INTERIOR BOARD OF LAND APPEALS

Frank Robbins, d.b.a. High Island Ranch

167 IBLA 239 (November 30, 2005)

FRANK ROBBINS, d.b.a. HIGH ISLAND RANCH

IBLA 2001-119 Decided November 30, 2005

Appeal from a decision of the Worland, Wyoming, Field Office, Bureau of Land Management, finding that appellant's activities constituted unauthorized, commercial recreation use of public lands and assessing administrative costs, fair market rental value, and a penalty for unauthorized use of Federal land. WYW-150987.

Affirmed in part, vacated in part, and remanded.

1. Administrative Procedure: Adjudication: Leases and Permits–Public Lands: Special Use Permits–Rules of Practice: Evidence--Special Use Permits

   When contemporaneous reports and maps prepared by Bureau of Land Management employees and subsequent affidavits by the employees are sufficient to establish facts to support a decision finding an appellant to have violated 43 CFR 8372.0-7(a) by using public lands for commercial recreation without a special recreation permit, and the appellant does not present evidence which refutes the facts, the decision will be affirmed.

2. Federal Land Policy and Management Act of 1976: Permits--Federal Land Policy and Management Act of 1976: Rules and Regulations--Public Lands: Special Use Permits--Special Use Permits--Trespass: Measure of Damages

   The sanctions for unauthorized commercial recreation use of the public lands are set forth in the regulations governing special recreation permits at 43 CFR 8372.0-7(b) (2000). A decision applying the trespass regulation at 43 CFR 2920.1-2, which pertains to uses not authorized under any other law or regulation, to assess administrative costs, fair market value rental, and a willful trespass penalty for unauthorized commercial recreation use will be vacated.

APPEARANCES: Marc R. Stimpert, Esq., and Karen Budd-Falen, Esq., Cheyenne, Wyoming, for appellant; John R. Kunz, Esq., and John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Frank Robbins and the High Island Ranch & Cattle Co. (Robbins or appellant) [1/] have appealed a December 14, 2000, decision by the Field Manager of the Worland (Wyoming) Field Office, Bureau of Land Management (BLM), finding that cattle drives conducted by appellant as a part of his guest ranch operation on August 23 and September 6, 2000, involved unauthorized commercial recreation use of public lands in violation of 43 U.S.C. § 1732 (2000) and 43 CFR 8372.0-7 (2000). [2/] (WYW-150987.) Based on observations made by BLM personnel, BLM found that on these occasions cattle were driven across the public lands for more than 1.75 miles as part of appellant's advertised cattle drives for which guests paid a fee. (BLM Decision at 2.) Recognizing that appellant has grazing permits for certain public lands, BLM held that grazing permits do not authorize use of the public lands for commercial recreation activities. Id. The BLM decision noted that 43 CFR 8372.0-5(a) defines "commercial use" as "recreational use of the public lands for business or financial gain." The regulations require a special recreation permit for commercial use of the public lands. 43 CFR 8372.1-1. Under the regulations, it is a prohibited act to "[f]ail to obtain a permit and pay any fee required by this subpart." 43 CFR 8372.0-7(a)(1).

In view of prior notification to appellant that this type of operation was not authorized, the Field Manager found that this unauthorized use of the public lands was penalized as a willful trespass under the regulations at 43 CFR 2920.1-2(a). (BLM Decision at 3.) Appellant was assessed with charges for BLM's administrative costs of investigating and processing the unauthorized use ($1500), the fair market value of a special recreation permit based on the minimum fee for a permit ($80), and a penalty of triple that value ($240) for the willful trespass, constituting a total

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[1/] BLM addressed its decision to Frank Robbins and High Island Ranch & Cattle Co. The notice of appeal states that it is on behalf of Frank Robbins and the High Island Ranch. The Statement of Reasons states that it is filed on behalf of Frank Robbins and the High Island Ranch & Cattle Co. which are identified as a single appellant. No assertion is made that the High Island Ranch is a corporate or other separate entity.

[2/] The regulations governing special recreation permits at 43 CFR Subpart 8372 have subsequently been extensively revised and relocated to 43 CFR Subpart 2932. 67 FR 61732, 61740 (Oct. 1, 2002). All citations to special use permit regulations in Subpart 8372 in this decision are to the 2000 edition of 43 CFR.

of $1820. Id. at 3-4. Stating that there was no need for rehabilitation or stabilization of the public lands involved, BLM set the total liability at $1820.00. Id. at 4.

