



United States Department of the Interior

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ORANGE TORPEDO TRIPS

IBLA 2009-61

Decided July 8, 2009

Appeal from a decision of the Grants Pass (Oregon) Resource Area, Bureau of Land Management, placing a special recreation permit in probationary status for one year and requiring the forfeiture of one scheduled future commercial river trip. MPR 2.

Affirmed.

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

Where the appellant commercial river outfitter directed two employees to obtain a noncommercial use permit knowing that the permit would not be used for noncommercial recreation, and that it instead would be, and was, used for the employees to participate as guides on the appellant's commercial river rafting trip, appellant violated the conditions and stipulations governing the terms of its special recreation permit. BLM properly placed the permit on probation and required appellant to forfeit one scheduled future river trip where the terms and conditions of the special recreation permit provided for suspension and probation.

APPEARANCES: Eric Weiseth, Grants Pass, Oregon, for appellant; Abbie Jossie, Field Manager, Grants Pass Resource Area, Medford District Office, Medford, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Orange Torpedo Trips (OTT), a commercial outfitter conducting guided river trips on the Rogue River in southwestern Oregon, has appealed a September 23, 2008, decision (Decision) by the Field Manager of the Grants Pass (Oregon) Resource Area, Bureau of Land Management (BLM), placing its special recreation permit (SRP), number MRP [Medford Recreation Permit] 2, in probationary status for one year. The Decision also determined that OTT would "lose its scheduled trip of August 28, 2009," under that permit. BLM took this action because on August 29, 2008,

BLM employees found that two OTT employees “were working in a commercial capacity and not listed on the Commercial Trip Confirmation Authorization card,” but instead “were, in fact, on the river under a non-commercial permit (Permit 832) issued on August 28, 2008,” and they had been “issued citations (0145776 and 0145777) for using a private permit for commercial gain.” Decision at 1.

OTT’s one-page letter constituting its combined notice of appeal and statement of reasons (SOR), received on October 23, 2008, contends that removal of the August 28, 2009, “start date from our list of 2009 starts is excessive for an action which has become a commonly accepted practice by other outfitters in the area.”¹ OTT argues that “being fined \$16,000 in lost revenue is excessive for this action.” *Id.* For the reasons explained below, we affirm.

BACKGROUND

OTT’s SRP, approved by the BLM Acting Field Manager on June 4, 2008, authorized “commercial inflatable kayaking whitewater lodge trips” on every Monday and Friday from June 13 through August 31 for a period ending on September 23, 2009. SRP at unpaginated 1, blocks 3 and 4, Administrative Record (AR) section 1. The SRP anticipated 20 guests and 5 guides per trip, using “20+” inflatable kayaks, one oar raft, and 1-4 paddle rafts. *Id.*, blocks 3 and 6. The SRP imposes a number of conditions, including that it “is subject to all applicable provisions of the regulations (43 CFR Group 8300) which are made a part hereof” and that the permittee “shall abide by all special stipulations attached hereto.”² SRP at unpaginated 2. The regulations also require a permittee to comply with permit stipulations and conditions and prohibit violation of those stipulations or conditions. 43 C.F.R. §§ 2932.41, 2932.57(a)(2). The SRP further provides that “[a]ll rules and regulations pertaining to this permit, as well as those outlined in the ‘Commercial Operating Plan’, must be observed.” SRP at unpaginated 1, block 2.

¹ OTT incorrectly refers to the starting date of the cancelled trip as Aug. 29 rather than Aug. 28, 2009.

² The permit form, Form 8370-1 (April 1999), including its reference to “43 CFR Group 8300,” is outdated relative to the codification of the regulations. The regulations applicable to SRPs codified at former 43 C.F.R. subpart 8372 were replaced in 2002 by regulations at the current subpart 2932. 67 Fed. Reg. 61732, 61741 (Oct. 1, 2002); *see* 65 Fed. Reg. 31234, 31235 (May 16, 2000) (proposed rules, table). In addition, most of the section of the Land and Water Conservation Fund Act cited at the top of Form 8370-1 as codified at 16 U.S.C. § 460l-6a was repealed in 2004 by section 813(a) of the Federal Lands Recreation Enhancement Act, Pub. L. No. 108-477, § 2, div. J, Title VIII, 118 Stat. 2809, 3390 (Dec. 8, 2004), codified at 16 U.S.C. § 6812(a) (2006).

The Commercial Permittee Operating Plan for the Wild Section of the Rogue National Wild and Scenic River, Revised February 2004 (hereinafter "Operating Plan"), provides in the section captioned "Commercial Trip Confirmation and Reporting" that "[a]ll trips during the regulated use season must be confirmed with the Rand VC [Visitors Center] no later than ten days prior to the launch date. This is done by complying with all directions listed on the back of the Wild Rogue River 'Commercial Trip Confirmation and Authorization' card." Operating Plan at 18, AR section 5.³

On August 28, 2008 (a Thursday), Wild Rogue River Noncommercial Use Permit 0832 was issued to Josh Makepeace, an OTT employee, as party leader of a party of two for 4 days on the river, with a stated launch date the same day.⁴ AR section 5. The other party member listed was Benito Silva, also an OTT employee. Neither Makepeace nor Silva is identified as an OTT employee on the permit. The "Conditions of Use" printed on the back of the form state that the party leader's signature on the permit affirms, *inter alia*, that "[t]here is no financial gain by any member of the group" and "[n]o charge is collected for use of the equipment." The regulations prohibit the holder of a noncommercial recreation use permit for a fee use area from violating its stipulations or conditions. 43 C.F.R. § 2933.33(a)(2).

On the same day the noncommercial use permit was issued to Makepeace (August 28, 2008), the BLM representative at the Rand Visitors Center approved the "Commercial Trip Confirmation and Authorization" for OTT's commercial trip to launch the next day (Friday, August 29, 2008). The copy marked "tan copy" shows 20 paying passengers at various price levels, 3 passengers at no charge, and 5 crew. AR section 5 (copy attached to memorandum from Louise Richards, Permit Administrator for the Rogue River Program, to Jeanne Klein, River Manager, dated Oct. 27, 2008). The names of the crew shown on the Commercial Trip Confirmation were Mike Slagle, Mike Porzio, Tim Satre, Jerrod Dastrup, and Damian McClean. Makepeace's and Silva's names were originally included, but they were marked out, and it appears that Dastrup's name was added.

Makepeace and Silva did not launch their own noncommercial trip on August 28, as authorized by Noncommercial Use Permit 0832, but instead participated as guides in OTT's commercial trip that launched on the 29th.

³ OTT has not disputed that it has the Commercial Operating Plan or that it was an attachment to the SRP, as the Decision states.

⁴ Although permit form OR110-8372-1 is dated March 2008, it cites as authority the subpart 8372 regulations which were removed from the C.F.R. in 2002, as explained in n.2 above. Regulations governing noncommercial recreational use permits for fee use areas currently appear at 43 C.F.R. subpart 2933.

Incident/Investigation Reports by BLM law enforcement officers Jacque S. Hansen, dated Sept. 1, 2008, and Jason A. Curry, dated Sept. 16, 2008, AR section 4, both state that during a compliance check of OTT's August 29 trip, "the lead guide admitted to having two of his employees purchase personal permits, because he had already exceeded his limit of permits. The lead guide had his two guides purchase the personal permits so that they could assist in guiding the rafting tour." Hansen Report at 2; Curry Report at 2. The reports also state that when the officers contacted Makepeace and Silva later in the day, Makepeace and Silva each stated that he "was aware that it was a violation to use a personal recreation permit for commercial gain" and that they "had purchased the permit at the direction of [their] boss so that he could guide the trip even though [OTT] had reached its limit." *Id.* In describing the offenses, the reports cite 43 C.F.R. § 2932.57(3) as governing a violation of the stipulations of a commercial permit.⁵

ANALYSIS

I. *Violations Committed*

[1] SRP regulations at 43 C.F.R. § 2932.57(a) provide in relevant part: "You must not— . . . (2) Violate the stipulations or conditions of a permit issued under this subpart." OTT admits that two of its employees obtained a noncommercial private river trip permit on August 28, 2008, and used it to act as guides on a commercial river trip beginning on August 29. OTT does not dispute that Makepeace and Silva were not identified as guides for the August 29 trip on the Commercial Trip Confirmation and Authorization card submitted to and approved by BLM. This violated the above-quoted requirements of the Operating Plan incorporated as part of the stipulations and conditions of the SRP, and, therefore, violated 43 C.F.R. § 2932.57(a)(2).

