

INTERIOR BOARD OF LAND APPEALS

Carrol White

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Appeal from a decision of the Deschutes Resource Area Manager, Bureau of Land Management, issuing special recreation permit OR-056-3-129R on a probationary basis for commercial river rafting use of the Lower Deschutes River.

Affirmed.

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

A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interest, and where a commercial river rafting permit holder is on notice that violation of party size restrictions may result in sanctions, BLM may invoke such sanctions upon noncompliance.

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

A decision issuing a special recreation permit for commercial river rafting on a probationary basis based on party size violations during the previous commercial rafting season will be affirmed on appeal where the case record establishes that the permittee violated the party size restriction on four occasions during that previous season.

APPEARANCES: Rolf L. Anderson, Esq., The Dalles, Oregon, for appellant; James L. Hancock, Prineville District Manager, and James G. Kenna, Deschutes Resource Area Manager, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Carrol White appeals from a decision of the Deschutes Resource Area Manager, Bureau of Land Management (BLM), dated April 8, 1993, issuing

special recreation permit OR-056-3-129R for commercial river rafting use of the Lower Deschutes River on a probationary basis. BLM explained that it was issuing a "probationary permit because of your party size violations in 1992." In its decision, BLM referred to the issuance to White of three violation notices in 1992 for a total of six party size violations. <sup>1/</sup>

It also noted a seventh violation for which no violation notice was issued. BLM was informed of that violation, it explained, in a June 30, 1992, telephone call from "the public" complaining that White had exceeded the maximum party size on segment 1 of the Lower Deschutes River during the period June 25, 1992, to June 27, 1992.

In response to that decision, White provided BLM with some explanatory information. However, in a May 8, 1992, letter to White, the Deschutes Area Manager acknowledged that while "the violation reported on June 25, 1992 to June 27, 1992 may require further investigation, I believe the remaining violations are sound observations by BLM personnel and the public." He refused to alter his decision.

In his statement of reasons (SOR), White provides his explanation why none of the seven cited instances constituted a party size violation. He claims that his permit should not have been probationary and that BLM's allegations adversely affect his business. He requests a hearing.

In explaining the alleged violations in his SOR, White relies on language in Stipulation 34, "PARTY SIZE," of "Guidelines for Commercial Use of Rivers in the Prineville District" (Guidelines), dated November 1991, stating:

The maximum party size allowed under this permit is 16 people including guides, employees and service personnel. Passengers who are not clients will be counted toward the maximum party size.

Permittees who elect to have more than one party on the river at the same time are to ensure that each party is fully equipped and remains at least 300 yards away from other parties of the same permittee, or a different permittee who are working together. Permittees with more than one party may arrive at the

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<sup>1/</sup> The violation notices and the dates upon which White allegedly exceeded the maximum party size were listed as follows in the decision: (1) a Sept. 23, 1992, notice citing three occasions, July 24, 1992, at "Buckskin Mary;" Aug. 6, 1992, below Colorado rapids; and Aug. 9, 1992, at "Blue Hole;" (2) an Oct. 22, 1992, notice citing a violation at "Pine Tree," on Aug. 29, 1992; and (3) an Oct. 27, 1992, notice for Aug. 14 and Aug. 15, 1992, violations at "Buckhollow."

launch area together but must stagger their boats down the river. These groups may meet together again at the take out area. Permittees with more than one party on the river may group together just before running any class IV rapid but must separate again after running the rapid.

White's explanation was apparently directed to the Area Manager's statement in his April 8, 1993, decision, relating to three of the alleged violations, that "the parties were observed together at the launch and landing areas. In these cases, where the maximum party size has been violated at the launch and landing areas, I believe there is potential for confusion" (Decision at 1). The Area Manager stated further that

[u]sers of the Deschutes River cannot discriminate between one or two groups when stoves are placed back to back or when multiple groups are bunched up at launching or landing sites or while on the river. This lack of ability to discriminate has resulted in three complaints regarding three separate commercial trips run by your company in the last two years.

Id.

Because the case file forwarded to the Board did not contain a copy of the Guidelines cited by White, but instead a copy of Guidelines, dated December 1991, which did not contain the second paragraph of the language quoted above, this Board, by order dated June 9, 1993, directed that BLM respond to White's statement of reasons and state

what Guidelines are applicable and how they were violated by White. The fact that BLM may have received complaints regarding White's trips does not necessarily mean that there has been a violation of the party size Guidelines. Moreover, absent a specific prohibition against bunching of groups at the launching and landing sites, it is unclear how such activity constitutes a violation of the Guidelines.

