

INTERIOR BOARD OF LAND APPEALS

Judy K. Stewart d.b.a. Western Wilderness Outdoor Adventure

153 IBLA 245 (September 5, 2000)

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JUDY K. STEWART d.b.a.
WESTERN WILDERNESS OUTDOOR ADVENTURE

IBLA 98-76

Decided September 5, 2000

Appeal from a decision of the Bureau of Land Management denying an application for a Special Recreation Permit. CO-01617-8735.

Affirmed.

1. Special Use Permits

Regulations governing special recreation permits are set forth in 43 C.F.R. Subpart 8372. The regulations state that the holder of an SRP is prohibited from violating the conditions and stipulations governing its terms, 43 C.F.R. § 8372.0-7(a)(2), and although the regulations do not specify administrative sanctions for violations, if BLM notifies the permittee of those sanctions, it may impose them for violations. Appellant received such notification in the form of Standard Stipulation No. 6, which reserved to BLM the right to place a permittee on probation, to suspend or revoke an SRP, or to refuse to issue a permit in subsequent years for violations.

2. Administrative Procedure: Administrative Review--Administrative Procedure:
Administrative Record-- Rules of Practice: Generally--Special Use Permits

Pursuant to 43 C.F.R. § 8372.3, approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer. To withstand administrative review, however, an exercise of discretionary authority must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion. Thus, decisions imposing sanctions for violation of permit terms, waiving permit terms, or excusing noncompliance will be upheld, unless it is shown that the decision was arbitrary, capricious, or based upon a mistake of fact or law.

3. Administrative Procedure: Administrative Review--Administrative Procedure: Administrative Record-- Rules of Practice: Generally--Special Use Permits

Where appellant neither acknowledges the evidence nor directly responds to it, and fails to submit any evidence to support its version of relevant events, appellant has not demonstrated that the decision is arbitrary, capricious, or based on a mistake of fact or law. In such a case, BLM has discharged its burden of demonstrating by a preponderance of credible evidence that appellant violated applicable Conditions and Standard Stipulations of its special recreation permit. A decision denying an application for an SRP will be affirmed where the decision to do so is supported by facts of record and there are no compelling reasons for modifying or reversing it, and in those cases where the basis for the decision is clear from the record and unrefuted by appellant, we will not substitute our judgment for that of the BLM official exercising his or her discretion.

APPEARANCES: James D. Osborne, Esq., Craig, Colorado, for Judy Stewart d.b.a. Western Wilderness Outdoor Adventures; Brock Wood, Esq., Office of the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Judy K. Stewart (Stewart) d.b.a. Western Wilderness Outdoor Adventure (Western Wilderness) has appealed an October 27, 1997, decision of the Snake Resource Area Manager, Bureau of Land Management (BLM), Craig, Colorado, denying her application for a special recreation permit (SRP) for the 1997-98 mountain lion hunting season in the Little Snake Resource Area (LSRA).

Appellant's application was filed May 5, 1997, and sought to use Big Game Units 1, 2, 201, and 10 of the LSRA for commercial lion hunts between November 15, 1997, and April 15, 1998. The application stated that the hunting parties would consist of approximately five hunters and that all the camps would be located on private lands. The application acknowledged that BLM had issued an SRP to appellant for the same activity in 1995.

BLM cited three grounds for denying the permit, two of which are related. BLM stated that the post-use report filed by appellant for the last lion season for which appellant held a permit, January 3, 1997,

through April 15, 1997, failed to record a January 27, 1997, hunt. BLM stated:

Your Post Use Report for the last Lion season, January 3, 1997[,] through April 15, 1997, for which you had an SRP with this office, reports the first use to be on February 8, 1997. The Colorado Division of Wildlife (DOW) checked a lion on January 28, 1997, killed by one of your clients on January 27, 1997. This hunt and the revenue received from it are not reported on your Post Use Reports. Complete and accurate Post Use Reports are a requirement of the permit, therefore, your permit application is denied.

As a second ground, BLM stated that when a District Wildlife Manager of the Colorado Department of Natural Resources, Division of Wildlife (DOW), checked the January 27 lion kill, he determined that Corey Knowlton was the guide for the hunt, though he was not listed as a guide on appellant's Operating Plan until February 18, 1997. On that date, BLM received a telephone call from appellant seeking to amend its Operating Plan to list Knowlton. BLM therefore concluded that "the hunt of January 27, 1997, was conducted outside your approved operating plan, a violation of your SRP (see Standard Stipulation #1 attached to your 1997 SRP). Your pending SRP application is denied for violation of a previous year permit stipulation." (Decision at 1.)

