

INTERIOR BOARD OF LAND APPEALS

The Exodus Corp.

126 IBLA 1 (April 1, 1993)

Title page added by:
ibiadecisions.com

THE EXODUS CORP.

IBLA 92-391

Decided April 1, 1993

Appeal from a decision of the Cottonwood, Idaho, Resource Area Office, Bureau of Land Management, issuing Special Recreation Use Permit No. ID-060-REC2-365.

Affirmed.

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

BLM has the discretionary authority under 43 U.S.C. § 1732(b) (1988) and 43 CFR Subpart 8372 to issue special recreation use permits for commercial float boating operations and to set permit conditions. There must be a compelling reason for modification or reversal of an exercise of this discretionary authority, and the Board will affirm a decision exercising this authority if the decision is not arbitrary, capricious, or an abuse of discretion.

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

BLM may limit commercial jet back service during the peak summer use period to protect public safety. The fact that BLM was contemplating revisions to the recreation management plan concerning commercial jet back services when the restrictions were imposed did not render the imposition arbitrary, capricious or an abuse of discretion.

APPEARANCES: Richard A. Bradbury, Jr., Riggins, Idaho, President, The Exodus Corporation; Sandra F. Church, Lewiston, Idaho, Executive Director, Northwest Powerboat Association, Intervenor; James LaFrance, Woodinville, Oregon, pro se; Robert S. Burr, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Exodus Corporation (Exodus) has appealed from an April 7, 1992, decision by the Acting Area Manager, Cottonwood (Idaho) Resource Area

Office, Bureau of Land Management (BLM), approving Exodus' application for a special recreation permit for float and jet boat use along the Lower Salmon River in Idaho. ^{1/} This permit was made subject to the following stipulation, which is the primary focus of this appeal:

Jet backs, or the picking up of a float party and transporting said party, people, and/or equipment upstream by jet boat, are prohibited between July 1 and the day after Labor Day. Exceptions to this may occur when river flows measured at the White Bird gauge exceed 20,000 CFS. All exceptions must be approved in advance.

BLM manages the Lower Salmon River under a 1983 comprehensive recreation area management plan (RAMP), which contains objectives and

^{1/} Exodus' May 5, 1992, notice of appeal purported to be from a Jan. 6, 1992, memorandum endorsed by the Cottonwood Resource Area Manager. This memorandum was from the Outdoor Recreation Planner to the Coeur d'Alene District Manager and recommended prohibiting use of jet backs on the Lower Salmon River during the control season. In Southern Utah Wilderness Alliance, 122 IBLA 17, 20 (1992), we stated:

"This Board's appellate review authority cannot be invoked simply because someone may object to something BLM is doing. Departmental regulation 43 CFR 4.410 provides in relevant part that: 'Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right of appeal to the Board.' Thus, there must be an identifiable decision, the appellant must be a 'party' to the case, and the appellant must be 'adversely affected.'"

The Jan. 6 document is an internal memorandum, Exodus was not a party, and Exodus suffered no direct adverse effect from its issuance. Such memoranda are not subject to appeal. See Utah Wilderness Association, 65 IBLA 219 (1982); Tenneco Oil Co., 36 IBLA 1, 2 (1978). Although BLM's Idaho State Director by letter to Exodus dated Apr. 28, 1992, endorsed the prohibition on jet back use between July 1 and Labor Day of each year, neither the Jan. 6 memorandum nor the letter of Apr. 28 are properly before us. Issuance of the permit on Apr. 7 containing the stipulation constituted the decision adversely affecting Exodus, and from which an appeal may be properly taken under 43 CFR 4.410. Exodus is considered to have filed a timely appeal from the issuance of the permit containing the adverse permit stipulation. This decision is reviewable here, not by the State Director. See 43 CFR 8372.6; Patrick G. Blumm, 121 IBLA 169, 170 (1991).