On January 11, 2001, appellant filed a timely Notice of Appeal. On April 13, 2001, he filed a "Statement of Reasons or in the Alternative Motion for Summary Judgment" (hereinafter, "SOR"). Robbins explains that he owns and operates the High Island and "HD" Ranches as a commercial cattle operation and guest ranch and that the latter includes taking paying guests on trail rides and cattle drives. (SOR at 1-2.) Appellant asserts that he does not need a permit for trailing his livestock on BLM lands apart from the participation of paying guests and notes that, prior to its expiration in 1999, he had a special use recreation permit (SRP) issued by BLM for commercial use of public lands so that his guests could trail livestock. Id. at 2. In 1999 BLM denied appellant's application for a new SRP in a decision which was appealed and affirmed by this Board. See Frank Robbins, d.b.a. High Island Ranch, 154 IBLA 93 (2000). Robbins states that he has moved his cattle trail so that its ten-mile length, as shown on a supporting exhibit, is located entirely on his private land and, consequently, he does not need a permit for his guest operation. (SOR at 2.) A map showing both the new route and the old route is attached to the SOR. (Ex. 1.) In support of his motion for summary judgment, Robbins argues that he did not violate any BLM regulation, claims that BLM lacks evidence to sustain the finding made in its decision, contends that any unauthorized use was not willful as required by 43 CFR 8372.0-7(a)(3), and asserts that BLM lacks authority to impose a penalty under 43 CFR Subpart 2920, citing Summit Quest, Inc., 120 IBLA 374 (1991). (SOR at 6-11.) He also asserts that there are issues of equal protection and harassment, but concedes that these assertions are properly cognizable by a court and he raises them only to preserve them as part of the record. (SOR at 11-12.)

In its Answer, BLM asserts as a matter of fact that the cattle drives appellant conducted on August 23 and September 6, 2000, occurred in part on public land as observed and videotaped by BLM employees. It argues in its Answer that BLM properly cited Robbins for conducting unauthorized commercial cattle drives on public lands and that his assertion that he did not "knowingly" use public lands is misplaced because knowledge is not required by the relevant regulation. (Answer at 11-15.) However, BLM concedes that, under the precedent of Summit Quest, Inc., it cannot impose a monetary penalty under 43 CFR 2920.1-2 for a violation of the SRP regulations. (Answer at 16.) BLM requests that the Board affirm its decision that Robbins violated 43 CFR 8372.0-7(a)(1), vacate the penalties, and remand the case to BLM for further review. (Answer at 16-17, 19-20.)

On February 25, 2002, appellant filed a motion to have the Board refer the appeal to the Hearings Division and requested that it be consolidated with Robbins'

appeal of a grazing decision issued January 11, 2001. [3/] See 43 CFR 4.415. He states that "both of these cases involve the same set of allegations concerning the same facts regarding the same event." (Motion for Remand to Office of Hearings and Appeals for an Evidentiary Hearing at 2.) On May 13, 2002, BLM filed a response objecting to the motion. In addition to asserting the lack of any requisite material issue of fact which would necessitate an evidentiary hearing, BLM contends that the January 11, 2001, decision is based upon different events (grazing trespasses) which occurred on August 23 and 30, 2000, and which are distinct from the incidents at issue in the present appeal. (BLM Objection at 8-9.)

Several requests were filed by appellant for an extension to reply to the BLM objection while settlement negotiations were pending. On March 25, 2003, the parties filed a "Joint Motion to Stay Proceedings." The motion explained that there were 16 administrative cases pending between appellant and BLM (including this appeal and 15 appeals before the Hearings Division of the Office of Hearings and Appeals), and that the parties had entered into a "Settlement Agreement." The agreement did not actually resolve the parties' differences over the 16 cases but established a "course of conduct" for them to follow. (Joint Motion at 1-2.) The agreement specified that the parties would seek to have the proceedings stayed and that, if stayed and if:

> a period of 24 consecutive months transpires after the Effective Date of this Agreement without BLM having initiated a formal administrative or judicial proceeding against Robbins alleging willful trespass, the violation of any regulation, law, or BLM decision where range or resource degradation is at issue, or upon completion of a comprehensive land exchange * * *, the Parties shall jointly move to dismiss with prejudice each of the cases * * *, and this agreement shall terminate and be void and of no further force or effect.