Third, BLM stated that information regarding appellant's SRP use in the LSRA during the preceding lion hunting season showed that Keith Stewart was actively involved in appellant's SRP activities, although Stewart had averred in her 1996-1997 SRP application that Keith had been removed from serving with Western Wilderness in any capacity. (Decision at 2.) Keith is Stewart's husband. His outfitter's guide license and registration was revoked by the Colorado Office of Outfitter Registration on December 12, 1990, and as a result, he was ineligible to apply for Forest Service or BLM outfitter-guide permits. ^{1/}

In her statement of reasons for appeal (SOR), appellant claims that the January 27 hunt "was not a guided, paid for hunt nor was it contracted through Judy Stewart nor her business Western Wilderness Outdoor Adventure." (SOR at 1.) She states that the January 27 hunt was an occasion on which several friends hunted together and that there was no compensation for it. (SOR at 1.) Because it was not a commercial hunt conducted

^{1/} A copy of the Final Agency Order issued in Case No. OG 89-01 by the Colorado Office of Outfitter Registration was submitted as Exhibit 2 to BLM's Answer. That order allowed Keith the right to reapply for registration after the expiration of 1 year from the effective date thereof. Appellant has not stated or suggested that Keith was a registered outfitter at the time of the events here at issue, and so we assume that he did not avail himself of the opportunity to reapply or was unsuccessful if he did.

by Western Wildemess, Stewart concludes that she was not required to file any information regarding it on her post-use reports for the past lion season. Stewart argues that Knowlton was not a guide for the hunt, he was merely a participant in the "buddy hunt," and because he was not appellant's employee in January 1997, there was no requirement to identify him in appellant's Operating Plan for the January 27 hunt. Instead, he was properly added to the Operating Plan on or about February 18, 1997, "after he had completed certain class work relating to first aid." (SOR at 2.)

Appellant's argument that the January 27 lion hunt was merely a group of friends hunting is at odds with the evidence. As BLM points out in its Answer, that evidence establishes the following: The Post-Use Report does not mention any hunt or kill on January 27. Appellant's Operating Plan, as amended on December 30, 1996, identifies Tom Boyer and Legland Evans as the persons authorized to represent appellant as employees, guides, or contract help. On February 1, 1997, BLM District Ranger Edward Patrovsky prepared an Incident Record after he was contacted by DOW regarding the hunting activities of appellant and her husband. According to that Incident Report, on February 1, 1997, the District Ranger tracked the vehicle of members of the Stewart hunting party to the White River Resource Area in Moffat County, Colorado. The vehicle was stuck in snow and contained three occupants, all of whom the District Ranger interviewed. Robert Bulaw identified the other two men, Boyer and Bret (Kyle) Stringham, as guides for Western Wildemess. Boyer and Stringham "denied that they worked as guides," and said that they were hunting recreationally. At a subsequent interview later that same day, the group again claimed to be hunting recreationally, and Bulaw claimed he was a friend of Keith, although he had difficulty remembering Stewart's name. (Exh. 6 to Answer.)

By letter dated February 12, 1997, Bill de Vergie, a DOW District Wildlife Manager, wrote to the LSRA Area Manager confirming, on the basis of personal knowledge, that Stewart had a valid 1997 DOW outfitter's license; that he had had several contacts with Keith and associates hunting in the LSRA, and several conversations with "friends and hunters" 2/ on February 8, 1997, which strongly suggest that Keith was guiding or directing the hunting activity; that Stewart had made inconsistent statements regarding Boyer's role and function in the hunting party; and that she had confirmed that two members of the party had booked the hunt with Western Wildemess. (Exh. 5 to Answer.)

By letter dated October 17, 1997, Bradford B. Petch, a DOW District Wildlife Manager in Maybell, Colorado, wrote the LSRA Area Manager to relate evidence regarding appellant's activities in various areas. That letter recounted that Stewart had been "prominent during much of the time," that appellant's guides and clients were hunting in the Maybell area in

2/ The letter does not directly state that they were Keith Stewart's friends and hunters, but the rest of the letter names persons associated with him and appellant.