Further, the Operating Plan, under the section captioned "Penalties," identifies "Violation 1" as a "Violation of the operating plan requirements, rules of conduct, or other federal, state, or local regulations by an outfitter or an outfitter's employee on any federally administered lands or related waters." Operating Plan at 23, AR section

⁵ The correct citation is 43 C.F.R. § 2932.57(a)(2), quoted below. The Incident/Investigation Reports also identify 43 C.F.R. § 8365.1-6 as applicable to violations of BLM supplementary rules. Although that regulation allows a BLM State Director to establish supplementary rules protecting persons, property, and public lands and resources, it requires that they be posted and also published in the *Federal Register* and a local newspaper. It does not appear that BLM has published supplementary rules governing use of the Rogue River. Consequently, section 8365.1-6 cannot serve as the basis of a violation. See 5 U.S.C. § 552(a)(1) (2006).

4 (emphasis added).⁶ In obtaining a noncommercial use permit for a launch of a party of two on a particular date and then instead participating as guides on a commercial trip launched on the following day, Makepeace and Silva violated the stipulations and conditions of the noncommercial use permit quoted above and thereby violated 43 C.F.R. § 2933.33(a)(2). The quoted provision of the Operating Plan, to which OTT agreed, makes OTT responsible for violations committed by its employees. Further, the lead guide admitted to the BLM officers that he directed Makepeace and Silva to obtain the noncommercial permit. Their actions thus come within Violation 1 of the Operating Plan.⁷

In its SOR, OTT argues:

[W]hat caused the infraction was our desire to ensure we did not take permits from the public we did not need. As of Thursday August 28th no additional permits for the 29th were available. We pulled two permits Thursday afternoon. The morning of Friday the 29th additional permits did become available and our guides decided not to pull them and honor the theory of the law and not the letter. Had we pulled the available permits Friday morning they would have been under our commercial permit and we would have had no problems, instead we honored the theory of the law and tried not to waste permits private citizens could have used.

BLM's response to the SOR is contained in the December 3, 2008, memorandum by which it transmitted the case file/administrative record to the Board. However, the response does not address this argument directly. The October 27, 2008, memorandum from Richards to Klein, at 1, AR section 5, discusses it briefly, but Richards seems unsure of what some of the statements mean and offers no counter-arguments.

We find OTT's argument both confusing and unpersuasive. In asserting that "[a]s of Thursday August 28th no additional permits for the 29th were available," OTT seems to be saying that BLM had reached a daily limit for the total number of

⁶ BLM included only pages 18 and 23-29 of the Commercial Operating Plan in the Administrative Record submitted to the Board. Page 18 is in section 5 and pages 23-29 are in section 4 of the record. Presumably, BLM did not consider the remainder of the document to be relevant.

⁷ BLM's Sept. 23, 2008, Decision states that Makepeace and Silva were issued citations "for using a private permit for commercial gain," as indicated in an e-mail dated Aug. 31, 2008, from BLM Ranger John Miller to Richards and other BLM employees, AR section 4, but the record does not include copies of those citations.

people allowed on the river under a commercial or other permit, but that is not expressly stated and is not certain. In then saying that "additional permits did become available" on the morning of Friday the 29th, OTT does not explain precisely what this means or how this came to be. It is unclear whether this refers to two of OTT's anticipated passengers who were "no-shows" according to Richards' October 27, 2008, memorandum at 1 and the copy of the Commercial Trip Confirmation and Authorization card attached to that memorandum and marked as the "pink copy." In then stating that "our guides decided not to pull them and honor the theory of the law and not the letter," we infer that OTT means that its guides decided not to use the additional available spaces. (These apparently were spaces for commercial trips, because OTT also asserts that "[h]ad we pulled the available permits Friday morning they would have been under our commercial permit and we would have had no problems.") There appears to have been no reason why OTT could not have designated Makepeace and Silva to fill any additional spaces for commercial trips as guides.⁸ OTT then repeats that it "honored the theory of the law."