On July 6, 1993, the Board received BLM's response to the order. Therein, BLM stated that the November 1991 version of the Guidelines was a draft that was distributed at the November 14, 1991, annual guide and outfitter meeting. <sup>2/</sup> BLM continued:

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<sup>2/</sup> Although in its Response and in a letter to the Board dated Oct. 4, 1993, responding to White's Aug. 25, 1993, reply, BLM refers to the "November 14, 1991," guide and outfitters meeting, a copy of the meeting minutes accompanying BLM's Oct. 4, 1993, letter states: "Minutes from the Annual Meeting of River Related Permittees in the Prineville District - 9/14/91." (Emphasis added.)

At the meeting, the permittees and the BLM agreed to revise the party size stipulation. At the permittees' bidding, the distance requirement and language related to launch and landing areas was removed from the party size stipulation. The permittees stated that the distance requirement made it impossible for two separate groups to camp at smaller campgrounds and that noncommercial parties often camped between the commercial parties, causing social conflicts. Mr. James Kenna, Deschutes Area Manager, agreed to revise the stipulation but made it clear to the permittees that compliance with the party size stipulation was important to the BLM and that multiple groups under the same permit were expected to function as separate units from other parties at all times. Mr. White attended this meeting. He agreed to abide by the revised party size stipulation.

(Response at 1).

BLM asserts that the final version of the Guidelines was completed in December 1991 and mailed to White on February 12, 1992. The final Guidelines contain a revised party size stipulation (No. 33), which states, in pertinent part: "On the Deschutes River, the maximum party size allowed is 16 people including guides, employees and service personnel on segments 1, 3, and 4 and 24 people on segment 2. \* \* \* Passengers who are not clients will be counted toward the maximum party size." The draft November 1991 Guideline language concerning launching and landing areas and establishing distance requirements on the river does not appear in the final Guidelines.

In reviewing this case, we will address each of the alleged 1992 violations. <sup>3/</sup> First, however, we note that White asserts that he never received a copy of the December 1991 Guidelines. BLM disputes that

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<sup>3/</sup> In its Response at 2, BLM states that "Mr. White has a history of violating the party size stipulation." It then recounts various alleged violations occurring in 1987, 1988, 1990, and 1991. While various performance evaluations in the file support such a statement, the rationale stated in the decision for taking the action in question is party size violations only in 1992. In addition, the record contains a letter to White from the Area Manager, dated Mar. 18, 1992, notifying White that because of two party size violations in 1991, he had considered "giving you a probationary permit for the Deschutes River but because of your exemplary record and the close cooperation we have had with you in the past in matters concerning our guide and outfitter program, I have decided not to take the above action." Thus, even though White allegedly had party size violations in prior years, the Area Manager considered White's overall record, prior to the 1992 commercial rafting season, to be "exemplary."

claim, alleging that it, in fact, sent him a copy, and, because it was not returned, he must have gotten it. The file contains no evidence of receipt, such as a return receipt card.

White responds that upon inquiry of BLM in the fall of 1992, he was informed that BLM had mistakenly mailed the draft Guidelines to about nine people, implying that he was one of them. Nevertheless, White does not deny attendance at the guide and outfitter's meeting in 1991 at which revision of the party size stipulation was discussed. Further, it is the responsibility of the permittee to ensure thorough knowledge concerning the permit restrictions, special provisions, requirements, and all other rules or regulations that may affect the outfitter's business on public lands or waters. Osprey River Trips, Inc., 83 IBLA 98, 100 (1984). The standard special recreation application and permit form, 8370-1 (June 1989), which appellant signed for permit year 1992, requires permittees to abide by all special stipulations (item 14, permit conditions).

June 25 to June 27, 1992

In its Response at 2, BLM stated that "[i]n 1992, Mr. White had seven violations of the party size stipulation." The first violation discussed in the response is the alleged violation occurring June 25 to June 27, 1992, reported to BLM by "an anonymous call." Id. BLM did not issue a violation notice for this alleged violation, and in his May 8, 1993, letter to White, the Area Manager acknowledged that the June 1992 violation "may require further investigation." The record submitted to the Board provides no evidence of any further investigation. An alleged violation, reported by an anonymous caller, which BLM admits requires further inquiry, provides no support for imposition of a probationary permit.

July 24, 1992

In a September 23, 1992, notice, BLM stated that White had been observed at Trout Creek and Buckskin Mary on July 24, 1992, with 17 clients and 5 guides. <sup>4/</sup> In a November 3, 1992, letter to BLM, White explained that there were 17 clients and 5 guides at Trout Creek and Buckskin Mary but that they were two separate groups. In its decision, BLM stated only that "we observed the group camped together at Buckskin Mary [segment 1]." BLM made no mention of Trout Creek. On appeal, White stated that his wife had told a BLM person at the Trout Creek launch site on July 23, 1992, that

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<sup>4/</sup> The notice does not indicate service on White and there is no response to this alleged violation until White provided an explanation in a Nov. 3, 1992, letter following receipt of the Oct. 22, 1992, violation notice which referred, inter alia, to the July 24, 1992, incident again and stated: "Please respond to this notice within 30 days \* \* \*."

there were 2 groups, 1 of 5 clients and 2 guides, and 1 of 12 clients and 3 guides. He stated that they were separated on the river; that they both camped at Buckskin Mary "in two separate spots next to each other"; that "[e]ach group had completely separate kitchens, supply boats, ice chests[, and] food and functioned as completely separate parties, including separate sleeping quarters \* \* \*" (SOR at 2). He stated that no one checked to see if the groups were separate.

In its response, BLM states that Mrs. White told a BLM River Ranger at Trout Creek on July 23, 1992, that the commercial group consisted of 17 clients and 5 guides and that a second BLM River Ranger observed the party camped at Buckskin Mary the next day and that only "one kitchen was set up with the sleeping quarters surrounding it" (Response at 3). BLM stated that the groups did not function as separate units. In reply, White alleges that "no BLM river rangers ever entered the campsite to verify the location of the kitchen or equipment, food, or other arrangements which were made for camping" (Reply at 3). Thereafter, BLM submitted the declaration of Max Linn, Lead BLM River Ranger, Prineville District, dated October 1, 1993, stating that on July 25, 1992:

I rowed to shore at Buckskin Mary Camp and walked into the camp occupied by C.J. Lodge [White] and their clients. Since I had already been notified by Tom Famam [BLM River Ranger] that C.J. Lodge had an oversized trip on the Deschutes River, I personally counted all the people present and determined that there were twenty-two (22) people, all of whom were involved with and part of C.J. Lodge commercial operations. I talked to one of the guides working for C.J. Lodge and was told that the group included seventeen (17) clients and five (5) guides.

I observed that C.J. Lodge's camp was set up with a single kitchen and dining area surrounded on three sides by tents. The fourth side of the camp area was the Deschutes River.

White provided no further response to this declaration.

Although White maintains that no BLM ranger entered the Buckskin Mary campsite to verify the camp setup, the record supports a finding to the contrary. Based on Linn's declaration, we find that White violated the maximum party size stipulation on July 24, 1992, while camping at the Buckskin Mary campsite, by maintaining a group larger than 16 people, including guides.

August 6, 1992

The September 23, 1992, violation notice also cited a second violation: "On 8/6/92, you were observed with 48 clients and 8 guides floating together below Colorado rapids [segment 4]." In reply to that alleged

violation, White stated in his November 3, 1992, letter to BLM that the groups launched separately and that he understood from the 1991 guide and outfitter meeting "that one does not have to maintain any set distance between rafts while floating on the water." <sup>5/</sup> In its decision, BLM stated that "[p]ermittees are not allowed to float together with oversized groups."

White provided the following explanation in his SOR at 2:

We guided 4 separate groups of Boy Scouts down river from the launch site at Warm Springs to the Mouth of the Deschutes River from August 3 thru August 6, on a 4-day trip. The Boy Scouts were in 4 separate parties both camping and while floating. We followed Stipulation No. 34 [November 1991 draft Guidelines] as we normally do. Some one called BLM saying we had been observed below Colorado Rapids with 48 people. On the reports no one has stated how far apart our groups were while floating the river, but that they only saw or heard that we were on the river.

In its response, BLM states for the first time that the party size violation was observed by a "long-standing commercial fishing outfitter." The case record before the Board, however, contains no report concerning this observation. <sup>6/</sup>

We accept White's explanation that he had four separate groups on the river. The fact that some unidentified person may have counted 48 people and 8 guides "below the Colorado rapids," which White notes is a class IV rapid, is not a reliable basis upon which to conclude that White violated the party size stipulation. This alleged violation does not support issuance of the 1993 permit on a probationary basis.

August 9, 1992

The third violation recounted in the September 23, 1992, violation notice was explained as follows: "On 8/9/92, you were observed at Blue Hole [on segment 2] with 33 clients and 5 guides." In his November 3,

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<sup>5/</sup> This assertion by White is consistent with the December 1991 Guidelines, which contain no restriction regarding spacing on the river. However, the assertion is inconsistent with the draft November 1991 Guidelines, which require 300-yard spacing on the river by parties of the same permittee and which White claims governed his conduct during the 1992 commercial rafting season.

<sup>6/</sup> In its Response at 3, BLM stated that "[t]his was the fourth time a member of the public had complained about Mr. White exceeding the party size." However, in its decision, regarding this same alleged violation, BLM stated at 2 that "[f]or the third time, a party size violation by your company was brought to our attention by the public."



1992, letter, White explained that he had two separate parties that day on a 1-day raft trip, that they were all strung out on the river, and that his raft was the last to reach Blue Hole, where he pulled over to get his raft pumped up. In its decision at 2, BLM stated only that "[w]hen this trip was discussed with you on July 16, 1992, after observing your group together at Blue Hole, you stated that the group stopped together because two boats were low." <sup>7/</sup> In response to the decision, but prior to filing his appeal, White stated in a May 1, 1992, letter to BLM that the trip consisted of two groups with three boats in the first group and two boats in the second and that the first group floated "some distance away" from the second.

In his SOR, White states that "our raft groups were staggered and my group of people were so far back that our driver left without letting me use the air pump" (SOR at 3). In its Response at 3, BLM explains that White "was observed by a BLM River ranger with 33 clients and five guides floating by Blue Hole \* \* \*," and that the ranger "observed four rafts separated by 20 to 150 feet with Mr. White's fifth raft further behind the others. The separation of rafts was clearly due to external factors such as some guides rowing faster or slower than others."

The case record does not support this alleged violation, and, thus, it cannot serve as a basis for placing White on probation for the 1993 commercial rafting season. There is no declaration in the file by the river ranger who allegedly observed the violation. Thus, the file contains no first-hand explanation of the situation observed on August 9. The applicable party size stipulation allows a maximum party size of 24 on segment 2 of the river. The December 1991 Guidelines contain no requirement for maintaining set distances on the river.

#### August 14 and 15, 1992

These two alleged violations were cited in a violation notice dated October 27, 1992. Therein, BLM stated that White was observed at Buckhollow on segment 3 on August 14, 1992, with 37 clients and 6 guides and on August 15, 1992, with 80 clients and 12 guides. In his November 3, 1992, letter, White admitted that groups arrived at launch sites and departed landing sites in larger groups, but that they launched and landed in "16 party size groups." In its decision at 2, BLM stated that "[w]hile you may have launched and landed your multiple groups separately, you were observed grouping large numbers of clients, well above the maximum party size, together to issue river equipment at the launch area and to load into several vehicles after the end of a trip" (Decision at 2).

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<sup>7/</sup> The July 16 date is obviously an error since the alleged violation did not occur until Aug. 9. Presumably, BLM meant Aug. 16. However, there is no document in the record reporting any conversation with White regarding this particular alleged violation.

Based on BLM's reliance on grouping at launching and landing sites and White's citation in his SOR to the provision of stipulation No. 34 of the draft November 1991 Guidelines allowing such activity, it appears that the parties dispute whether such activity is prohibited. While we note that the December 1991 Guidelines contain no prohibition regarding bunching at launch or landing sites, statements by White in his SOR establish a party size violation on each date.

BLM states that Buckhollow is on segment 3 of the Lower Deschutes River. That segment has a maximum party size of 16 people, including guides. Although in his November 3, 1992, letter, White stated that he maintained "16 party size groups" on both dates, he states otherwise in his SOR. Therein, at page 3, he describes the August 14 parties as "1 group - 21 Clients[,] 1 group - 16 Clients[,] 6 Guides" and the August 15 parties as "1 Group - 20 Clients, 1 Group - 20 Clients, 1 Group - 20 Clients, 1 Group - 20 Clients, 12 guides." He also stated that on August 15, 1992, he had a large company rafting with him and that he explained to them that "there was a maximum party size and each group of 24 people, the maximum party size, would have to stagger starts and would have to maintain that through out the trip." *Id.* (emphasis added). <sup>8/</sup> As noted above, the maximum party size for segment 3 was 16 people, including guides. Each group described by White exceeded the party size limitation, irrespective of bunching at launching and landing sites.

Thus, we find that White's own statements support a finding of a party size violation for both August 14 and August 15, 1992.

#### August 29, 1992

BLM described this alleged violation in a notice dated October 22, 1992, stating that "[o]n 8/29/92, you were observed at Pine Tree on the Deschutes River [segment 3] with 33 clients and 5 guides." In his November 3, 1992, letter, White stated that he separated his groups "with plenty of distance between them," but that one group was "a party size of 24 clients & guides and one group was 11 clients and guides." He continued by stating that pursuant to a telephone conversation with BLM on August 24, 1992, it was his understanding that it was possible to have "a 24 party size on section 3 between Buck Hollow and Pine Tree only." In its decision, BLM did not acknowledge any such telephone conversation, but again expressed concern regarding the bunching at launch and landing sites.

In his SOR, White does not make any further mention of the telephone conversation. Rather, he alleges that his two groups on that day remained

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<sup>8/</sup> We note that under the draft November 1991 Guidelines, which White asserts were the Guidelines under which he operated in 1992, the maximum party size for all segments of the river was "16 people including guides."

staggered on the river. However, he describes his two groups as consisting of "21 clients" and "13 clients" with five guides.

Segment 3 has a party size limitation of 16 people, including guides, as established by the December 1991 Guidelines. There is no evidence that the party size limitation for that segment had been modified at the time of White's August 29, 1992, trip. Therefore, we consider his statement in his SOR regarding the size of his groups to be an admission that he violated the party size limitation on August 29, 1992.

We conclude that the record shows that White violated the party size stipulation on four occasions in 1992: on July 24, August 14, August 15, and August 29.<sup>9/</sup> Having reached that conclusion, we now turn to whether BLM's action in placing White on probation was an appropriate response to those violations. We conclude that it was.

Special recreation permits are issued under the authority granted to the Secretary of the Interior by the Land and Water Conservation Fund Act, 16 U.S.C. § 4601-6a(c) (1988), 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 CFR 8372.0-3; Special Recreation Permit Policy Statement (Policy Statement), 49 FR 5300 (Feb. 10, 1984).

[1] The regulations state that a special recreation permittee is prohibited from violating permit stipulations or conditions. 43 CFR 8372.0-7(a)(2). However, the regulations do not assign sanctions for violating stipulations or conditions but merely allude to criminal penalties and civil action for unauthorized use. 43 CFR 8372.0-7(b). That does not mean that BLM has no authority to impose administrative sanctions. A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interest, and, notwithstanding a failure to promulgate regulations, if BLM notifies a permittee of sanctions for failure to comply, it may invoke those sanctions upon noncompliance. Patrick G. Blumm, 116 IBLA 321, 338-39 (1990); Hondoo River & Trails, 91 IBLA 296, 300-01 (1986). Recognized sanctions include placing the permit holder on probation. Rogue Excursions Unlimited, Inc., 104 IBLA 322, 325 (1988); Robert L. Snook, 100 IBLA 151, 155 (1987).

[2] Thus, as indicated above, by signing his special recreation application and permit form on February 12, 1992, White agreed to be bound by the party size stipulation which was included in the December 1991 Guidelines. Those same Guidelines included an explanation under the

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<sup>9/</sup> Three out of four of these violations are essentially admitted by White in his pleadings. Moreover, the incidents discussed herein would have been violations even under the draft November 1991 Guidelines. We find no necessity for a hearing in this case, and we deny White's request for one.

general category of "Performance Evaluation" for "Handling Violations" (December 1991 Guidelines at 9-10). <sup>10/</sup> The Guidelines identified three categories of violations: Category A, Category B, and Category C, with Category A being the most serious. Although not identified as such, we assume that the violations in this case were Category C, which under the Guidelines could, "depending on the number, nature and corrective actions taken may result in probationary or acceptable evaluation at the end of the year" (Guidelines at 9).

In its March 18, 1992, letter to White, which accompanied his 1991 performance evaluation, *see* note 3, *supra*, BLM informed White that it had considered issuing him a probationary permit for the 1992 commercial river rafting season because of two party size violations in 1991. Although BLM's April 8, 1993, decision was based on seven alleged party size violations in 1992, we find that given the fact that White clearly was on notice that party size violations were a concern for BLM, four party size violations in 1992 clearly justified the issuance of a probationary permit for the 1993 season. Thus, we uphold BLM's decision to issue White's 1993 permit on a probationary basis, based on the violations as discussed in this decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Deschutes Area Manager is affirmed.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

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<sup>10/</sup> The Policy Statement provides for performance evaluations:

"At a minimum, an annual evaluation of each multi-year permit is completed to evaluate performance and compliance with terms and conditions of the permit, determine if use still complies with management plan objectives, and review of past year receipts to determine over or under payment.

"For commercial special recreation permits, the authorized officer develops performance review standards in consultation with the permittee, State fish and game agencies, State outfitter licensing boards, councils, and other State and Federal land managing agencies. These performance standards are included in each permit. If, as a result of a performance evaluation or compliance check, a permittee is found to have performed unsatisfactorily, the authorized officer will modify or invalidate the permit."

49 FR 5300, 5305 (Feb. 10, 1984).