The State Director's letter of Apr. 28 stated that the restriction would not be implemented until 1993. Exodus correctly noted, however, that the permit contained no provision for a phase-in. Under 43 CFR 8372.6(b) the decision on appeal remains effective pending appeal. The fact that BLM did not consider the stipulation effective during the 1992 control period was not clarified until after Exodus had filed its statement of reasons and sought a stay and this Board had issued its June 12, 1992, order staying BLM's decision with respect to trips booked before Exodus' receipt of BLM's Apr. 7, 1992, decision.

constraints upon management of the river. Subsequent RAMP revisions have been made with the help of an Ad Hoc Advisory Committee representing various users and interest groups.

BLM offers the following description of the river and its users:

The Lower Salmon is different than other regional rivers such as the Snake or main Salmon. The Lower Salmon is often narrower and has more blind curves with more constricted and narrow rapids than these other rivers. This makes seeing of other boats and people more difficult. The Lower Salmon is open to all kinds of users, with no permit required for most, and, therefore, it is often used as a beginners river for novice whitewater boaters. Many of these users are inexperienced, especially in avoidance of power/float boat encounters. In addition, the river is more conducive to family float trips than either the Snake or main Salmon. The use of craft such as inflatable kayaks and large groups of people floating along in life vests is prevalent. This type of use is difficult to detect and avoid by power boaters. While there has not yet been an accident involving jet backs and float boaters, there is a reasonable risk for a collision between floaters and jet boats during the heavily used control period.

(Answer at 3-4). BLM adds:

Many of the noncommercial floaters have little or no whitewater experience and would pose a definite safety risk to themselves and the jet back operators. As mentioned in the Background section, the use of small inflatable craft and the prevalence of many individuals floating behind their rafts in life vests adds to the problems of jet boat operators seeing and avoiding floaters, particularly in the constricted rapids of the Lower Salmon. This combination of factors is unique to the Lower Salmon.

(Answer at 12).

BLM has submitted the following statistics for seasonal floater use, and states that recreational use of the Lower Salmon River, particularly during the control season, and float boating have increased steadily over the last 15 years. The number of float users increased from 479 in 1975 to more than 5,200 in 1985. The use level remained at about that level until 1989 when it increased to more than 5,700 and it increased again to 6,800 in 1990 (Answer at 13). In addition BLM submitted an affidavit by Lanny O. Wilson, Cottonwood Resource Area Manager, discussing daily usage. Wilson states that during the control season, which runs from July 1 through Labor Day weekend, visitor use increased from an average of 124 visitors per day to 291 visitors per day between 1980 and 1990, and was more than 300 visitors per day in 1992.

In its answer, BLM's offers an explanation of the limited nature, purpose, and effect of the stipulation appended to Exodus' permit:

BLM's Special Recreation Permit stipulation to prohibit commercial jet back operations during the July 1 to Labor Day control period starting in 1993 is not setting a precedent for eliminating all powerboat use on the Lower Salmon. Jet boat use is well established as an historical use and will not be eliminated. The vast majority of all powerboat use on the Lower Salmon occurs outside the control period. Most is for steelhead fishing which starts in late September and continues into March. * * * Jet back operations are only being eliminated from the Lower Salmon during the annual critical low water flow period and only for 8-9 weeks each year. This is the time period when float boating is at its peak. During the other 42 to 43 weeks, jet backs are authorized.

(Answer at 4).

Exodus' previous permits contained no stipulation prohibiting jet back use during the control season, but we do not believe BLM's action to be a new limitation on an existing use. BLM is not relying on the statistics of increasing usage to sharply curtail established commercial jet back service for floaters. BLM notes that "in the total boater history of the Lower Salmon there have been fewer than 25 reported jet backs" (Answer at 17). During the previous 5 years, 15 jet back trips on the Lower Salmon were reported (Answer at 4). In the 1990 season, Exodus had two overnight float trips below Hammer Creek on the Lower Salmon, and both were jet backs. In 1991, Exodus had five overnight float trips during the control season (two jet backs up the Salmon River and three jet backs up the Snake River). *Id.* at 5, 6. By contrast, Exodus' brochures indicate Exodus' intent to make jet boats an option for its half-day and 1-day trips as well. Exodus' use logs show that it conducted 77 trips lasting one-half or 1 day during the control season in 1991, and Exodus stated its intent to provide jet back service for all one-half and 1 day trips when water levels permit (Response to BLM at 4).