January and February 1997; that Keith had referred to the hunters as "his hunters" in a conversation with the proprietor of a local store; that on February 8, 1997, Petch found Keith transporting David Goodrich, a person identified by Stewart as client, from one hunting site to another; that Keith was with clients "for the majority of that day;" and that when contacted by a Moffat County Deputy Sheriff on February 9, 1997, both Keith and Goodrich explained that they were lion hunting. In addition, the letter provided further details with respect to "dates when admitted clients were known to have been operating with Judy Stewart's outfitting business in the 1996-97 lion season." (Exh. 1 to Answer at 1.) These details are as follows:

My first contact with a Stewart Hunter occurred on 01/28/97. I checked a lion killed by Joseph Tokash of Pennsylvania. The lion had been killed on Little Bears Ears the day prior. The hunt is believed to have lasted two days. Tokash, Mark Tokash, and Corey Knowlton camped on the lion's track on the night of 01/26/97. Knowlton operated as a guide for Judy Stewart during the 96-97 lion season. Knowlton claimed that the Tokash hunt was not an outfitted hunt. Tokash explained that he and Keith Stewart had traded hunts. Colorado State Statute provides that any value received for hunting constitutes an outfitted hunt (even traded hunts).

Two Stewart clients were contacted several times on BLM land on 02/08/97. Steven Gateman of Michigan and David Goodrich of Colorado were both identified by Judy Stewart as paid clients. Both hunted BLM lands for at least two days.

(Exh. 1 to Answer at 2.) In addition to the foregoing statements, we have been provided excerpts of what appear to be the rules governing licensing and registering of outfitters in Colorado in Exhibit 3 to BLM's Answer. These excerpts, 3/ define "guide" and "outfitting services" in a manner which makes it clear that the activities alleged and observed by BLM and DOW, if true, constitute "outfitting."

Finally, the relevant conditions and stipulations to which appellant's 1996-1997 SRP was subject should be detailed. Standard Condition No. 6 obligates the permittee to "observe all Federal, State, and local laws and regulations applicable to the premises." It was issued subject to a number of Standard Stipulations, No. 1 of which states: "The completed and approved operating plan is considered part of your permit stipulations. You must follow the operating plan you submit. You must receive the approval of the Area Manager before deviating from the approved operating plan." Standard Stipulation No. 6 advises that

BLM reserves the right to put a permittee on probation, suspend, or revoke a permit for reasons such as, but not limited

3/ The excerpts have not been addressed or challenged by appellant, and thus we accept them at face value.

to, noncompliance with stipulations, failure to adhere to the operating plan, or untimely permit reporting or use fee payments. This may also result in BLM's refusal to issue a permit and/or Annual Operating Authorization for subsequent years. This action will also apply to permits you hold in other resource areas or districts.

Additionally, Standard Stipulation No. 8 advises that the "[p]ermittee is responsible for all actions of employees and clients on both public and private lands."

On appeal, appellant adheres to its claim that the hunt was not a "commercial" hunt and therefore not subject to the conditions and stipulations of the SRP. See 43 C.F.R. § 8372.0-5(a). Thus, appellant disputes the assertion that Keith was actively involved in SRP activities for Western Wilderness during the January 3 through April 15, 1997, season. According to appellant, Keith hunted as a private individual on different occasions but was not a guide, agent nor an employee of Western Wilderness for its commercial hunts. (SOR at 2.) Appellant argues that a private individual may hunt and gain access to public lands without obtaining an SRP and is not subject to regulation as to access. Moreover, appellant denies that Keith's individual activities are chargeable to Western Wilderness, or otherwise affect the application for the SRP permit, given that he had been removed from, and has no ownership interest in Western Wilderness. Alternatively, appellant argues that BLM's interest in Keith relative to Western Wilderness must be limited to the use of BLM land, and his activities on private lands are beyond BLM's purview and cannot be the basis for any action taken by BLM. (SOR at 2.)

Lastly, appellant notes that the Operating Plan attached to BLM's decision was dated May 19, 1997, whereas the lion hunting season at issue was January 3, 1997, through April 15, 1997, and therefore had concluded prior to the Operating Plan of May 13, 1997. (SOR at 2.)

Special recreation permits are issued pursuant to the Land and Water Conservation Fund Act, 16 U.S.C. § 4601-6a (c) (1994), which states that "special recreation permits for uses such as group activities, recreation events, motorized recreation vehicles, and other specialized recreation uses may be issued in accordance with procedures and at fees established by the agency involved." See also section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1994), which generally requires the Secretary to manage the public lands under terms and conditions which are consistent with FLPMA and other applicable law.

[1] Regulations governing SRP's are set forth in 43 C.F.R. Subpart 8372. See also Special Recreation Permit Policy Statement (Policy Statement), 49 Fed. Reg. 5300 (Feb. 10, 1984), which recognized and provided for specialized individual uses in areas requiring special management, as well as commercial and competitive recreational uses. As this Board has observed in the past, the regulations state that the holder of an SRP

is prohibited from violating the conditions and stipulations governing its terms, 43 C.F.R. § 8372.0-7(a)(2), and although the regulations do not specify administrative sanctions for violations, if BLM notifies the permittee of the range of potential sanctions, it may impose them for violations. Appellant received such notification in the form of Standard Stipulation No. 6. See Carrol White, 132 IBLA 141, 150 (1995), and cases cited therein. In signing and accepting the 1996-1997 SRP, appellant acknowledged and agreed that, among others sanctions, BLM could deny an SRP application in subsequent years. The evidence pertaining to Stewart's and Western Wilderness' hunting activities in February 1997 are therefore relevant to the decision ultimately made by the Area Manager.

[2] Moreover, pursuant to 43 C.F.R. § 8372.3, "approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer." To withstand administrative review, an exercise of discretionary authority must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion. Terry Kayser, 136 IBLA 148, 150 (1996); Four Corners Expeditions, 104 IBLA 122, 125-26 (1988). Thus, decisions imposing sanctions for violation of permit terms, waiving permit terms, or excusing noncompliance will be upheld, unless it is shown that the decision was arbitrary, capricious, or based upon a mistake of fact or law. Dvorak Expeditions, 127 IBLA 145, 151 (1993); Four Corners Expeditions, *supra* at 127. If a decision has any rational basis, it will not be held arbitrary and capricious. Robert E. Miller, Jr. v. BLM, 118 IBLA 354, 357 (1991).

Rather than addressing the particulars of these allegations and the evidence supporting them to demonstrate that the decision is arbitrary, capricious, or based upon a mistake of fact or law, or submitting evidence controverting that contained in the record, appellant offers only its characterization of the January 27 hunt as a noncommercial gathering of friends, obviously intending to cast doubt on the ultimate conclusions BLM drew from the evidence described herein. The only evidence that Western Wilderness has addressed is the Operating Plan attached to BLM's decision. Noting that the attached Operating Plan was dated May 13, 1997, and on its face was therefore applicable to a period following the January 27 hunt, appellant implies that there can be no violation of the plan. (SOR at 2.) This argument is disingenuous at best.

A comparison of the Operating Plan submitted with appellant's application on May 20, 1996, with that appended to the decision shows that they are copies of the same application. Even as photocopies, it is apparent that Stewart merely masked or "whited out" earlier dates and wrote in the current date to reuse the completed application. This is what she did for the 1996-1997 SRP as well, as evidenced by her unmistakable conversion of the date in item 4 of the SRP application from April 15, 1996, to April 15, 1997, and a hand-written change in the Permit No., which suggests Stewart may have used the same copy for application(s) prior to the 1996-1997 season. Thus, there is no material difference between the permit conditions

and stipulations by which Western Wilderness was bound or would have been bound, had the SRP application been approved for the 1996-1997 season. Appellant wisely did not mount a direct attack on the sufficiency of the record based upon the error in attaching the wrong version to the decision, an error for which Stewart bears at least some responsibility, since it is she who chooses to reuse copies of the same SRP application in this manner. Thus, we refuse to ascribe the evidentiary significance to the mistake that appellant suggests.

[3] Indeed, with the one exception discussed above, appellant neither acknowledges the evidence nor directly responds to it, so that it stands unrefuted. Having failed to submit any evidence to support its version of the events of January 27, Western Wilderness has failed to demonstrate that the decision is arbitrary, capricious, or based on a mistake of fact or law. We find that BLM has discharged its burden of demonstrating by a preponderance of credible evidence that appellant violated applicable Conditions and Standard Stipulations. See Carrol White, *supra* at 150; Dvorak Expeditions, *supra* at 151. A rejection of an application for an SRP will be affirmed where the decision to do so is supported by facts of record and there are no compelling reasons for modifying or reversing it, and in those cases where the basis for the decision is clear from the record, we will not substitute our judgment for that of the BLM official exercising his or her discretion. Daniel T. Cooper, 150 IBLA 286, 291 (1999); Red Rock Hounds, Inc., 123 IBLA 314, 318-19 (1992).

Therefore, 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 is affirmed.

T. Britt Price
Administrative Judge

I concur:

John H. Kelly
Administrative Judge