

INTERIOR BOARD OF LAND APPEALS

Dvorak Expeditions, et al.

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DVORAK EXPEDITIONS ET AL.

IBLA 89-570

Decided August 25, 1993

Appeals from a decision of the District Manager, Bureau of Land Management, Montrose District, Colorado, placing Special Recreation Permit CO-030-SRP-85-12 on probationary status.

Affirmed in part; vacated in part.

1. Administrative Procedure: Generally--Board of Land Appeals--Rules of Practice: Appeals: Statement of Reasons

The failure to file a statement of reasons subjects an appeal to summary dismissal. 43 CFR 4.402(a). If no statement of reasons or reason for the failure to file a statement of reasons is filed, the appeal is properly dismissed.

2. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

In order to have standing to appeal to the Board of Land Appeals, the appellant must have been adversely affected by the decision being appealed. If no right to appeal exists, a party may be granted amicus curiae status.

3. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Hearings--Federal Land Policy and Management Act of 1976: Permits--Rules of Practice: Hearings--Special Use Permits

If the applicable statute does not expressly require a formal evidentiary hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an administrative law judge are not mandated. The language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not dictate a formal hearing before an administrative law judge, and a special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988) are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals.

4. Special Use Permits

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.

5. Special Use Permits

A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interests. If BLM notifies a permittee of sanctions for failure to comply, it may invoke those sanctions upon noncompliance.

6. Special Use Permits

BLM has the discretionary authority to invoke penalties for a pattern of violation of a recreational use permit stipulation by placing a permittee on probationary status. However, the record must demonstrate a pattern of stipulation violations, the number and the relative severity of those violations, and a basis for selecting the chosen remedy.

APPEARANCES: James Moss, Esq., Lakewood, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Bill Dvorak, d.b.a. Dvorak Expeditions (Dvorak), has appealed a June 23, 1989, decision of the District Manager, Bureau of Land Management (BLM), for the Montrose District, Colorado, placing Dvorak's Special Recreation Permit (Permit) CO-030-SRP-85-12 on probationary status.

[1] American Wilderness Adventures also filed a notice of appeal from BLM's June 23, 1989, decision, stating that it would file a statement of reasons within 30 days, but it has failed to do so. 43 CFR 4.412 provides that "[i]f the notice of appeal did not include a statement of reasons for the appeal, the appellant shall file such a statement with the Board * * * within 30 days after the notice of appeal was filed." The failure to file a statement of reasons subjects the appeal to summary dismissal. 43 CFR 4.402(a). A statement of reasons was due not later than August 24, 1989. Neither a statement of reasons nor an explanation for the failure to file a statement of reasons has been submitted. American Wilderness Adventures' appeal is dismissed. See Robert L. True, 101 IBLA 320 (1988).

[2] Far Flung Adventures and Adventures International, Inc., each filed notices of appeal, but their notices included a statement of reasons. We deem it appropriate to address their standing to appeal before addressing

their reasons for appeal. Standing before the Board of Land Appeals is governed by 43 CFR 4.410(a). In Colorado Open Space Council, 109 IBLA 274 (1989) we noted that:

The decisional law of the Department has clearly established that the question of standing must be resolved by a two-step analysis. First, are the appellants parties to the case within the meaning of the regulation? Second, assuming that the answer to this first question is in the affirmative, have the appellants been adversely affected by the decision being appealed?

Id. at 279.

Far Flung Adventures and Adventures International, Inc., are also commercial outfitters operating on the Gunnison River under special recreation permits containing a stipulation identical to Stipulation P cited in the decision now before us. ^{1/} There is nothing in the record indicating that either was adversely affected by BLM's decision to place Dvorak's Permit on "probationary status," and there is no basis for finding that they have been "adversely affected" within the meaning of 43 CFR 4.410(a). However, they are commercial outfitters with similar interests, and we deem it appropriate to grant amicus curiae status to both.

The permit issued to Dvorak on March 23, 1989, authorizes "commercial rafting, kayaking, canoeing, fishing, hiking, camping" on the "Gunnison River Black Canyon to North Fork" (Permit at 1) situated within the Gunnison Gorge Wilderness Study Area. Dvorak was one of six outfitters selected for a 3-year multi-year special recreation permit after a formal bid and prospectus offering. The Permit is "revocable for any breach of conditions hereof or at the discretion of the authorized officer of the Bureau of Land Management, at any time upon notice and subject to special stipulations attached [to the Permit], or sent under separate cover" (Permit at 2).

Stipulation P of the "Special Stipulations for Gunnison Gorge" "to protect and preserve the natural resource values of the Gunnison Gorge" provides: "On all trips, day or night, a maximum group size of twelve (12) people, including guides, is permitted." The source of Stipulation P, found at page 7 of the July 21, 1988, Addition to the Plan, states:

d. Action D.13, Gunnison Gorge RAMP

The maximum group size for all parties within the Gunnison Gorge WSA (foot, horseback, and floatboaters) is 12 individuals.

^{1/} Stipulation P was taken directly from the Recreation Management Plan for the Gunnison Gorge Recreation Lands, Colorado, dated July 24, 1985, as supplemented by the Addition dated July 21, 1988 (collectively referred to as the Plan). A planning decision is not appealable to this Board, but when the language of the Planning decision is adopted as a stipulation to a permit, that language is subject to our review and the planning document can be used to gain an understanding of the intent of the stipulation.

This figure (12 individuals) would include clients and guides in commercially-outfitted groups.

Discussion: The impacts on campsites along the river corridor are the primary factor in limiting group size. The majority of the campsites cannot withstand the soil compaction and vegetative trampling that is associated with groups of more than twelve individuals. In addition, U.S. Forest Service wilderness studies have substantiated that the adverse social impact on small user groups is greater when they encounter a single large group (more than 12 individuals) than when they encounter ten small groups (five or fewer individuals). The maximum group size of 12 individuals is consistent with the BLM's management objectives and with wilderness and wild river management. [Emphasis in original.]

In its June 23, 1989, decision BLM notes Dvorak's response to BLM's May 31, 1989, Show Cause Notice and concludes that Dvorak's response does not justify the infraction. Dvorak's May 16-17 commercial trip was registered as two launches but the six rafts launched, floated and camped together, a violation of Stipulation P's group size limit. The District Manager stated that this was the second violation for exceeding group size limitations and placed Dvorak on "probationary status." Both BLM's decision and the May 31, 1989, Show Cause Notice defined "probationary status" as: "A permittee given a probationary performance rating will only qualify for a permit not to exceed 1 year, and permits with remaining periods of more than one year will be so amended" (Decision at 2; Show Cause Notice at 2 (emphasis added)).

BLM's decision continued:

Your permit, by now being changed from a three-year (multi-year permit) to a one-year permit, may jeopardize your ability to be given a five-year multi-year permit beginning in 1992. A second probationary performance rating or one unacceptable performance rating will result in your commercial recreation permit being cancelled and/or not renewed.

(Decision at 2).

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 and Special Recreation Permit Policy Statement (Policy Statement), 49 FR 5300 (Feb. 10, 1984).

Under the terms and conditions set out in the Plan, BLM was required to make Stipulation P a part of the Permit. The Dvorak and Far Flung

Adventures challenges to Stipulation P on the basis that it is unreasonable (Dvorak's Statement of Reasons at 2-3; Far Flung Adventures Notice of Appeal at 2) may be relevant to the plan revision and amendment process. These challenges are not relevant here, however, as Dvorak agreed to be bound by Stipulation P when it executed the Permit. Incident to BLM's authority to prescribe permit stipulations is BLM's authority to enforce those stipulations by assessing penalties (Galand Haas, 114 IBLA 198, 204 (1990); see 43 CFR 8372.5(a); Osprey River Trips, Inc., 83 IBLA 98, 101 (1984)), by permit suspension (Osprey River Trips Inc., supra), and/or by permit cancellation (Don Hatch River Expeditions, 91 IBLA 291 (1986)).

BLM has promulgated specific regulations (43 CFR Subpart 8372), and has published its Policy Statement pertaining to special recreation permits. Section D.1 of the Policy Statement addresses permit length, monitoring of compliance with permit stipulations, and provides for permit modification or cancellation if the permittee's performance is unsatisfactory. 49 FR 5305 (Feb. 10, 1984). ^{2/} Under the published Policy Statement, only multi-year commercial permits may be renewed. (49 FR 5305 (Feb. 10, 1984); Four Corners Expeditions, 104 IBLA 122, 127 (1988)). Section D.2. states that preference should be given to those permittees having "satisfactorily met the requirements of the previous permit and continued use is consistent with the management plan" when granting renewal of multi-year permits. The Policy Statement also states that "[u]nsatisfactory performance may lead to denial of the permit applications." Id.

The requirements set out at 43 U.S.C. § 1732(c) (1988) provide:

^{2/} The Policy Statement also provides for performance evaluation:

"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).

Section 8 of the Policy Statement provides that BLM may require a permittee to comply with any reasonable stipulations or conditions necessary to protect the lands and resources involved and the public interest in general and compliance with stipulations may be monitored at various intervals and depending on the type of use involved, the resource values at risk, the permittee's past record and other factors. Failure to comply with stipulations or conditions may result in permit cancellation, criminal sanction, or civil suit. 49 FR 5305-06 (Feb. 10, 1984).

The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard [sic] or implementation plan [sic]: Provided, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: Provided further, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: Provided further, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: Provided further, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail. [Emphasis in original.]

In James C. Mackey, 96 IBLA 356, 365, 94 I.D. 132, 137 (1987), we held that Congress intended to extend the 43 U.S.C. § 1732(c) (1988) requirement to "all land use authorizations issued by the Department under any law for lands managed by BLM" (quoted with authority in San Juan County, 102 IBLA 155, 158, 95 I.D. 61, 62-63 (1988)). In Mackey, we held that the protection afforded by 43 U.S.C. § 1732(c) (1988) extended to the suspension of permits issued pursuant to the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa (1988), and in San Juan County we found that it extended to the suspension or revocation of leases issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. §§ 869-869-4 (1988). The principle stated in Mackey is applicable to this case.

[3] When the enabling statute states that an agency decision is to be made "after notice and hearing," and Congress has not clearly indicated that the hearing must be a formal evidentiary hearing on the record, the agency has flexibility in how it structures such hearing. Sea-Land Service, Inc. v. United States, 683 F.2d 491, 495-96 (D.C. Cir. 1982); United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519, 536-37 (D.C. Cir. 1978). If the statute does not expressly require a hearing "on the record" and no contrary Congressional intent is evident, formal proceedings before an administrative law judge are not mandated. See Railroad Commission of Texas v. United States, 765 F.2d 221, 227 (D.C. Cir. 1985); Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908, 922 n.63 (D.C. Cir. 1982). There being an absence of a Congressional expression requiring a formal evidentiary hearing on the record, the language of 43 U.S.C. § 1732(c) (1988), allowing for revocation or suspension of a use permit after "notice and hearing," does not dictate formal proceedings before an administrative law judge. Compare 43 U.S.C. § 1766 (1988) (which expressly provides for "an appropriate administrative proceeding pursuant to section 554 of Title 5")

prior to suspension or termination of "easements"). A special recreation permittee's hearing rights under 43 U.S.C. § 1732(c) (1988) are satisfied by applying established Department procedures for review of BLM's decision by this Board. When Dvorak was given notice of BLM's adverse decision and afforded the right to appeal to this Board, his rights were fully satisfied. 3/

[4] 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. Four Corners Expeditions, supra at 126. Dvorak admits that his May 16-17 commercial trip was registered as two launches, and that the six rafts launched, floated and camped together, a violation of that stipulation. In defense of his action he asserts that extenuating circumstances justified noncompliance. Recognizing that emergency conditions may well justify a waiver of or noncompliance with Stipulation P, we find that the preponderance of the evidence now before us supports BLM's conclusion that Dvorak combined the two camps for convenience rather than in response to an emergency condition making it necessary to combine the camps for the safety and well being of the float participants. 4/

[5] Having found that the preponderance of the evidence supports BLM's finding that a violation occurred, we find it appropriate to examine the penalty BLM has imposed for that violation. 5/ 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). The only basis for placing Dvorak on probation, effectively

3/ The Board has the authority to order a fact-finding hearing before an administrative law judge when it finds material issues of fact not resolved by the record. 43 CFR 4.415; see San Juan County, supra, and James C. Mackey, supra. This procedure is adequate to ensure that the Department "has sufficient information so that its final decision reflects a consideration of the relevant factors." See Sea-Land Service, Inc. v. United States, supra at 496; United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 453 (9th Cir. 1971).

4/ An example of the nature of the evidence is illustrated by Dvorak's statement that the "storm leveled the campsite leaving both the camps in shambles," found at pages 2 and 3 of the Supplemental Statement of Reasons, and the statement by the leader of the group that booked the float that "it rained a little but nothing major," quoted in the BLM Supplemental Answer at 2.

5/ The fact that the choice of action is committed to BLM's discretion "does not necessitate our affirmance since this Board has the authority to review such discretionary actions and substitute its judgment for that of BLM." Peak River Expeditions, 94 IBLA 98, 106 (1986) (A.J. Burski concurring); see, e.g., United States Fish & Wildlife Service, 72 IBLA 218 (1983).

cancelling his 3-year permit and preferential rights, is found in the BLM Manual, which is not readily available to the public. ^{6/} We find the absence of a more readily available resource for predicting the sanctions that may be imposed to be troubling, but recognize the Board's previous holdings that BLM's use of Manual provisions did not restrict its authority to invoke administrative sanctions for violation of the permit. 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. See Patrick G. Blumm, 116 IBLA 321, 338-39 (1990); Hondoo River & Trails, 91 IBLA 296 (1986); Peak River Expeditions, *supra*; Don Hatch River Expeditions, *supra*; Osprey River Trips, Inc., *supra*. Recognized sanctions include placing the permit holder on probation. Rogue Excursions Unlimited, Inc., 104 IBLA 322 (1988); Robert L. Snook, 100 IBLA 151 (1987).

[6] There is no question that BLM had the authority to respond to a violation of Stipulation P, that placing a permittee on "probationary status" is committed to BLM discretion, or that imposing probationary status is reasonable when the permittee demonstrates a clear pattern of violation. However, the record must support BLM's determination that the alleged violations demonstrate a pattern of stipulation violations, the number and the relative severity of those violations, and a basis for selecting the chosen remedy. ^{7/}

Dvorak was placed on probation when BLM's authorized officer found that Dvorak had violated Stipulation P on two occasions, demonstrating a pattern of violation. Its Show Cause Notice makes reference to an alleged "first violation of Stipulation P" in 1987. However, that apparent violation did not fall under the 1989 Permit at issue, and no action was taken by BLM.

^{6/} Sec. H-8372-1 of the BLM Manual provides:

"Violation of the operating plan requirements, rules of conduct, or other Federal, State, or local regulations by a permittee or a permittee's employees or agents on any federally administered lands or related waters can result in administrative penalties issued against the permittee by [BLM]. Specific administrative penalties should be identified in a permittee's operating plan."

The same Manual section indicates that BLM has "discretionary authority to impose specific penalties upon the permittee, including, but not limited to: permit privilege denial, probation, suspension, or revocation, in whole or in part, and without compensation." Id.

^{7/} The following Far Flung Adventures' description of its experience suggests that our concern may be justified: "Our annual permit was received one day late, a negligible inconvenience for the area office for which we were threatened with revocation of permit for nearly one month and finally placed on probation, which resulted in our permit status being changed from multi-year to single year, and needlessly placing a tarnish on an otherwise blameless record of compliance by our organization" (Far Flung Adventures Notice of Appeal at 2).

When examining the "first violation" we do not find that the event can properly be called a violation. The alleged 1987 violation of Stipulation P group size limitation was noted by the District Manager when he referred to a trip run by Dvorak on July 31 and August 1, 1987, and said that "our records show you ran with a group size of 17. As you know, our maximum group size was 12 in 1987, but since you had already scheduled this trip under our 1986 rules, an exception was granted for you to run 17" (BLM Decision at 1). We find that Dvorak's action in 1987 was not a violation of Stipulation P because BLM had waived the terms of Stipulation P, recognizing that the trip had been booked when a 17 member group was permissible. ^{8/} If the 1987 trip was not in violation of Stipulation P, there was a single infraction of Stipulation P to Dvorak's special recreation permit (the May 1989 incident). A single violation does not support a finding that there was a pattern of violations.

We also note that the sanction imposed had much greater impact than simple probation. In response to a single violation of Stipulation P to the 1989 multi-year Permit, BLM amended the permit by "chang[ing] [the permit] from a three-year (multi-year permit) to a one year permit," effectively revoking the preferential right to renewal granted to Dvorak when its multi-year permit was issued. This priority status was a material benefit flowing from Dvorak's multi-year permit. We are unable to find this choice of remedy reasonable and supported by the record, and deem it appropriate to vacate that portion of the decision placing Dvorak on probationary status.

Therefore, 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 affirmed, in part, and vacated, in part.

R. W. Mullen
Administrative Judge

We concur:

James L. Byrnes
Chief Administrative Judge

^{8/} We have recognized the inequity that may result when BLM imposes new and more restrictive standards after a commercial outfitter books reservations. See The Exodus Corp., 126 IBLA 1 (1993) at note 1.

ADMINISTRATIVE JUDGE HUGHES, CONCURRING SPECIALLY:

While in agreement with the majority's disposition of the present appeal, I wish to offer my comments on the situation governing special recreation permits (SRPs) issued under section 302(c) of the Federal Land Policy and Management Act, 43 U.S.C. § 1732(c) (1988), to commercial river rafting concerns.

As noted by the majority, there are no regulations governing violations of commercial river rafting SRPs or setting out administrative sanctions for violations. The regulations do state that an SRP holder is prohibited from violating stipulations or conditions of an SRP. 43 CFR 8372.0-7(a)(2). They do not provide for administrative sanctions for violations of stipulations or conditions, but merely allude to criminal penalties and civil actions for unauthorized use, presumably judicial. 43 CFR 8372.0-7(b).

The only basis for placing the permittee in this case on probation (and cancelling his 3-year permit and any grandfather rights) appears in the BLM Manual, which is not known to the public. Further sanctions, including barring an outfitter from operating on Federally-managed rivers are allowed.

Despite the absence of Departmental regulations establishing nationwide standards and sanctions for noncompliance, the Board has in the past found the use of BLM Manual provisions rather than regulations not to restrict BLM's authority to invoke administrative sanctions against commercial SRP holders. The Board has ruled that an SRP issued to a commercial river runner is subject to any special condition or stipulation deemed necessary by BLM for protection of public interests, and that, notwithstanding the failure to publish regulations, where BLM notifies a permittee that his permit will be subject to sanctions for failure to comply with these stipulations, it may invoke such sanctions. See Patrick C. Blumm, 116 IBLA 321, 338-39 (1990); Hondoo River & Trails, 91 IBLA 296 (1986); Peak River Expeditions, 94 IBLA 98 (1986); Don Hatch River Expeditions, 91 IBLA 291 (1986); Osprey River Trips, Inc., 83 IBLA 98 (1984).

I find this situation troubling. Various offices have developed different rules regarding what is permissible. Further, they have established different procedures for reviewing adverse decisions against permittees, some of which are fundamentally unworkable. See, e.g., Patrick C. Blumm, supra at 339 n.25. It is unclear to me how SRP holders can be expected to keep up with what is required of them, particularly where requirements vary widely from year to year. Further, it seems patently unfair to require commercial river rafters to operate under the widely differing procedures in place in the various BLM offices that regulate commercial river rafting.

A simple solution would be for BLM to promulgate Departmental regulations governing commercial SRPs. Those regulations could set out consistent BLM-wide sanctions for violations and procedures for reviewing adverse decisions against permittees. Special local conditions could be accommodated by authorizing imposition by BLM of stipulations in the SRPs, and flexibility to make adjustments from year to year could be maintained via a yearly

update of those stipulations. Procedures could be implemented via regulation to ensure that the SRP holders would both have the chance to participate in preparation of such local rules and receive ample notification of such rules in time to meet the demands presented by having to schedule customers' trips in advance.

It appears certain to me that the commercial river rafting regulation system would function much better if a standard framework were established providing for the orderly imposition of local stipulations, Department-wide sanctions, and review of adverse decisions, as well as other administrative concerns. I urge BLM to promulgate appropriate regulations.

David L. Hughes
Administrative Judge