

INTERIOR BOARD OF LAND APPEALS

Curt Farmer Pack Llamas

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CURT FARMER PACK LLAMAS

IBLA 94-521

Decided February 10, 1995

Appeal from a decision of the Rio Puerco, New Mexico, Resource Area, Bureau of Land Management, denying an application for commercial recreation permit. NM 8550 (017).

Reversed.

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

An application for issuance of a commercial recreation permit to an outfitter offering hiking trips assisted by pack llamas into the public lands was denied in error when BLM found that publication of a magazine article describing such a trip without prior review by BLM was a breach of the terms of a prior permit.

APPEARANCES: Calvin Hyer, Jr., Esq., Albuquerque, New Mexico, for appellant; Margaret Miller Brown, Esq., Office of the Field Office Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Curt Farmer has appealed from an April 28, 1994, decision issued by the Rio Puerco Assistant Resource Area Manager, Bureau of Land Management (BLM), that denied his application for special recreation permit for commercial use, NM 8550 (017). Farmer had sought a permit for the 1994-95 season of intended use from May 1994 until May 1995, thereby extending a prior permit that expired on May 3, 1994. The recreational use proposed consisted of outfitting and leading hiking tours assisted by llamas used as pack animals into public lands in the Rio Puerco Resource Area. The decision to deny permit issuance was based entirely on the publication in April 1994 of a magazine article that appeared in the Southwest Airline "Spirit" magazine.

The decision finds that the article "exemplifies an ethical breach" in a partnership between BLM and Farmer that was in existence since 1992, so as to require denial of his 1994-95 permit application. The magazine article entitled "Mystery Terrain" beginning at page 44 of the April 1994 "Spirit" magazine is included in the case file; together with a series of photographs it describes impressions gathered by the author, identified as "Chicago-based writer" Elizabeth Kaufmann, and photographer Michael Datoli, during a 5-day hiking trip in September led by Farmer "in the valley of the

nearly dry bed of the Rio Puerco." Id. at 45, 120, 126. Kaufmann recommended the trip to her readers, concluding that it allowed her a "magical immersion into the mythic past." Id. at 125.

Contending that he is likely to succeed on the merits of his appeal, Farmer has petitioned for a stay of BLM action pursuant to the appeals regulation provided for recreational permitting, 43 CFR 8372.6(b). He argues that standards customarily applied to motions for temporary relief support his petition in this case, concluding that he and the public generally will be harmed by the BLM decision, while no harm would be done to BLM by staying the decision here under review. Cf. 43 CFR 4.21(b)(1).

Opposing the stay request, BLM contends that a stay would not be appropriate in this case, inasmuch as the action taken, denial of a permit, does not lend itself to such a remedy. That being the case, BLM contends that neither Farmer nor the public is harmed by denial of his permit application because publication of the magazine article that prompted BLM to deny Farmer's application shows he was a lax outfitter who lacked control over his customers and that the public is best served by protecting sensitive resources from such permittees. While disclaiming an intention to hold Farmer responsible for a writing published by others, BLM contends that his failure to control such writing amounts to lack of cooperation with BLM. Finally, it is contended that inasmuch as permit issuance is a discretionary action, Farmer is unlikely to succeed on the merits of his appeal since he was warned that BLM wanted him to use "extreme caution in publicizing the existence of sensitive cultural, archeological and natural resources in the permitted area" (BLM Answer at 2). BLM states that, despite these cautions, Farmer "either solicited or consented to the writing" which was done "without any prior attempt having been made to coordinate such publicity with the agency." Id. at 3. Also cited as impediments to approval of the Farmer application are his failure to file the application 120 days before his intended use was to begin and failure to report trip completion within 15 days of his last trip made under the 1993-94 permit.

This appeal, and the application for stay made in support of it, are governed by the regulation provided for recreational use permits, 43 CFR 8272.6(b). This being the case, the automatic stay provision and procedure established by the general stay regulation at 43 CFR 4.21 do not apply here. See Texaco Trading & Transportation Inc., 128 IBLA 239, 240 (1994). Since 43 CFR 8272.6(b) provides that decisions of the authorized officer are effective unless otherwise ordered, the decision has been effective since it was issued. The question raised by the application for stay is therefore whether a stay is justified on the record presented. Id.

BLM has correctly pointed out that a stay in this case would not have the effect of approving the application for permit that was denied, but would instead stay the effect of permit denial, leaving the application pending approval as though there had been no action of any kind. On the record before us, however, we find Farmer has established a likelihood of success on the merits. Because we have found, during our review of the

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application for stay, that denial of the application for permit is not supported by the record on appeal, the BLM decision denying Farmer's application is reversed and the record is remanded to permit consideration by BLM of the application and, all things else being regular, its approval.

[1] While issuance of recreational use permits is a discretionary act, this does not mean that the authorized officer may grant or deny permits without a reasoned, factual basis for such action; it does mean that, under regulations published at 43 CFR Part 8370, issued pursuant to 16 U.S.C. § 4601-6a(b) (1988), permit issuance may be conditioned on compliance with the permit and fee system established by the Department. See Osprey River Trips, Inc., 83 IBLA 98, 101 (1984). Commercial permits may be suspended (Id.), amended and shortened (Dvorak Expeditions, 127 IBLA 145 (1993)), or denied (Patrick G. Blumm, 121 IBLA 169 (1991)) in conformity to the rules established for such permitting, for reasons and under conditions

shown to require such action. The reason given for denial of Farmer's application was that the magazine article caused a breach of the relationship between BLM and Farmer established by prior permits issued to him for llama treks into the Rio Puerco area. Those prior permits, which are included in the case file, do not, however, mention how publicity concerning hiking trips will be handled, except to require that Farmer notify his customers about BLM's "leave no trace land ethics." This policy is described in a pamphlet by the same name. A copy of the brochure appears in the case file, and bears the notations "provided to Curt's clients" and "gave lecture to clients." This indicates that Farmer did, on at least one occasion, make the required disclosure. There is no other reference to publicity concerning the hikes and no requirement that Farmer review any report by any of his customers concerning how a trip assisted by llamas is conducted or that he facilitate such review by BLM prior to publication.

Decisions by BLM must be supported by the record and be made upon a rational basis in fact. See Carl S. Hansen, 130 IBLA 369, 375 (1994), and cases cited. Nothing in the record before us supports the decision to deny Farmer's permit application. The magazine article does not purport to speak either for BLM or for Farmer, but is a statement of impressions by the author of a trip taken (with Farmer) into the Rio Puerco area (she liked it, called it magical, and reported that the llamas were helpful). She did not presume to speak for Farmer or BLM and was not directly concerned about either her guide or the permitting agency, although she does mention both. Nothing in the permit issued to Farmer by BLM required that he review and edit the report before it was published in the magazine. Nor is there anything in the article to suggest that any requirement imposed by any prior permit issued by BLM to Farmer was violated.

On the record presented, there is no reason shown why a permit should not have been issued to Farmer. The arguments belatedly raised by BLM suggesting that the application should have been made earlier and that his trip reports were tardy were not cited by BLM as reasons for permit denial, nor does it appear that they could have provided cause for such a penalty. The requirement that applications be made 3 months in advance was intended,

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it appears, to insure timely permit issuance. As for the trip reports, it appears they were ultimately made to BLM's satisfaction. Neither of these matters would, as a consequence, justify denial of a permit, nor does it appear that BLM considered them to merit such action, or any action at all.

Accordingly, 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 reversed; upon receipt of the case file, all else being regular, BLM will issue the commercial recreation permit applied for by Farmer.

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Franklin D. Amess  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

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