

INTERIOR BOARD OF LAND APPEALS

Terry Kayser

136 IBLA 148 (July 22, 1996)

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TERRY KAYSER

IBLA 96-372, 96-432

Decided July 22, 1996

Appeal of two decisions denying applications for special recreation permits.

Affirmed as modified.

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

An authorized officer's exercise of discretionary authority to deny a special recreation permit should have a rational basis supported by facts of record so as not to be arbitrary, capricious, or an abuse of discretion. BLM may deny a special recreation permit if the proposed activity conflicts with BLM objectives, responsibilities, or programs for management of the public lands.

2. Federal Land Policy and Management Act of 1976: Permits–Public Lands: Special Use Permits–Special Use Permits

Convictions for activities similar to those proposed to be undertaken under a special recreation permit are a proper basis for denying a permit, even though the offenses did not occur while operating under a Federal permit.

APPEARANCE: Terry Kayser, Dodson, Montana, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Terry Kayser, doing business as Cabinet Divide and Northern Plains Outfitters and Cabinet Divide Outfitting, appealed and seeks stays of two decisions by the managers of the Havre and Phillips Resource Areas (Montana), Bureau of Land Management (BLM), denying his applications for special recreation permits. Because the appeals raise identical issues, they are consolidated for review sua sponte.

Kayser filed his application for a special recreation permit with the Havre Resource Area on January 23, 1996. On his application Kayser stated that he wished to conduct "outfitting & guiding--Hunting Antelope--Mountain Lions--Deer--elk & birds--Float trips scenic tours--trailrides--mock hunting campguide school" between May 15, 1996, and February 28, 1997. By decision dated April 22, 1996, the Havre Resource Area Manager denied Kayser's application because Kayser had been "charged, found guilty, and convicted of two criminal charges associated with outfitting activities in the Kootenai National Forest, Montana," had pled guilty to a Montana Department of Fish, Wildlife and Parks (MDFWP) violation "while operating under a BLM permit issued by the Phillips Resource Area," and had "subsequently been cited for an additional MDFWP violation in Phillips County, MT."

A special recreation permit had been issued to Kayser by the Phillips Resource Area office on July 21, 1992 (MT 065-92-03). That permit authorized Kayser to "[p]rovide hunting trips for nonresident sportsmen for deer, antelope and upland birds" and for fishing between September 25, 1992, and November 15, 1997. By application dated October 30, 1995, Kayser requested a special recreation permit to provide "mountain lion hunts and for the purpose of training dogs during chase season" from December 1995 through April 1996. He filed an additional application dated January 9, 1996, for a special recreation permit to provide "hunting, fishing, sightseeing, trailriding activities for non-resident sportsmen & vacationers." In a May 20, 1996, decision the Phillips Resource Area Manager denied Kayser a permit because Kayser had been "charged, found guilty, and convicted of two criminal charges associated with outfitting activities in the Kootenai National Forest, Montana" and had pled guilty to a MDFWP violation "while operating under a BLM permit issued by the Phillips Resource Area."

On appeal, Kayser argues that the two criminal convictions were for acts by a guide he had promptly discharged from employment, and that he has filed an appeal with the U.S. District Court. Kayser states that he pled guilty to the Phillips County charges on advice from his attorney, who had been advised by the State that a guilty plea would not affect his permits, and that he is now seeking to have the case reopened for a jury trial. He further asserts that he is not guilty of the offenses, has been licensed, insured, and bonded in Montana for 20 years, and is not a "hazard to the public or the resources of Phillips County or any where else." Kayser also argues that BLM's reliance on his having been cited by the MDFWP was an unconstitutional imposition of a penalty before conviction.

In support of a stay, Kayser states that he has booked a substantial number of clients who have obtained Montana nonresident hunting licenses for the 1996 season and these clients will suffer severe financial hardship if he cannot operate. He states that the Federal District Court will review briefs in his case no earlier than August 1996, and the appeals process may take several years. He argues that, absent a stay, he will suffer severe financial harm and, if he prevails, an injustice will occur because the outcome of his appeals will then be meaningless.

[1] Special recreation permits are issued pursuant to the Secretary's authority to regulate use of the public lands granted by the Land and Water Conservation Fund Act, 16 U.S.C. § 4601-6a(c) (1994); see also section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1994). Regulations governing special recreation permits are set forth in 43 CFR Subpart 8372, and 43 CFR 8372.3 provides: "The approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer."

"Discretion" does not mean that the decision cannot be reviewed. Any exercise of discretionary authority must have a rational basis supported by facts of record so as not to be arbitrary, capricious, or an abuse of discretion. Red Rock Hounds, Inc., 123 IBLA 314, 318 (1992); Four Corners Expeditions, 104 IBLA 122, 125-26 (1988). BLM may exercise this discretion to deny a special recreation permit if the proposed activity conflicts with BLM objectives, responsibilities, or programs for management of the public lands. Checker Motorcycle Club, 126 IBLA 251, 254 (1993), and cases cited therein.