(Joint Motion, Ex. 1, ¶ 6.) The agreement also provided that during the 24 months, if BLM, after following the informal dispute resolution procedure defined by the agreement, initiated "a formal administrative or judicial proceeding against Robbins alleging willful trespass, or the violation of any regulation, law, or BLM decision where range or resource degradation is at issue," then BLM could in its sole discretion declare the parties' intent to stay the 16 cases "to be of no further force or legal effect

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[3/] Final BLM decisions issued in the course of administering grazing regulations are subject to appeal to the Hearings Division, Office of Hearings and Appeals, for a hearing before an administrative law judge. 43 CFR 4160.4. Appeals from decisions involving activities authorized by an SRP are subject to appeal directly to this Board. 43 CFR 8372.6(a).

and BLM shall be free to file appropriate pleadings or take any action necessary" to have them "returned to the docket and scheduled for further proceedings." (Joint Motion, Ex. 1, ¶ 6.) By order dated April 25, 2003, the Board stayed further proceedings in this appeal until January 15, 2005, the date requested by the parties.

On May 3, 2004, BLM filed a "Motion to Lift Stay of the Proceedings." It explained that on various dates in December of 2003, BLM personnel had observed cattle on several grazing allotments and had issued two trespass notices. BLM provided documentation showing that it had followed the informal dispute resolution process specified in the Settlement Agreement, the outcome of which was that the designee of the Director of BLM, the Wyoming Deputy State Director for Resources Policy and Management, instructed the Worland Field Manager to issue a proposed decision under 43 CFR 4160. (Motion to Lift Stay, Ex. 3 at 3.) The designee's memorandum specifies that the cattle were owned by Robbins and were found on grazing allotments for which he did not have permitted use. Id. at 2. The proposed decision was issued on January 28, 2004. By letter dated January 30, 2004, the BLM Assistant Director, Renewable Resources and Planning, informed Robbins that the Settlement Agreement "is now void and of no further effect" due to the initiation of formal administrative proceedings by issuance of the proposed decision. (Motion to Lift Stay, Ex. 4.)

Appellant responded on May 18, 2004, stating that he had filed a complaint in Federal District Court alleging that BLM's breach of the Settlement Agreement violated his rights. (Opposition to Motion to Lift Stay of the Proceedings at 2.) Robbins contended that, because the issue of whether the agreement is void was being litigated, the Board should not lift the stay since, if he prevailed, the administrative proceedings would again need to be stayed. The Board did not rule on BLM's motion and the matter has now become moot due to the expiration of the stay on January 15, 2005.

On September 14, 2005, the Board received from BLM a document titled "Notification to the Board" stating that by a Memorandum Order and Opinion dated August 25, 2005, the U.S. District Court upheld BLM's annulment of the Settlement Agreement. As stated in the copy of the order BLM provided:

> The Settlement Agreement distilled the often contentious relationship between the parties into a clear standard. It essentially offered a quid pro quo: if Mr. Robbins followed the rules for twenty-four months the BLM would dismiss a number of pending actions against him. Mr. Robbins did not live up to his side of the bargain, and the Settlement Agreement became void by its own terms; Mr. Robbins was due no more, or no less, process then [sic] he received. This Court

> cannot, under these facts and the plain language of the Settlement Agreement, characterize BLM's decision to void the Settlement Agreement as arbitrary and capricious.

(Memorandum Order and Opinion, Case No. 04-CV-0041-J (Aug. 25, 2005) at 19.)

On September 22, 2005, the Board received from the appellant a document titled "Motion to Reconsider Orders Granting Motion to Reinstate Proceedings." Because the Board has not entered such an order and the Board has verified that the motion was also sent to the Hearings Division, we conclude that this was an information copy for inclusion in the record of this case of the motion sent to the Hearings Division.

The record before the Board contains contemporaneous reports written by Joseph T. Vessels and David Baker describing their encounter with the High Island cattle drive on August 23, 2000. With its Answer, BLM has provided an affidavit by Vessels dated July 10, 2001. (Answer, Ex. 1.) Attached to the affidavit and incorporated by reference therein is a contemporaneous conversation record signed by Vessels recounting his observations on that date. (Ex. A to Ex. 1.) Vessels' report states that the two men and Darrell Barnes, also a BLM employee, were in the Lime Point area of Western Hot Springs County, "situated in T. 43 N., R. 102 W., Section 25, in the southeast corner of the NW¼SE¼ on public land." (Answer, Ex. A to Ex. 1 at 1.) They "observed riders and cattle coming east on the road in the NW¼NW¼ of the same section, on public land" and that "[a]s the cattle drive came into the SE¼NW¼ of the same section the riders moved the cattle off the road in a southeasterly direction toward a gate between the SW¼NE¼ and the NW¼SE¼ of section 25." Id. Vessels goes on to describe Robbins riding up to them and the contentious discussion they had concerning whether they were on public or private land. He states that, after Robbins left and rejoined the cattle drive, they counted 33 riders with the herd and watched as the cattle drive "passed over the saddle and south into section 36 (Wyoming state trust land) * * *." Id. at 2. The route taken by the cattle and riders across the public lands is shown on plats prepared under Vessels' supervision and attached as Exhibits B and C to his affidavit. This account of events on August 23 is corroborated in the written conversation record in the file signed by David Baker.

Plats accompanying the reports show the location of brass caps, the areas of Federal, private, and state lands, the approximate route of the cattle drive, and the locations from which a video of the cattle drive was filmed. (Answer, Exs. B and C to Ex. 1; color copy of Ex. B in case file.) They differ from the plat Robbins has submitted with his SOR in that they show the cattle drive to have entered the NW¼NW¼ of section 25 from Federal land in the SE¼SE¼ of section 23, rather than

entering private land in section 25 from private land in section 26. [4/] These plats also indicate the cattle crossed the SE¼ of section 25 (Federal), rather than the SW¼ (private). See SOR, Ex. 1. An additional copy of the map has handwritten notations made by Vessels showing the location of the gates and allotment fence mentioned in the reports. (Answer, Ex. 1 at 2 and Ex. C to Ex. 1.) Vessels' affidavit states that he "observed the High Island Ranch/Frank Robbins conducting a commercial guest ranch cattle drive over approximately 1¾ miles of public land." (Answer, Ex. 1 at 1.) A second affidavit signed by Darrell Barnes on July 10, 2001, states that he also observed the cattle drive on August 23 being conducted over 1¾ miles of public land. (Answer, Ex. 2 at 2.)

Barnes' affidavit also addresses events on September 6, 2000, as does a report he wrote the next day. The report states that Barnes and Larry Rockhill, a range technician, went to the same area as on August 23, 2000, and observed a cattle drive with an estimated 150 cattle and 20-25 riders. (Answer, Ex. A to Ex. 2.) It further states that after the drive had passed, they went down to the site and that fresh horse and cattle tracks indicated that approximately the same route had been used as on August 23, 2000. Id. Barnes' affidavit states that he "observed the High Island Ranch/Frank Robbins conducting a commercial guest ranch cattle drive over approximately 1¾ miles of public land." (Answer, Ex. 2 at 1.) A plat similar to the plat for August 23, 2000, identifies the observation point. (Answer, Ex. B to Ex. 2; color copy in case file.)

[1] Based upon the observations documented by the BLM employees and their affidavits and supporting plats, it is apparent that the Field Manager's finding that the activities observed on August 23 and September 6, 2000, "constitute unauthorized commercial recreation use" in violation of the regulation at 43 CFR 8372.0-7(a)(1) must be affirmed. On administrative review, a BLM decision must have a rational basis supported by the facts of record. See Dirt, Inc., 162 IBLA 55, 58 (2004); William B. Danielson, 153 IBLA 72, 74 (2000). Administrative decisions are decided on the preponderance of the evidence. Bender v. Clark, 744 F.2d 1424, 1429-30 (10th Cir. 1984); Galand Haas, 114 IBLA 198, 203 (1990); see Patrick Blum, 143 IBLA 73, 77 (1998); Dvorak Expeditions, 127 IBLA 145, 151 (1993). The finding of unauthorized commercial recreation use in this case is supported by a

