

GUNNISON RIVER EXPEDITIONS

IBLA 88-677

Decided April 25, 1989

Appeal from a decision of the Montrose, Colorado, District Manager, Bureau of Land Management, denying a protest of a previous decision to choose one additional walk-in fishing outfitter utilizing a lottery system.

Affirmed.

1. Special Use Permits

In choosing between two qualified first-time applicants for a special recreation permit for walk-in fishing in the Gunnison Gorge, BLM's use of a coin toss to select the applicant was an equitable way to award the permit and will be affirmed.

2. Special Use Permits

The issuance of a special recreation permit is discretionary with the authorized officer, and where necessary BLM may restrict use in the Gunnison Gorge by issuing a limited number of special recreation permits. Where there is a reasonable basis for the selection process implementing its management policy, BLM's decision will be affirmed.

APPEARANCES: Hank Hotze, Hotchkiss, Colorado, for Gunnison River Expeditions; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; Mark A. Schumacher, Almont, Colorado, for Three Rivers Resort.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Hank Hotze d.b.a. Gunnison River Expeditions has appealed the August 19, 1988, decision of the District Manager, Montrose District Office, Bureau of Land Management (BLM), denying a protest against BLM's previous decision to "choose one additional walk-in fishing outfitter in the Gunnison Gorge, utilizing a lottery system (witnessed coin toss)."

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On April 12, 1988, the Area Manager, Uncompahgre Basin Resource Area, BLM, informed appellant that his special recreation application and permit (SRP) for the 1988 season had been approved for rafting and floatfishing, but had been "denied for walk-in fish guiding services and for horse packing for hire." The Area Manager, BLM, explained that its

draft management plan addition would allow for one additional outfitter, but the plan has not been finalized. * * * As there is presently more than just yourself who is interested in offering commercial walk-in fish trips, we will probably use a selection process such as a lottery to select that additional outfitter.

On August 2, 1988, BLM conducted a coin toss to choose between the selection of Gunnison River Expeditions and Three Rivers Resort - Willowfly Anglers (Three Rivers Resort) for a walk-in fishing outfitter permit in the Gunnison Gorge. The winner of the coin toss was Three Rivers Resort.

By decision dated August 19, 1988, the Montrose District Manager, BLM, denied appellant's protest against the issuance of the SRP to Three Rivers Resort, explaining as follows:

The "Addition to the Recreation Area Management Plan for the Gunnison Gorge Recreation Lands, Colorado" (dated July 21, 1988) allowed for one walk-in fishing outfitter. The applicant who was awarded the permit through the lottery system, and yourself, both made the April 1, 1988 deadline by submitting all forms as required. Since there was no previous use by either yourself or the other applicant as a walk-in fishing outfitter, specifically within the Gunnison Gorge, the lottery system was chosen as a fair, quick, and low-cost method of selection. Earlier in the year, the other applicant and yourself were contacted by telephone and informed by the BLM that you could submit a compromise proposal whereby both applicants would receive a permit. You were told that the Area Manager was open to the issuance of two additional permits if the compromise proposal would not adversely affect the existing permitted outfitter and would be compatible with the management goals and objectives of the Gunnison Gorge. No proposal was received by the BLM. Therefore, I am denying your request that we use a bid and prospectus process to select the one additional walk-in fishing outfitter and I support the Area Manager's decision using the lottery system.

(District Manager Decision at 1).

By letter dated August 19, 1988, appellant set forth several objections to BLM's decision, explaining that the statement of reasons would follow within 30 days. In this letter, appellant states:

Based on the intention of the "addition to the recreation management plan for Gunnison Gorge Recreation Area, Colorado, July 21, 1988" which was to

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systematically manage Gunnison Gorge users, a

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flip of the coin selection of walk-in fishing outfitters is inconsistent with the bid and prospectus selection process stipulated for river outfitters.

Gunnison River Expeditions has operated as a fishing guide service in the Gunnison Gorge since 1981 first permitted by the BLM and Colorado State agencies in 1982. * * * Gunnison River Expedition's history of performance, compliance as fishing/floating outfitters should not have been dismissed by the flip of a coin. There is no difference in use whether an outfitter is walk-ing or floating and walking as we do.

Your reference to Alan Belt's desire for us to reach a compromise is correct. We proposed a compromise to 3 Rivers and they were to get back to us after consulting with Jon Sterling. We were never given a date by which we had to have reached a compromise. Our assumption was the date would be consistent with other outfitter selection in the R.A.M.P. addition which is October 31st, 1988.

As briefly stated in a letter dated November 1, 1988, Hotze's primary argument is that "[t]he coin toss used to select walk-in fishing guides ignores historical use and compliance exhibited by Gunnison River Expeditions." In this connection, Hotze argues that "[t]here is no difference in operation between our operations since 1981 and that described as a walk-in fishing guide with the exception of the use of the boat." Apparently, Hotze believes that BLM should have considered his prior use of the Gunnison Gorge as a float-fishing outfitter in awarding the one remaining SRP for walk-in fishing, rather than awarding it by means of a lottery.

Three Rivers Resort filed its response on February 10, 1989, wherein it addressed appellant's objections to the selection process and concluded that appellant's reasons for appeal are invalid.

[1, 2] 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. Four Corners Expeditions, 104 IBLA 122 (1988); Don Hatch River Expeditions, 91 IBLA 291 (1986); Osprey River Trips, Inc., 83 IBLA 98 (1984).

Herein, the "Addition to the Recreation Area Management Plan for the Gunnison Gorge Recreation Lands, Colorado," at page 10, allowed for one walk-in fishing outfitter in addition to the existing permitted walk-in fishing outfitter. The selection of the additional walk-in fishing outfitter is clearly a matter 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. Four Corners Expeditions, supra at 125-26. The question presented is

whether the BLM decision is arbitrary and capricious so as to constitute an abuse of discretion.

In Outdoor Adventures, S.W., 50 IBLA 90 (1980), BLM awarded the 12 available permits for commercial recreational use of the Rio Grande River for the year 1980 from among the 19 applicants by assigning points to four applicable criteria: (1) historical use of the applicant during 1979 (up to 10 points); (2) the applicant's record of use, including safety, compliance, and payment of fees (up to 5 points); (3) the applicant's proposed service to the public, including length of trip, cost to participants, educational aspects, etc. (up to 5 points); and (4) financial ability of the applicant to provide the proposed service (up to 5 points). BLM automatically granted permits to applicants who received 20 points or more. Although there were 12 such applicants, only 11 received permits. Therefore, one permit remained available. BLM placed the seven remaining applications into a drawing to determine the priority for that permit or for any others which might become available. The appellant, who was drawn fifth, challenged "BLM's use of a drawing to award the permit in lieu of basing its decision on the merit and ability of the applicant." 50 IBLA at 93. The Board ruled on this argument as follows:

BLM's use of a drawing was proper. Use of a drawing to choose one from among many closely qualified applicants to receive an interest in public lands is well established and sanctioned in oil and gas leasing (43 CFR 3112.2; Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257, 259 (D.C. Cir. 1963), cert. denied, 373 U.S. 951 (1963)) and small tract grants (43 CFR 2233.1-3 (1966)). Accordingly, we do not hesitate to approve use of a drawing here.

50 IBLA at 93.

The Montrose District Manager, BLM, provided detailed responses to appellant's arguments in a memorandum dated January 10, 1989, to the Regional Solicitor, Rocky Mountain Region, who submitted it to the Board with the answer filed on behalf of BLM. The District Manager provides the following rationale for using a coin toss in awarding the SRP for walk-in fishing:

[I]n the interest of quickly selecting one additional walk-in fishing outfitter before the season ended, BLM chose the lottery system as the method of allocation. Historical use was dismissed by BLM as neither Mark Schumacher [the other applicant] nor Hank Hotze had provided any commercial walk-in fishing services in the Gunnison Gorge in 1987. Also, since both applicants were licensed by the State of Colorado to conduct fishing outfitter/guide services, BLM felt a lottery system was a quick, fair, and low-cost method of selection.

