

GALAND HAAS

IBLA 88-547

Decided April 24, 1990

Appeal from a decision of the Medford District Office, Bureau of Land Management, affirming administrative penalty for providing an unauthorized river trip. MRP-62 (Oregon).

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976:
Permits--Public Lands: Special Use Permits--Special Use
Permits--Wild and Scenic Rivers Act--Words and Phrases

"Providing an Unauthorized Trip." Where the holder of a special recreation permit for commercial use of a wild and scenic river, during the 1987 period of regulated use of the river, put boats into the water on the day of a scheduled river trip, but did not load passengers and begin the scheduled trip downriver until 2 days later, the trip was unauthorized as that term is used by an operating plan governing such excursions.

2. Evidence: Burden of Proof--Evidence: Preponderance

An appellant before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision is in error.

3. Federal Land Policy and Management Act of 1976:
Permits--Public Lands: Special Use Permits--Special
Use Permits--Wild and Scenic Rivers Act

The holder of a special recreation permit for commercial use on a wild and scenic river may be required to forfeit two scheduled trips where it is established the permittee provided an unauthorized trip by starting a trip on an unscheduled date without reporting his departure as required by an operating plan made part of his permit.

APPEARANCES: Steven C. Baldwin, Esq., Eugene, Oregon, for appellant; Donald P. Lawton, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

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Galand Haas, d.b.a. Northwest Whitewater Excursions, appeals from an April 15, 1988, decision of the Medford District Office, Bureau of Land Management (BLM), affirming a penalty providing for cancellation of two river trip starts under special recreation permit MRP-62 (Oregon). The penalty was assessed against him for providing an unauthorized trip during the 1987 period of regulated use of the "wild" section of the Rogue River. Appellant is a commercial outfitter on the Rogue River.

On January 20, 1988, BLM's Grants Pass Area Manager found that appellant had provided an unauthorized trip starting on September 4, 1987, in violation of the Rogue National Wild and Scenic River Commercial Outfitter Operating Plan For Commercial Permittees in the Designated 'Wild' Section, (1985) (Operating Plan). The Operating Plan controls the operations of commercial guides and outfitters on the Rogue River, whose permits are conditioned upon observance of rules established by the Plan. Because of the violation found, BLM proposed an administrative penalty of forfeiture of two trips in 1988 of the same size as the unauthorized trip taken in 1987. The forfeited launch dates in 1988 were to be those dates closest to the month and day of the unauthorized 1987 trip.

Appellant protested the proposed decision to the Medford District Manager, BLM, who affirmed the Area Manager, denying appellant's protest in a decision issued April 15, 1988.

In 1987, the Operating Plan required commercial outfitters to obtain a special recreation permit prior to offering or conducting commercial services (Operating Plan at 3). The Plan provided that permittees give 10 days prior written confirmation that a scheduled trip would take place as planned (Operating Plan at 7). The number of persons allowed to be on commercial excursions in the "wild" section of the river on any given day was limited (Operating Plan at 2, 6). In the event that a scheduled trip was cancelled, the number of places reserved for persons assigned to that trip was to go into a common pool of passengers which would then become available to other guides who wished to increase the size of parties scheduled for the same day, or who had customers ready to travel on the scheduled day who were not previously booked. The procedure for reallocating cancelled places among outfitters is described in the Operating Plan:

Common pool passenger spaces are allocated in the following manner:

(1) Allocations which are cancelled nine days or less prior to the assigned launch date are available the day following cancellation.

(2) Allocations which are not confirmed ten days or more prior to the assigned launch date are available nine days prior to the assigned launch date.

(3) Allocations cancelled on the actual launch date, or allocations which are not registered at the Rand Visitor Center

by 2 p.m. on the scheduled launch date are available on that day on a first-come, first-served basis, with scheduling preference granted to those who wait in person at the Rand Visitor Center.

(Operating Plan at 7).

Appellant had a scheduled trip set to begin on September 4, 1987. He failed to give written notice of confirmation of that fact to the Rand Center within 10 days of the scheduled start, however, and was notified that his passenger spaces for that trip had been transferred into the common pool as a result. To accommodate his scheduled party, appellant obtained permission to start a trip on September 2, 1987. The case file does not indicate the source of the spaces obtained for the September 2 trip.

On September 2, appellant put boats into the river and moored them a short way downstream of the site where commercial trips are launched into the river. On September 4, he moved the boats back to the launch site, loaded his passengers and equipment, and commenced an excursion downstream.

Appellant contends that he had timely mailed notice to the Rand Center that his September 4 trip would take place as scheduled, but that through no fault of his the trip confirmation was not delivered, being returned to him 9 days before the scheduled trip for insufficient postage paid.