[4/] BLM notes that for the cattle to have come east along the two-track road to the location where they were spotted in the NW1/4NW1/4 of section 25, they would have had to come through a gate in the pasture fence in the SE1/4SE1/4 of section 23. (BLM Answer at 2 n. 1.)

preponderance of the evidence. [5/] The only evidence Robbins provides to the contrary is the map of a trail which crosses his private land (and Wyoming state land) which appellant indicates is a new trail developed on his private lands to avoid trailing livestock on BLM lands. (SOR at 2 and Ex. 1.) Although the map may be accepted as portraying the route which the cattle drives on August 23 and September 6, 2000, were supposed to follow, it does not establish that it was in fact the route they took. Robbins asserts in his SOR that they did, but offers no evidence in support. [6/]

Robbins challenges BLM's use of the videotape as evidence, asserting that conclusions cannot be accurately drawn from reviewing the videotape. We find it unnecessary to consider the videotape in this case. The BLM finding of unauthorized use of the public lands is supported by the reports of its employees and the maps they prepared at the time as well as their subsequent affidavits. Robbins has submitted no evidence to contradict these accounts, or argued that such evidence exists. (See Supra, n. 6.) [7/] Nor does it matter that BLM cannot specify precisely "how many inches or feet over the approximately known boundary that the supposed trailing occurred." (SOR at 8.) It is sufficient that BLM's employees established their position

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[5/] As BLM points out, Robbins does not dispute the basic fact that the cattle drives at issue qualify as "commercial use." (Answer at 4.) Indeed, he describes his ranch operations as including taking paying guests on trail rides and cattle drives (SOR at 2) and documents in the case file (apparently advertising) confirm this fact.

[6/] Robbins' "Motion for Remand to Office of Hearings and Appeals for an Evidentiary Hearing" quotes Felix F. Virgil, 129 IBLA 345, 347 (1994), to the effect that normally the Board will order a hearing only when a material issue of fact requires the introduction of testimony or other evidence that cannot be obtained through the appeals process and that a request for a hearing is properly denied when the appeal can be resolved based upon documentary submissions. Although appellant is clearly aware of the standard the Board applies, he has neither tendered any affidavits or other evidence to raise a factual issue requiring a hearing nor described the evidence he would present at a hearing other than his testimony about his state of mind. See Obsidian Services, Inc., 155 IBLA 239, 248 (2001); American Stone, Inc., 153 IBLA 77, 80 (2000). Accordingly, the motion is denied.

[7/] In an Oct. 3, 2000, letter responding to BLM's Notice of Unauthorized Use, dated Sept. 22, 2000, Robbins implied strongly that he was not operating a commercial cattle drive on the relevant dates. His SOR abandons this contention.

and identified relevant corners of the public land survey by use of a GPS device and observed the riders trailing cattle over a significant extent of public land. [8/]

Robbins asserts that BLM cannot justify treating the events of August 23 and September 6 differently from similar incidents on June 26-28. Apparently, BLM encountered Robbins running a cattle drive over a small segment of public land on those dates in June, but did not find Robbins to be in violation of BLM regulations. Robbins' view rests upon a misunderstanding of the regulation which allows BLM to "determine that permits and fees are unnecessary where a use or event begins and ends on non-public lands or related waters, traverses less than 1 mile of public lands or 1 shoreline mile, and poses no threat of significant damage to public land or water resource values." 43 CFR 8372.1-3(b). As stated in its decision, "BLM's observation of your guest cattle drive on June 26 – 28, 2000 indicated that it was conducted substantially on your private land" and "it was determined that this use involved slightly less than 1 mile of public lands and was considered incidental." (Decision at 2.) As stated above, BLM determined that each of the cattle drives on August 23 and September 6 crossed 1¾ miles of public land. Not only are the distances different but, as set forth in the decision, BLM found Robbins to be in violation of 43 CFR 8372.0-7(a)(1) and, consequently, it has no obligation to establish that there was a "threat of significant damage to public land or water resources" as defined in the exception in 43 CFR 8372.1-3(b). See SOR at 7 and 8. Contrary to Robbins' understanding, BLM does not need to establish that his use fails to qualify under the "exception." See SOR at 5 and 6. The provision sets forth one circumstance in which BLM may exercise its discretion to refrain from issuing a violation notice for