OTT never explains, however, what "theory of the law" it supposedly was honoring, and it is difficult for us to make sense of these assertions. The lead guide had directed Makepeace and Silva to obtain a noncommercial permit on the previous day. Both he and they knew that permit would not be used for a launch on that day and would be used for a commercial rather than a noncommercial purpose, and all knew that doing so constituted a violation of its express stipulations. Further, the lead guide knew that he would actually have more guides on the commercial trip starting August 29 than were identified on the Commercial Trip Confirmation and Authorization card. Moreover, if no additional spaces were available as of August 28 to issue to anyone for a commercial launch on the 29th, the lead guide employed a deliberate ruse to try to get around the lack of available spaces without BLM's knowledge. Instead of "ensur[ing] we did not take permits from the public we did not need" or "wast[ing] permits private citizens could have used," OTT very much needed additional spaces for the commercial trip if they were available on the morning of the 29th. Rather than "honor[ing] the theory of the law," it seems apparent that OTT's employees violated both the letter and the spirit of the applicable requirements.

⁸ The SRP, in the description of the activity and its purpose, says "20 guests/5 guides pr. trip." However, this does not appear to have been a firm maximum limit for any particular trip run by OTT. For the Aug. 29, 2008, trip, OTT's Commercial Trip Confirmation and Authorization card added five passenger spaces for a total of 25, two of which did not show up. BLM approved the trip with 23 passengers and 5 guides without objection. Presumably, BLM would have approved more than 5 guides on the trip assuming that total spaces on the river were available, as OTT's statement also assumes. BLM did not cite OTT for having too many people on the trip.

II. Penalties Imposed

The commercial SRP regulations at 43 C.F.R. § 2932.56(b) provide in relevant part: “(b) BLM may suspend or cancel your Special Recreation Permit if you— (1) Violate permit stipulations.”⁹ BLM also may require a commercial river rafting SRP holder to consent to other permit conditions or stipulations necessary to protect the public interest,¹⁰ and, when the permit holder has been notified of the requirements and the sanctions for failure to comply, BLM may impose administrative sanctions. *Pete Carlson*, 136 IBLA 214, 217-18 (1996); *Carrol White*, 132 IBLA 141, 150 (1995), and cases cited; *Dvorak Expeditions*, 127 IBLA 145, 151-52 (1993), and cases cited; *Galand Haas*, 114 IBLA 198, 203-04 (1990). In this case, additional stipulations, conditions, and administrative sanctions are included in the Operating Plan. See *Galand Haas*, 114 IBLA at 199-204; *Rogue Excursions Unlimited, Inc.*, 104 IBLA 322, 324-25 (1988); *Robert L. Snook*, 100 IBLA 151, 154-55 (1987).

The Operating Plan provides that “Penalty 1,” corresponding to “Violation 1” (relied on in the Decision at 2), is:

First Offense: Outfitter must take immediate steps to rectify the situation to the satisfaction of the Authorized Officer(s). Depending upon the severity of the violation and/or the outfitter’s ability to rectify the violation, the Authorized Officer(s) reserves the discretionary authority to impose specific penalties upon the outfitter including, but not limited to, *permit privilege denial, probation, suspension, or revocation. . . .*

Operating Plan at 23 (boldface in original, italicized emphasis added). This provision expressly authorizes the probationary status imposed in this case. In *Rogue Excursions Unlimited, Inc.*, 104 IBLA at 324-26, a commercial use SRP on the Rogue River was put in probationary status under a prior version of the Operating Plan for submitting inaccurate trip confirmation and authorization reports.