He contends that he accidentally learned on the 10th day before the scheduled trip, however, that the notice had not been delivered, when he telephoned the Rand Center to learn whether there had been any cancellations. According to appellant, an employee at the Center informed him that his confirmation card had not been received and that his trip scheduled for September 4 had gone into the common pool of spaces available to all comers. Appellant states that he was told the spaces from his trip had already been placed into the common pool of spaces available for assignment and had been reassigned.

In his statement of reasons on appeal (SOR), appellant argues that BLM's cancellation of the river trip scheduled for September 4, 1987, was unlawful. Appellant argues that the cancellation occurred one day early and was therefore ineffective to cancel his trip under conditions imposed by the permit, which provides that spaces will not be reallocated until the ninth day prior to the originally scheduled departure date.

Alternatively, he argues that when he put boats into the river on September 2, this action constituted a "launch" within the meaning of Violation F of the Operating Plan, because to launch is defined as "to set (a boat or ship) afloat" (SOR at 5). This is a reference to the Operating Plan provision describing Violation F, "Providing an unauthorized trip" which contains an explanatory note stating "(Note: Unauthorized trips occur when an permittee launches a trip without first checking in with the Rand Visitor Center by 2 p.m. on the day of launch, launching on date on which the outfitter is not scheduled, etc.)" (Operating Plan at 17).

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BLM disputes that cancellation of the trip scheduled by appellant for September 4 was made early, relying upon the affidavit of the same employee cited by appellant. BLM has submitted that affidavit on appeal to this Board in response to appellant's statement, explaining:

That no Trip Validation Card was received at the Rand Visitor Center by August 25, 1987, as confirmation from Galand Haas for his September 4, 1987 10-person start. That as a result these 10-float openings went into the Common Pool for re-allocation the following day. That a Commercial Nonconfirmation letter was mailed to Mr. Haas on August 26, 1987 notifying him that his scheduled trip on September 4, 1987 had been cancelled.

(Affidavit of Kenneth M. Vines dated July 12, 1988).

BLM argues that appellant was not authorized to start a trip on September 4, 1987, and that his departure then was unauthorized. The argument is made that failure to start the trip, authorized to begin September 2, until 2 days later, resulted in a "no-show" and that departure on the fourth without first notifying the Rand Center caused the trip to be unauthorized. This aspect of the appeal is considered first.

[1] Appellant's argument that he could avoid the notice requirements placed on commercial outfitters doing business on the Rogue by placing boats without passengers on the water of the river on the day scheduled is not correct. The Operating Plan indicates that traffic in travelers is the principal object of regulation of the river when it provides that "rental of equipment alone does not constitute outfitting and guiding services" (Operating Plan at 1). The violation charged, providing an unauthorized trip, is not concerned with the placement of boats in the water at the departure point, which presumably is not within the "wild" section of the river, but with controlling the number of visitors to the "wild" area. *Id.* at 2, 6. In Robert L. Snook, 100 IBLA 151 (1987), also a decision dealing with a commercial permit violation on the Rogue, we observed, concerning regulation of passenger excursions on the river, that:

BLM and the Forest Service regulate the number of commercial permits, the number of trips allocated to commercial outfitters during the operating season and the number of passengers on commercial trips during the operating season. In addition, passenger spaces allocated and confirmed 10 days or more prior to the assigned launch date but "not registered at the Rand Visitor Center by 2 p.m. on the launch date" are placed in a common pool and made available on a first-come, first-serve basis "on that day" (Operating Plan at 7). Thus, launching a trip without checking into the Rand Visitor center may result in an excess number of users on the river on a given day. Therefore, the requirement to check into the Rand Visitor Center prior to launching a trip, with the attendant penalty for failure to do so, is a necessary component of proper management of the river.

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Appellant's attempt to characterize the "launch" as the placement of boats into water is incorrect. It is not the act of putting boats into the water that is regulated by the Operating Plan, although that action is a necessary prelude to the conduct regulated.

It is the launching of a trip which is the focus of regulatory purpose. The note to the Operating Plan at "Violation F" states as much. It explains that an unauthorized trip occurs "when a permittee launches a trip without first checking in with the Rand Visitor Center." Id. at 17 (emphasis supplied). While the condition of the equipment used by guides is also a matter of regulatory interest (for example, boat identification and use of motorized boats is regulated by the Operating Plan), such matters are not, however, relevant to the appeal before us. When appellant began an unscheduled trip on September 4 without checking in at the Rand Visitor Center he therefore provided an unauthorized trip, assuming that his September 4 excursion as originally scheduled had been properly cancelled for failure to confirm departure. We now turn to that question.

Appellant assumes that his September 4 trip was not properly cancelled. He argues that he "may have still have hand delivered a card on August 25th [the 10th day before September 4] if the agency had not violated its own rules" (SOR at 4). Implicit in this argument is the assertion he would have done so, had he not been prevented from giving such direct confirmation by agency action. The rule said to have been violated by the agency is the rule that spaces not confirmed for use by the 10th day prior to a scheduled day not be reassigned until the day following, in this case, August 26.

Appellant's contention rests on his report of a telephone conversation with an employee at the Rand Visitor Center said to have taken place on August 25, the day when confirmation of the September 4 trip was due. To explain why he called the Center on the 25th, appellant explains, in a letter which appears as exhibit 1 to his SOR:

On August 25, ten days prior to my trip start, I called the Rand Visitor Center in hopes of picking up some additional spaces for my trip through the common pool system. The phone lines were busy and I was unable to get through to the visitor center until late morning. When I was finally able to get through, I identified myself and explained that I was looking for some additional common pool spaces for my September 4, four day fishing trip. I was then told by Mr. Ken Vines of the Forest Service, that he had given away all of my available trip spaces on that morning.

(Letter dated Apr. 21, 1988, Haas to Salsgiver, at 1).

This version of the cancellation is contradicted by the Vines affidavit, which states that cancellation did not occur until August 26, when notice of that fact was mailed to appellant. This assertion by Vines is corroborated by the postmark on the envelope used to mail the notice, which is stamped August 26, 1987. The Vines' affidavit does not mention a telephone call.

[2] To evaluate whether this conflict in the evidence can be resolved without further fact-finding proceedings, we must comment concerning a suggestion in the initial decision under review that proof beyond a "reasonable doubt" is required in this case (Decision dated Apr. 15, 1988, at 2).^{1/} In administrative proceedings before the Department, the general rule is that there be proof by a preponderance of the evidence that a decision is in error if an appellant is to prevail. Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); Carolyn J. McCutchin, 93 IBLA 134 (1986). This means, simply, that there must be a showing that something is more likely so than not. Richard A. Willers, 101 IBLA 106 (1988); Elizabeth D. Anne, 66 IBLA 126 (1982). This is the standard applied in this case, and is the standard which BLM should apply in determining such cases in the future.

[3] Clearly, no written confirmation of the September 4 trip was ever received by the Rand Visitor Center. Evidence showing that there was written cancellation of appellant's trip on the 26th is provided by Vines' affidavit, and is corroborated by the postmark of the same date, indicating that written notice was issued in conformity to the Operating Plan on the day after confirmation of the September 4 trip was required. This evidence indicates that cancellation of the September 4 trip was regularly made.

The only evidence to contradict this conclusion is appellant's assertion that he called the Rand Visitor Center on August 25, only to learn that cancellation had already occurred. This assertion, however, is uncorroborated by other evidence. Moreover, it is not consistent with the explanation offered by appellant in exhibit 1 quoted above, to the effect that he called the center to obtain "additional common pool spaces for my September 4, four day fishing trip." This statement of purpose only makes sense if the confirmation period had expired when the telephone call was placed, because it would only be on August 26, the ninth day before the scheduled September 4 trip, that such additional spaces would have first become available for the September 4 trip through the cancellation process described in the Operating Plan. It would make sense, therefore, to conclude that the telephone conversation reported did take place, but that it occurred on August 26, one day after the confirmation deadline. Under the circumstances of this case, therefore, we conclude that the September 4, 1987, trip was cancelled in the regular course required by the Operating Plan. Consequently, we find that when appellant started his trip without notice to the Rand Center on September 4, 1987, he provided an unauthorized trip in violation of the Operating Plan.

The penalty provided for that violation was assessed by BLM pursuant to provision of the Operating Plan. We have previously recognized that it

^{1/} The decision actually stated that "[w]e find no convincing evidence in your letter that raises reasonable doubt about the correctness of the proposed decision." This was a reference to the requirement set forth in the proposed decision that "[p]rotests shall include convincing evidence that raises reasonable doubt about the correctness of the proposed decision."

is within the authority of the Department to establish permit conditions and establish penalties for violation of those conditions. Osprey River Trips, Inc., 83 IBLA 98 (1984). Appellant was on notice that failure to check in at the Rand Visitor Center would violate the terms of his permit. BLM's decision correctly imposed the penalty provided by the Operating Plan. See Robert L. Snook, supra.

Therefore, 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 Medford District Office is affirmed as modified.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge