INTERIOR BOARD OF LAND APPEALS

Noah's World of Water

141 IBLA 288 (December 1, 1997)

NOAH'S WORLD OF WATER

IBLA 95-53 Decided December 1, 1997

Appeal from a decision of the Klamath Falls, Oregon, Resource Area Office, Bureau of Land Management, denying a claim for reimbursement of recreation permit fees. Permit #159.

Affirmed.

1. Bureau of Land Management--Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

   The BLM resource area offices are empowered to agree that one office will manage recreational use of a river corridor flowing through lands administered by both offices. In such cases, the designated area office will issue and administer special recreation permits for recreational use of the portion of the river running through both resource areas, and a permittee's request for a reduction in permit fees based, in part, on recreational use of waters flowing through lands administered by the nonmanaging area office is properly denied.

APPEARANCES: Jack B. Buster, Ashland, Oregon, for Noah's World of Water; Donald P. Lawton, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Noah's World of Water (Noah) has appealed an August 30, 1994, Decision issued by the Klamath Falls Resource Area Office (Klamath Falls Office), Bureau of Land Management (BLM or Bureau), denying its claim for reimbursement of 40 percent of the fees paid pursuant to Special Recreation Permit No. 159 during the period from 1986 through 1994.

Noah provides commercial rafting and fishing trips on the upper Klamath River from the Spring Island put-in immediately below the John C. Boyle power plant in Oregon to the Copco Reservoir in California, pursuant to a special recreation permit first issued by the Klamath Falls Office in

1986. During the period from 1986 through 1994, Noah has paid permit fees equal to 3 percent of the gross revenues it received from the commercial activities authorized by the permit.

In a letter dated July 17, 1994, Noah sought clarification of the downstream termination point for its use pursuant to the permit, stating its impression that the area downriver from the Oregon-California state line was bounded by private property and was therefore not subject to BLM regulation. On July 20, 1994, a Klamath Falls BLM employee incorrectly advised Noah by telephone that BLM did not manage the Klamath River below the state line.

On August 15, 1994, Noah filed a claim for reimbursement of $7,491.30 in excess fees and $1,443.47 in interest for a total of $8,934.77. Based on the BLM statement regarding river management, Noah asserted that it was entitled to a 40-percent fee reduction because only between 6 and 60 percent of its total commercial trip time was spent on public lands or related waters. 1/ Noting that this reduction was authorized by the BLM Manual, H-8372-1 V.B.2. (Rel. 8-33 Sept. 9, 1987), Noah determined that only 47.5 percent of its activities were performed on public lands, because the time spent on the California side of the state line was spent on nonpublic land and waters.

In its August 30, 1997, Decision, rejecting Noah's claim, the Klamath Falls Office stated that its Klamath River recreation management responsibilities extended from the John Boyle Dam to the slack water of Copco Reservoir, a portion of the stream coinciding with the segment of that river addressed in a March 1990 Upper Klamath River Wild and Scenic River Study. The Klamath Falls Office explained that for many years the Klamath Falls Office and the Redding, California, Resource Area Office (Redding Office), which managed the public land adjacent to the river

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1/ On Aug. 24, 1994, Noah filed a second claim for reimbursement of excess fees paid, asserting that BLM had no authority to manage any part of the Klamath River because that river was navigable. Noah sought an additional deduction of 40 percent, for a total reduction of 80 percent of the fees it had paid, based on its calculation that 95.5 percent of its trip time occurred on nonpublic land and waters. The Klamath Falls Office rejected the second claim on Oct. 14, 1994. The issues raised in the second claim for reimbursement are not now before us. Jack B. Buster attempted to appeal this rejection on his own behalf as the assignee of Noah's claim (IBLA 95-134), and the Board dismissed the appeal for lack of standing by Order dated Nov. 12, 1997. We note, however that the Federal courts have recognized the Government's power under the Property Clause of the U.S. Constitution, art. IV, § 3, cl. 2, to regulate conduct off public lands and on navigable waters if necessary to protect Federal land and waters. See Minnesota v. Block, 660 F.2d 1240, 1249-50 (8th Cir. 1981); United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979); United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977).

between the state line and the Copco Reservoir, had decided to improve public service by having the Klamath Falls Office issue and administer permits. The Decision noted that this arrangement has reduced costs to both BLM and permittees, and that coordination between BLM offices and issuance of joint permits followed BLM Handbook guidelines encouraging such measures. Selection of the Klamath Falls Office as the lead office also conformed to the Handbook's direction that permits be issued by the office managing the most significant portion of the river or acreage.

