

WILDERNESS RIVER OUTFITTERS
AND
TRAIL EXPEDITIONS, INC.

IBLA 77-206

Decided May 16, 1977

Appeal from decision of Utah State Office denying renewal of Special Recreation Use Permit U-31493.

Reversed.

1. Public Land: Special Use Permit--Special Use Permits

A special use permit for commercial passenger carrying river-trip operations may be denied renewal for non-use or reduced for incomplete use over a two year period and only use during the crucial high season may be counted in determining usage if the permit so provides. However, where the program is recent and permittees are not fully familiar with its operations, and all the requirements for maintaining the permit are not immediately apparent, a permittee may be given some leeway before his permit is denied renewal.

APPEARANCES: Joe Tonsmeire, Salmon, Idaho.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Wilderness River Outfitters and Trail Expeditions, Inc., has appealed from a decision dated February 4, 1977, of the Utah State Office, Bureau of Land Management, affirming a decision of the Moab District Manager denying renewal of a Special Recreation Use Permit 1/ for operations of commercial passenger carrying river-trips on the Desolation Canyon segment of the Green River.

1/ Special land use permits have been issued to authorize beneficial use of public lands in situations where there is no provision of a law

Appellant's permit in 1976 and for several years earlier had authorized it to conduct trips totalling 275 passenger days. The permits were issued annually. Renewal was denied because the permittee had failed to make use of its allocation during two or more consecutive years, i.e., 1975 and 1976.

Appellant contends that he did make some use in 1975 and in any event, the "use or lose" policy is arbitrary, discriminatory, contradictory and unfounded.

It appears that appellant was first issued a permit in 1973 when the issuance of permits for river operations was instituted. 2/ The appeal involves the application of two particular provisions of the permit. The 1975 and 1976 permits provided:

fn. 1 (continued)

that may be invoked. 43 CFR 2920.0-2. However, Section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701, 1732(b) authorizes the Secretary to regulate the use of public lands "through easements, permits, leases, licenses, published rules, or other instruments as he deems appropriate."

On December 14, 1976, the Associate Director, BLM, issued Organic Act Directive No. 76-15 entitled:

"Interim Guidance for the Processing of Right-of-Way and Temporary Use Permit Applications under PL 94-579, the "Federal Land Policy and Management Act of 1976" (the Act).

It provides that all temporary use permits (TUPS) will be processed in accordance with the following guidance:

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"Secs. 302(b) and 504(a). L. Part 2920 - Temporary Use Permits

"1. Special land use permit authority is no longer applicable. Temporary use permits (TUPS) will be granted under Sec. 504(a) of the Act for any temporary land uses associated with rights-of-way deemed appropriate by the Authorized Officer.

"2. Temporary use permits may be issued under Sec. 302(b) for land uses not associated with rights-of-way. Until new regulations are issued, permits will be confined to short-term actions and/or temporary facilities where long-term tenure is not appropriate.

"3. Part 2920 regulations and BLM Manual procedures shall be utilized for the processing of TUP applications for land uses up to a one (1) year permitting period.

"4. We are exploring the feasibility of converting present seismic exploration procedures (43 CFR 3045) to temporary use permits under 43 CFR 2920. Further guidance will be forthcoming."

2/ See Canon Tours, Inc., 20 IBLA 216 (1975) for an account of why and how the special use permit and its attendant allocation of use was created and evolved:

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14 B. (5) A passenger day (P/D) is one commercial passenger, paying or non-paying, except as noted below, on the river for one calendar day, or a portion thereof. Crewman are not included in passenger day computations. The fee rate payable in advance to the BLM is \$ 25 per 100 passenger days, or a fraction thereof. Trips by permittees for the purpose of training boatmen and crew will not count against the passenger day allocation except that any person who is not a boatman or trainee will count against the allocation. Trips taken by a permittee where no fees are charged will be counted as non-commercial and not count against the passenger day allocation when advance approval

fn. 2 (continued)

"The courses of the Green and San Juan Rivers cross and run past national resource lands administered by the Bureau of Land Management. Commercial and recreational boating on the river in the Desolation Canyon area of the Green River may also involve use of campsite facilities on the public lands. The Bureau has developed a program to regulate the use of these rivers in order to maintain the environmental quality of the river and the adjacent public lands.

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"Before applications for 1974 commercial tour permits were allocated, the Bureau conducted an extensive environmental impact analysis of the river areas. Studies were undertaken to determine the capacity of the river systems and related lands. Detailed information on the amount of river use and the problems involved were gathered through the use of questionnaires and public meetings. All segments of the interested public were encouraged to participate in the discussion and preparation of management proposals

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"After pertinent information was gathered, permit applications were considered as to history and extent of use and scheduling of trips. Factors such as protection of the environment, provision for public safety, and minimizing user conflicts were of primary concern in the allocation of use. In the Desolation Canyon area alone there were 38,248 passenger days applied for by 46 commercial outfitters. This amounted to almost five times the recorded 1973 river use of 8,420 passenger days. At a meeting held October 11, 1973, between the Bureau and commercial river guides to discuss plans for river use, the consensus of the guides at that time was that Desolation Canyon applications would far exceed the carrying capacity in the 1974 season. A total of 20,400 passenger days were ultimately allocated to 36 commercial users. The total carrying capacity of 30,000 passenger days including private flatboat use had been established from the Bureau's review."

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is obtained from the BLM. Paying passengers on trips prior to May 1st or after September 30th, whether on training trips or regular trips, will not count against allocations but will require payment of additional fees at the regular rate (\$ 25/100 passenger days).

* * * * *

14 E. (3) Passenger day allocations in future years may be reduced by the following formula: Beginning January 1, 1974, if all or part of a permittee's annual passenger day allocation is not used during two or more consecutive years, the BLM reserves the right to reduce future yearly allocations up to, but not exceeding, the average amount not used during the two or more consecutive year period. This provision shall not apply to situations where allocations are not used as a result of river closure, exceptionally dangerous river conditions, lack of adequate water flow, or other conditions, natural or governmental, existing beyond the permittee's control. Notwithstanding the above, the BLM reserves the right to change passenger day allocations proportionately among the existing permittees in the event the BLM, in its sole discretion, determines that a river segment can support more or less passenger days than are then currently being allocated to commercial permittees.

The District Manager in his decision of December 27, 1976, pointed out that the records showed that appellant had not used any of its allocation in 1975 or 1976. He then, after citing 14E (3), supra, denied renewal for that reason.

In its appeal to the State Office, Wilderness stated that it had run a trip in October of 1975 and had written to the District Manager in November 1976 asking whether it had to have use in 1976 to preserve its permit. This letter went unanswered.

In its decision the State Office pointed out that, since under 14B (5) supra, paying passenger trips prior to May 1 or after September 30 do not count against the passenger day allocation, such use cannot be given credit as use during the allocation period. It then explained that it was not in the public interest to continue to tie up passenger days and allow them to go unused when they are within the ecological and environmental carrying capacity of the river and others could and would make use of them.

In its appeal, Wilderness says that it planned to build up its use in Desolation Canyon over time, but its patronage had not developed as rapidly as it had expected. However, it still advertises its Desolation Canyon trips along with its others in Idaho (where its main activities are based) and hopes to increase its usage. While it recognizes the good intentions underlying the

"use or lose" stipulation, it contends that it erroneously assumes that all trips allowed will be filled. It also says it is against common sense and good management to consider only usage during the central period – May 1 to September 30 – to determine usage under the permit for purposes of "use or lose."

[1] We agree with the State Office that it is poor practice to waste river trips through non-use and that it is proper to refuse to renew permits that are not used. We also find the State Office's interpretation of the permit to count only control period usage as satisfying "use or lose" is a proper reading of the permits – when the two provisions are read together. Yet if they are read as part of the permit as a whole, widely separated as they are, their correlation is not so immediately apparent.

Further, the river operation permit program is relatively recent and the operators have not had time to appreciate fully its nuances. We also note that refusal to renew is discretionary. Therefore, while we do not gainsay either the State Office's interpretation of the permit or the policy it seeks to explicate, we do believe that its application in this instance may be more stringent than necessary. Accordingly, in the absence of other reasons for denying it, we would renew Wilderness' permit for one more year so that with full awareness of the consequences, it may seek to utilize its permit or recognize that it may lose it in whole or in part.

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 State Office is set aside and the case remanded for further proceedings consistent herewith.

Martin Ritvo
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Frederick Fishman
Administrative Judge