BLM's reasons for awarding the one additional SRP for walk-in fishing by use of a coin toss in the instant case are consistent with the Board's decision in Outdoor Adventures, S.W., supra, even though the use of a coin toss is

not, in fact, a lottery. Nevertheless, the coin toss served the same purpose as a lottery in that it provided a fair opportunity for selection of each applicant. Thus, we reject appellant's contention that use of a coin toss in awarding the SRP was improper.

We are unpersuaded by appellant's argument that "[t]here is no difference between [its] operations since 1981 and that described as a walk-in fishing guide with the exception of the use of a boat." In appellant's view, BLM should have considered its history of performance and compliance as a "fishing/floating outfitter" in awarding the SRP for walk-in fishing, thus obviating the need for a coin toss. In the January 10, 1989, memorandum to the Regional Solicitor, Rocky Mountain Region, the Montrose District Manager, BLM, provided the following discussion of the differences between float fishing and walk-in fishing:

BLM considers float fishing and floatboating different from walk-in fishing. Float fishing and floatboating originate at the Chukar Trail and terminate at the Gunnison Forks Wildlife Management area. River campsites are selected by the river outfitter, usually at the Chukar put-in by listing campsites in the river register. Fishing clients normally fish from rafts or are occasionally dropped off along the shore to bank fish. At campsites, fishing clients will also bank fish. All floatboating fishing outfitters are required by the State of Colorado to be licensed as a river outfitter by the State Parks.

Walk-in fishing outfitters are not permitted for use in the Chukar Trail area to reduce crowding potential and conflicts with floatboaters rigging boats and launching. Walk-in outfitters hike on the Ute or Duncan trails and must use pre-identified camping areas approved by BLM which are located away from the river so as not to conflict with floatboaters. All fishing is bank fishing (or with waders). No boats may be used by walk-in outfitters. Walk-in fishing outfitters are required to be registered with the State of Colorado as outfitter/guides. They are not licensed with the State Parks as river outfitters.

In addition, walk-in outfitters may stay at one camping area for a maximum of three days. River outfitters must move their camp on a daily basis.

We agree with BLM's conclusion that "in permitting both float fishing services and walk-in fishing services, [BLM] recognizes that these are distinctively different recreational pursuits with a distinctively different clientele." Accordingly, we find no error in BLM's decision not to consider appellant's prior use of the Gunnison Gorge as a "fishing/floating outfitter" in awarding the one available walk-in fishing SRP. 1/

1/ See Durangers, 105 IBLA 156 (1988) (the Board affirmed BLM's decision not to distinguish between whitewater activities and float fishing for purposes of implementing its moratorium policy on the Dolores River).

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Appellant also argues that "[a] compromise was proposed between the guide services proposing the walk-in fishing guide service." Because "[a] timetable was not prescribed by the BLM," Hotze assumed the date of issuance of the SRP for walk-in fishing would be October 14, 1988, as with "all Gunnison Gorge outfitting services." In the January 10, 1989, memorandum to the Regional Solicitor, Rocky Mountain Region, the Montrose District Manager, BLM, responded that BLM never received a written proposal, 2/ and that "[a] walk-in fishing permit issued in mid-October, 1988, would essentially be non-usable as it would be issued after the use season." Thus, we find no merit in appellant's argument that "[t]he coin toss was premature, occurring in August, 1988."

In conclusion, we find no error in BLM's decision to award the one additional SRP for walk-in fishing in the Gunnison Gorge for the year 1988 by means of a coin toss.

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:

Bruce R. Harris
Administrative Judge

2/ Three Rivers Resort asserts that appellant's proposal was "one-sided and unacceptable," and that "no compromise between [the] guide services was ever agreed to or proposed to B.L.M."