The Decision further advised Noah that the BLM employee who stated that BLM did not manage the Klamath River below the state line was a second-year, seasonal BLM employee who erred when he indicated that the administrative jurisdiction for special recreation permits ceased at the state line. Noting that the time line provided in Noah's claim indicated that over 60 percent of the trips occurred on public lands and related waters, the Klamath Falls Office disallowed any discount for the time spent on nonpublic lands and waters, and denied Noah's claim for reimbursement. The Decision also stated that, to correct the current permit's omission of Noah's use of public lands between John Boyle Dam and the Spring Island put-in, Noah's permit would be amended to more clearly state that it included use of public lands between the dam and Copco Lake, California.

On appeal Noah challenges virtually every aspect of the Klamath Falls Office's Decision. Noah disputes the validity of the arrangement between the BLM offices, asserting that it presupposes that the Redding Office has authority to manage the California segment of the upper Klamath River, a claim which he asserts is undermined by Federal ownership of only a small percentage of the river frontage on that segment. Noah maintains that no Federal agency manages passenger traffic on the California segment of the river corridor.

Noah submits that the Klamath Falls Office's purported disavowal of its employee's representation that administrative jurisdiction for special recreation permits ends at the state line fails, because the employee was acting as the Area Director's agent. Noah avers that it properly relied on the statement, which binds BLM under agency law principles.

Noah acknowledges that over 60 percent of its trips are conducted on public lands and waters but contends that BLM does not manage water, only land, and less than 5 percent of Noah's trip time is spent on public land. According to Noah, the Klamath Falls Office's planned use of the words "public lands" in Noah's future permits concedes BLM's lack of authority over water and thwarts BLM's attempt to administer the California segment of the river, there being no public land between the state line and Copco Lake. Noah also questions BLM's good faith when controlling recreation management of the river corridor and suggests that BLM's conduct could be viewed as an illegal conspiracy to usurp unauthorized power.

In its Answer, BLM notes that Noah's permit covers approximately 11 river miles in Oregon and 5 miles in California and that the United

States owns approximately 90 percent of the river frontage in Oregon and 8 percent of the river frontage in California. 2/ The Bureau contends that the understanding between the Klamath Falls Office and the Redding Office provides ample basis for the Klamath Falls Office's issuance of commercial rafting permits for the river corridor in both states, adding that the informal agreement originated in 1982 while the Medford District Office (Medford Office) had jurisdiction over public lands in the Oregon portion of the river corridor. According to BLM, the Medford Office and the Redding Office agreed to have the Medford Office issue permits and collect fees for use of the upper Klamath River in California as well as Oregon because that office managed most of the land along the river, and the Redding Office had no prior experience with regulating private outfitters. The Bureau notes that the agreement remained effective following the 1987 modification of the boundaries of the Medford and Lakeview Districts and the transfer of river management responsibilities to the Klamath Falls Office. The Bureau notes that the understanding was formalized in a Memorandum of Understanding (MOU) on October 5, 1994. 3/

The Bureau counters Noah's contention that no Federal agency manages commercial rafting activity on the California segment of the river by reciting the numerous functions carried out by the Klamath Falls Office to maintain and enhance the recreation and scenic resources on PP&L lands and public lands in California. Additionally, BLM advises that the Klamath Falls Office, the Lakeview District Office, and PP&L have held regular coordination meetings since 1988 to address recreation issues on both the Oregon and California segments of the river and that some of those meetings included permittees including Noah. See Answer, Ex. 2, ¶¶ 4-5. The Bureau also submits a declaration from the employee who had made the statement to Noah, stating that his erroneous impression that his jurisdiction as an employee of the Klamath Falls Office stopped at the state line was based on a miscommunication and that, upon learning of the informal agreement, he extended his river patrols to the takeout point in California. See Answer, Ex. 7, at 2.

2/ On Sept. 22, 1994, the Secretary of the Interior designated the 11-mile stretch of the Klamath River from the John C. Boyle power plant to the state line as a state-administered component of the National Wild and Scenic Rivers System. Notwithstanding the designation, BLM anticipates that it will continue to manage its own lands and related waters. We need not consider what effect, if any, the designation will have on future management of recreation on the river corridor.

3/ A 1991 MOU between BLM's Oregon and California offices, private land owners Pacific Power & Light Company (PP&L) and Weyerhauser, the Oregon Department of Fish and Wildlife, and the California Department of Fish and Game also provides for the cooperative management of lands along the upper Klamath River.