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[8/] It is the use of videotaping and GPS equipment that forms the basis for appellant's assertion of an equal protection violation, in that he claims his neighbors are not subject to such verification "tactics" by BLM. BLM replies that it has not encountered the neighbors blatantly crossing public lands without permits, and thus its failure to use such equipment in documenting their behavior comes from a lack of violations on their part. We think it worth pointing out that the record of contentious interaction between BLM and Robbins fully supports BLM's efforts to verify the basis of any action it may take with respect to him. BLM's contemporaneous reports of these events reflect that BLM employees believed Robbins to be confrontational and belittling. Whether or not this was true, and whether or not Robbins' view is that it is BLM who is confrontational, are irrelevant in the face of written letters by Robbins in the BLM record which are sarcastic and threatening of BLM employees' job status. See e.g., Aug. 27, 2000, letter from Robbins to BLM ("I told him that he and Barnes were going to lose their jobs." "I ask[ed] where their fearless leader might be.") In light of the confrontational and dysfunctional nature of the BLM/Robbins interactions, Robbins should be aware that BLM would be remiss in failing to document, as carefully as possible, its actions in respect to him.

incidental use without a permit. That BLM exercised its discretion in that manner, beneficial to Robbins, for events in June in no way constrained or estopped BLM from finding violations for more than incidental use later on.

Robbins' additional argument that BLM cannot prove a willful violation also attempts to import an inapplicable portion of the regulations. (SOR at 8-9.) The provision he cites, 43 CFR 8372.0-7(a)(3), states that it is prohibited to "participate knowingly in an event or use subject to the permit requirements of this subpart where no such permit has been issued." While Robbins' customers might have been cited for violating this provision, he was not. Rather, as stated at the outset, BLM's decision relies upon subpart (a)(1) of the same subsection. It addresses the failure to obtain a permit and does not have any wording which could be construed to require knowledge or a particular state of mind.

[2] Finding that the activities cited by BLM constitute unauthorized commercial recreation use, we must address the monetary assessment imposed by the BLM decision pursuant to the regulation at 43 CFR 2920.1-2. As noted above, our holding in this regard is controlled by the analysis set forth in Summit Quest, Inc., 120 IBLA at 377-79. Thus, the penalties for trespass at 43 CFR 2920.1-2 are part of a different regulatory structure than the violations at 43 CFR 8372.0-7(a). The regulation at 43 CFR 8372.0-7(b) provides the penalties for violations of the regulations at 43 CFR Subpart 8372. These penalties are criminal in nature and are imposed in a judicial proceeding, rather than by BLM in an administrative adjudication. See Osprey River Trips, Inc., 83 IBLA 98, 102 (1984). The sanctions for unauthorized use of the public lands (trespass) set forth at 43 CFR 2920.1-2 which were applied by BLM in this case, including assessment of the administrative costs incurred, the fair market rental value of the land, and penalties for willful trespass, apply to use without authorization pursuant to 43 CFR 2920.1-1. Since the latter regulation expressly applies to uses not specifically authorized under other laws or regulations and SRPs for commercial recreational use of the public lands are authorized by the regulations at 43 CFR Subpart 8372, the Board has held that the enforcement provisions at 43 CFR 8372.0-7 do not authorize these trespass assessments under 43 CFR 2920.1-2 for violation of the regulations at 43 CFR Subpart 8372. Summit Quest, Inc., 120 IBLA at 379. Accordingly, given that BLM agrees that the appropriate violation is found in 43 CFR 8372.0-7, we vacate the BLM decision in part to the extent that it assessed appellant for administrative costs, rental

value of the land, and a penalty of three times the rental value for a knowing and willful trespass under 43 CFR Subpart 2920, and remand the case to BLM. [9/]

Therefore, 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 in part, vacated in part, and the case is remanded.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Lisa Hemmer
Administrative Judge

[9/] The inapplicability of the payments assessed by the Field Manager does not vitiate his finding that appellant conducted commercial recreation use of public land without a permit in violation of 43 CFR 8372.0-7(a)(1).