[2] One of the standard stipulations found in the special recreation permit form requires a permittee to "observe all Federal, State, and local laws and regulations applicable to the premises" and also obey "regulations for the protection of game birds and game animals." "[C]onviction of a violation of any Federal or State law or regulation concerning the conservation or protection of natural resources, the environment, endangered species, or antiquities" related to a special recreation permit is a sufficient basis for cancelling the permit. 43 CFR 8372.5(f).

The Board has previously recognized that convictions for illegal acts related to the activities to be undertaken under a special recreation permit may be the basis for denying the permit. In Red Rock Hounds, supra, BLM denied an application for renewal of a permit to conduct English-style fox hunts on public lands because the organization's president had been individually convicted for allowing her dogs to track and chase deer on public lands. When the convictions were subsequently reversed, BLM's decision was set aside because it was no longer supported by the record. Id. at 319. When it remanded the case, the Board noted that a decision to reject an application "may be supported by facts far short of conviction for violation of a Nevada statute." Id.; see also Dvorak Expeditions, 127 IBLA 145 (1993).

The case file contains a copy of a March 21, 1996, order by U.S. Magistrate Leif B. Erickson imposing sentence upon Kayser for having been tried and found guilty of conducting a guide school (Count I), and outfitting (Count II), contrary to the conditions of his special use permit, "in violation of 36 C.F.R. 261.10(k)." The case file also contains a copy of a March 28, 1996, judgment against Kayser, issued by Montana Justice of the Peace Gayle Stahl, stating that Kayser had pled guilty to the crimes of hunting without a license and transfer of license in violation of Montana statutes.

The convictions provide a reasonable factual basis for BLM's decisions. The Magistrate's citation of 36 CFR 261.10(k) indicates that Kayser's Federal convictions were for violations of a special use permit issued by the U.S. Forest Service. This fact is confirmed by a copy of a letter from the Forest Service to Kayser denying his permit application (Phillips Resource Area case file). We note that these documents do not confirm BLM's stated understanding that the hunting license offenses occurred while operating under a permit from BLM's Phillips Resource Area. However, this apparent error has no consequences because, regardless of who issued the permits, the convictions were for hunting violations directly related to hunting guide activities, and Kayser has applied for permits to provide commercial hunting guide services. Kayser's convictions were for actions like those he would undertake if the permits were issued, and are a proper basis for denying the permits. Red Rock Hounds, *supra*, at 318-19. The decisions have a rational basis, and are supported by the record.

The decision by the Havre Resource Area Manager, however, must be modified in another respect. Kayser correctly objects to BLM's reliance on citations issued by the MDFWP. A pending charge is not a proper basis for a denial of a permit. The decision is modified by striking the third reason for denial.

We note that the Phillips Resource Area Manager's decision states only that "[t]he application you have submitted * * * is denied." This wording does not identify whether the decision was directed to Kayser's October 30, 1995, application or his January 9, 1996, application. The basis for the decision applies equally to both applications, and our rationale for affirming does not require they be differentiated. No purpose would be served in requiring BLM to issue an additional decision. We conclude that the Phillips Resource Area Manager has properly rejected both applications.

The Phillips Resource Area Manager's decision does not mention special recreation permit MT 065-92-03, which was issued to Kayser on July 21, 1992. Correspondence in the case file indicates that the Phillips Resource Area requires permittees to make an annual supplemental filing and issues a yearly decision to approve or reject a permit. The basis for this procedure is not clear from the record, and the file does not contain annual applications or information Kayser may have provided in previous years, other than actual use reports. A decision cancelling or modifying an existing permit raises different questions of law than a decision not to issue a permit. See generally Dvorak Expeditions, *supra*. We find no basis in the record for finding that the Phillips Resource Area Manager's decision affects permit MT 065-92-03.

Because we have affirmed BLM's decisions, Kayser's stay petitions are denied as moot. We note, however, that he misunderstands the effect a stay of the decisions would have. If BLM's decision had canceled a permit rather than denying an application, a stay would keep the permit in effect and allow him to operate pending review of his appeal. The decisions

Kayser has appealed are decisions not to issue permits. A stay would do no more than keep his applications pending before the Department. BLM would not be required to issue the permits or otherwise allow him to operate prior to a decision on his appeal. Thus, even if we were to have granted a stay, Kayser would not avoid the financial hardship he claims will occur. This decision does not preclude Kayser from reapplying for a permit if he obtains the judicial relief he seeks.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 22, 1996, decision by the Havre Resource Area Manager is affirmed as modified, and the May 20, 1996, decision by the Phillips Resource Area Manager is affirmed.

R. W. Mullen
Administrative Judge

I concur:

David L. Hughes
Administrative Judge