The Bureau disputes Noah's assertion that BLM has no authority over water, citing the present BLM national policy on the regulation of recreational activity, which requires the acquisition of a permit and the payment of fees for the use of public lands and related waters, not just public lands. This policy, BLM submits, has been incorporated into the regulations in 43 C.F.R. Subpart 8372 which are duly promulgated regulations binding on the Department. Because Noah admittedly spent over 60 percent of its trip time on BLM managed lands and waters, BLM maintains that Noah is not entitled to any fee reduction. 4/

[1] The Secretary of the Interior issues special recreation permits under the authority of the Land and Water Conservation Fund Act, 16 U.S.C. § 460l-6a(c) (1994), which provides: "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 43 C.F.R. § 8372.0-3; Special Recreation Permit Policy Statement (Policy Statement), 49 Fed. Reg. 5300 (Feb. 10, 1984). The Bureau implemented this and other statutory provisions, including sections 302(b) and 304 of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1732(b), 1734 (1994), by promulgating the regulations in 43 C.F.R. Subpart 8372. The Board has found earlier versions of these regulations to be supported by ample statutory bases and, therefore, to have the force and effect of law and be binding on the Department. Rogue River Outfitters Association, 63 IBLA 373, 382-83 (1982). The current regulations, grounded on the same statutes, similarly have the force and effect of law and are binding on the Department.

The regulations generally require acquisition of special recreation permits and the payment of fees for commercial use of lands and waters administered by BLM. See 43 C.F.R. §§ 8372.0-1, 8372.1-1, 8372.4. Although Noah maintains that permits and fees can only be mandated for use of lands, not water, the preamble to the final regulations in 43 C.F.R. Subpart 8372 specifically states that "public lands" includes "any land or interest in land administered by [BLM], and waters related thereto." 49 Fed. Reg. 34332, 34336 (Aug. 29, 1984). Therefore, BLM properly assesses fees for the use of related waters as well as land.

The crux of Noah's claim for a 40-percent fee reduction rests on its contention that the Klamath Falls Office had no jurisdiction over the

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4/ A trip time line included in BLM's Answer estimates that Noah spends approximately 76 percent of its trip time on public lands and waters including those under cooperative agreement with PP&L. See Answer, Ex. 2, ¶ 2. Noah's strenuous objection to BLM's addition of 15 minutes to the length of the launch time does not alter the critical fact that, under both time lines, over 60 percent of Noah's trip time occurs on BLM managed lands and waters.

river below the Oregon-California state line. Although Noah challenges the validity of the understanding between the Klamath Falls Office and the Redding Office, the Policy Statement specifically encourages the use of cooperative agreements between BLM offices when, for example, a river crosses administrative boundaries but is best managed as a single unit. 49 Fed. Reg. 5301 (Feb. 10, 1984). Similarly, the BLM Handbook authorizes the use of joint permits when commercial recreation activities involve more than one BLM jurisdiction, to improve public service and reduce administrative costs for both BLM and the permittee, and specifies that the office responsible for the major portion of the activity should issue the permit. See BLM Manual, H-8372-1 VII.F. (Rel. 8-33 Sept. 9, 1987).

The record amply supports the existence of the understanding, beginning in 1982, and we find that the Klamath Falls Office properly managed recreation activity on the entire stretch of the upper Klamath River between the Spring Island put-in in Oregon and Copco Lake, California. The record further establishes that the Klamath Falls Office not only oversees recreation on public lands and related waters in the river corridor, but also has actively managed such activity on PP&L lands and related waters pursuant to a cooperative agreement for several years. We, therefore, uphold the Klamath Falls Office's issuing permits governing Noah's use of the California segment of the river and counting time spent on public land and related waters in the California segment when assessing fees for Noah's use.

We also reject Noah's contention that the BLM employee's statement that BLM's jurisdiction ended at the state line is binding on BLM. This argument is essentially one of estoppel. This Board applies the elements of estoppel described by the U.S. Court of Appeals for the Ninth Circuit in United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970):

> Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

See Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd sub. nom. Bolt v. United States, 944 F.2d 603 (9th Cir. 1991).

Estoppel in public land matters must be grounded on affirmative misconduct such as misrepresentation or concealment of a material fact. See David E. Best, 140 IBLA 234, 236 (1997), and cases cited. For a claim of estoppel to prevail, the erroneous advise upon which reliance is predicated must be in the form of a crucial misstatement in an official decision. Id. In this case, Noah's estoppel claim is based solely on an oral representation, rather than an official BLM decision. Noah also has not demonstrated

that it relied on the statement to its detriment. Accordingly, Noah's estoppel argument fails.

To the extent not specifically addressed herein, Noah's arguments have been considered and rejected.

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 from is affirmed.

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R.W. Mullen
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge