people like ourselves is not fair. Even if 2 years down the road the moratorium was lifted and we were permitted, current users would have an unfair advantage.

(Appellant's Letter to BLM dated Feb. 19, 1988).

By letter dated March 8, 1988, BLM responded that while appellant is "uniquely different from typical whitewater outfitters, * * * opening even low-flow boating permits to one additional commercial operation would offer us little justification in denying late-season permits to other outfitters excluded from the 1988 permit allocation." Moreover, BLM explained that it anticipated "substantial late-season fishing use from those several 1988 permittees who had both whitewater and fishing outfitter licenses in 1987." According to BLM, "their fishing use in 1988 will be extensive enough to allow in-depth study and monitoring of the fisheries resource and impacts created by recreationists, while also meeting public demand for commercially-outfitted fishing opportunities." BLM informed appellant that it intended to maintain its "previously-stated policy which limits 1988 Dolores River permits to 1987 permittees who had declared use in 1987," and that appellant could protest BLM's decision within 15 days.

By letter dated March 16, 1988, appellant formally protested BLM's moratorium on new SRP's, including those which propose float fishing. Appellant repeated the principal argument advanced in its February 19, 1988, letter, *i.e.*, that "the fishery should be treated as the new resource it is, allowing appropriate commercial outfitters to compete for this use on a fair and even basis; not by complicating the issue with the historic commercial whitewater rafting use." Appellant insists that BLM should issue SRP's to "legitimate fishing outfitters."

By letter-decision dated April 6, 1988, BLM denied appellant's protest, explaining its position that those boating permittees who have both whitewater and fishing outfitter licenses will meet the public demand. BLM stated as follows:

As you well know, the fishing resource below Bradfield Bridge is still in the early stages of development. The Colorado Division of Wildlife, Fisheries Division, has informed our staff that the fisheries below Bradfield Bridge probably would not sustain significant commercial fishing operations. Since three of our 1987 permittees ran fishing trips last season, we believe that we should not encourage increased commercial activity over last

year's level. * * * Moreover, we may even have to restrict fishing trips among the 1988 Dolores permittees who also maintain Colorado fishing outfitter licenses.

(BLM's Letter to Appellant dated Apr. 6, 1988).

In its statement of reasons (SOR), appellant reiterates its position that a distinction should be made between commercial fishing and whitewater activity. Appellant argues that "allowing rafting companies which solicited permits for only whitewater to expand and build a business around fishing" denies it fair competition. Appellant complains that BLM's decision will cause it "financial hardship," stating that "[t]o continue needed growth for payment of capital investments we must be allowed to expand our operation to provide new quality fishing experiences."

In its answer, BLM counters that "[a]lthough it is true that all Special Recreation Permits (SRPs) issued by BLM for commercial use on the Dolores River prior to 1988 were primarily for whitewater float trips, BLM did not preclude permittees from operating fishing trips in conjunction with float trips" (Answer at 1). BLM states that its "uncertainty regarding actual fish population levels below the Bradfield put-in was a major basis for denying Duranglers a float-fishing permit." *Id.* BLM rejects appellant's contention that present permittees would gain an unfair advantage by operating during the 2-year moratorium, explaining that "any fish use accumulated by an outfitter during our planning stage will not guarantee historical use privileges toward future fishing use allocations, should they become necessary." *Id.* at 2. Further, BLM questions appellant's assertion that BLM's decision will result in "financial hardship," stating that "Duranglers has never before been permitted to run commercial float-fishing trips on the Dolores River below Bradfield Bridge." *Id.* BLM concludes that the "moratorium may temporarily limit Duranglers' expansion of operations into a new geographical area, but it should not prevent reasonable growth of their company." *Id.*

[1] In Four Corners Expeditions, 104 IBLA 122 (1988), the Board upheld BLM's moratorium on the issuance of SRP's for commercial activities on the Dolores River, reasoning that "[c]ommensurate 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." *Id.* at 126. The Board began with the general proposition that "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." *Id.* at 125; Don Hatch River Expeditions, 91 IBLA 291 (1986); Osprey River Trips, Inc., 83 IBLA 98 (1984). In the Board's view, "[t]he question presented is whether the BLM decision is arbitrary and capricious so as to constitute an abuse of discretion." 104 IBLA at 126.

The Board's analysis in Four Corners Expeditions applies with equal force in the instant case:

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. * * * 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.

104 IBLA at 126.

As in Four Corners Expeditions, the record in the instant case establishes a rational basis for imposition of the moratorium on new SRP's pending completion of a study of the carrying capacity of the Dolores River. We reject appellant's contention that BLM erred in failing to distinguish between float fishing and whitewater activities, since, as BLM has explained, all current Dolores River permittees are not "strictly whitewater outfitters" (Answer at 1). Exempting appellant from the moratorium would undermine BLM's stated policy of maintaining the status quo until its study of the Dolores River is completed. This policy is equally important with regard to float fishing below the Bradfield Bridge, given BLM's uncertainty regarding actual fish population levels in the involved section of the Dolores River. BLM's decision to limit 1988 Dolores River permits to 1987 permittees who had documented use in 1987 is consistent with its stated objective of allowing "in-depth study and monitoring of the fisheries resource and impacts created by recreationists, while also meeting public demand for commercially-outfitted fishing opportunities" (BLM Letter to Appellant dated Mar. 8, 1988). Appellant has offered no compelling reason why we should exempt it from the SRP moratorium which we expressly upheld as reasonable in Four Corners Expeditions.

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

Gail M. Frazier
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