As quoted above, 43 C.F.R. § 2932.56(b) provides for suspension of an SRP for violation of permit stipulations. The Operating Plan also provides for both “permit privilege denial” and suspension of the permit. Suspensions of SRPs include temporary suspensions. *Osprey River Trips, Inc.*, 83 IBLA 98, 102-03 (1984). In this

⁹ The Decision, at 1, cites 43 C.F.R. § 2933.56. There is no such section, and we presume a typographical error in the citation.

¹⁰ “BLM may impose stipulations and conditions to meet management goals and objectives and to protect lands and resources and the public interest.” 43 C.F.R. § 2932.41.

case, forfeiture of the trip scheduled for August 28, 2009, is, in substance, a one-day suspension under both section 2932.56(b) and the Operating Plan. Because it removes the privilege of conducting one of the trips that otherwise would be conducted under the permit, it is also a "permit privilege denial" under Penalty 1 in the Operating Plan. BLM therefore has authority to impose forfeiture of the August 28, 2009, scheduled trip.

In *Galand Haas*, 114 IBLA at 203-04, we upheld BLM's determination that an outfitter forfeit two scheduled trips on the Rogue River under a prior version of the Operating Plan for conducting a commercial trip that was unauthorized because of failure to timely submit the trip confirmation. In *Robert L. Snook*, 100 IBLA at 154-55, we upheld BLM in requiring an outfitter on the Rogue River to forfeit two commercial trips under a prior version of the Operating Plan for conducting trips that were unauthorized because of failure to check in at the Rand Visitors Center on the date of the launch as required under the Operating Plan. In *Osprey River Trips, Inc.*, 83 IBLA at 99, 102-03, this Board upheld a temporary two-week suspension of an outfitter's commercial SRP on the Rogue River for failure to fill out and deposit a trip validation card at the Rand Visitors Center prior to launch and failure to mark its boats as required by the permit terms.

OTT asserts in its SOR that use of noncommercial recreational use permits (RUPs) for commercial trips "is excessive for an action which has become a commonly accepted practice by other outfitters in the area." BLM's response, at 4, notes that "BLM has not found this to be true either through its compliance trips or through the issuance of RUPs. If other outfitters are using RUPs to augment their commercial trips, they are also in violation." We agree that OTT has not presented any evidence to back up its assertion, and has neither shown a widespread pattern of improper use of noncommercial permits nor explained how violations by others would bar BLM from imposing appropriate sanctions for violations of permit stipulations and rules.

OTT also argues that "being fined \$16,000 in lost revenue is excessive for this action." SOR. BLM's response, at 4, correctly notes that OTT is not required to pay a fine. BLM also disputes the magnitude of the anticipated revenue loss resulting from forfeiting the August 28, 2009, trip. BLM argues: "If the amount of loss were to be based on the average of OTT's 2008 use, the dollar amount would be close to \$7,356.00. In 2008, the average price of a trip OTT charged their clients was \$566. The average number of clients for each trip was 13." *Id.*

We agree that the assertion that OTT will lose \$16,000 in revenue from the August 28, 2009, trip requires very favorable assumptions for OTT. According to the Commercial Trip Confirmation and Authorization card for the August 29, 2008, trip, OTT's 20 paying passengers were charged a total of \$13,324. Assuming a \$16,000

revenue loss requires assuming a full complement of 20 passengers and charging all of them \$800 each. The likelihood that this would actually occur is unknown.

Nevertheless, OTT is likely to suffer a revenue loss of several thousands of dollars. However, the revenue loss will be offset to some extent because some costs associated with conducting that trip will not be incurred. Under the circumstances, OTT has not shown that forfeiture of one scheduled trip and putting its SRP on probationary status is an unreasonable sanction for OTT's violations. OTT's calculated actions in this case undermine the integrity of the permit system regulating use of the river.

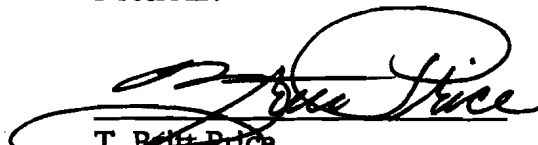
CONCLUSION

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the September 23, 2008, Decision is affirmed.



Geoffrey Heath
Administrative Judge

I concur:



T. Brett Price
Administrative Judge