It can be seen that the commercial jet back service level proposed in Exodus' application would constitute a new commercial use on the Lower Salmon River. BLM's decision to prohibit commercial jet backs during the control season can therefore be characterized as intended to maintain the existing powerboat usage level to protect the safety of an increased number of floaters. Only three of the commercial float operators operating on the Lower Salmon have used jet backs, and only Exodus has appealed the seasonal restriction.

[1] Special use permits are issued under the general authority of the Secretary of the Interior to regulate the use of public lands, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1988). The regulation found at 43 CFR 8372.3 provides that approval of an application and subsequent issuance of

a special recreation permit is discretionary. The exercise of Secretarial discretion to issue special use permits also includes the authority to set permit conditions. Patrick G. Blumm, 121 IBLA 169, 171 (1991); Four Corners Expeditions, 104 IBLA 122, 125 (1988); Don Hatch River Expeditions, 91 IBLA 291, 293 (1986); Osprey River Trips, Inc., 83 IBLA 98 (1984). Under 43 CFR 8372.5(b), a special recreation permit should contain stipulations the authorized officer considers necessary to protect the lands and resources and the general public interest.

The Board will affirm BLM's exercise of this authority if there are no "compelling reasons for modification or reversal." Patrick G. Blumm, *supra* at 173; American Motorcycle Association, District 37, 119 IBLA 196, 199 (1991); Southern California Trails Association, 104 IBLA 141, 143 (1988). If a decision is an exercise of this discretionary authority, the question presented on appeal is "whether the BLM decision is arbitrary and capricious so as to constitute an abuse discretion." Four Corners Expeditions, *supra* at 126.

Exodus objects to the way BLM imposed the restriction. It explains that it was given no appealable decision before the operating plan was issued and had little choice other than to sign the permit. In its statement of reasons, Exodus notes that BLM undertook a review of the Lower Salmon River RAMP in 1990, and it has submitted a number of exhibits showing that the advisory committee actively deliberated jet back restrictions, but that this issue had not been resolved by that committee. The August 1991, RAMP review and revision, signed by BLM's Cottonwood Resource Area Manager and Coeur d'Alene District Manager, called for development and implementation of a monitoring plan to collect use data (particularly powerboat use data) during the control season. The same document included the following discussion:

Analysis of the public comments revealed that 1/3 of the written comments (5 of 15) favored more restrictions on power boats. Three of the five favored a prohibition of jet-backs; one favored restricting jet-boat camps between Pine Bar and the mouth of Cottonwood Creek during the control season; one favored prohibition of jet boats; and several generally supported limiting use to current levels. Most of the comments made a distinction between control season and non-control season use, with restrictions applying only to the control season.

The advisory group discussed the issue at length, and made two separate recommendations regarding general jet-boat use and jet-backs. The consensus of the group was that jet-boat use is and always has been light during the control season, and that there is no trend to indicate major changes. Other factors, such as future Hells Canyon restrictions or a high water year may influence future use. The consensus of the groups is to leave the current management action in place, with the provision that the BLM closely monitor jet boat use to be able to determine

if significant use increases are occurring from the 1990 baseline use, and convene the standing ad hoc committee to address future restrictions if a trend toward higher use becomes apparent.

Exodus notes that the August 1991 management plan modification contains no decision concerning jet backs, except that BLM was to meet with the outfitters currently providing the service to see if a mutually acceptable limitation could be found. In a January 6, 1992, memorandum from LuVerne Grussing, Cottonwood Outdoor Recreation Planner, to the District Manager, Grussing noted the inability to reach an agreement on the jet back issue and recommended prohibiting jet backs during the control season. Exodus alleges that there was no attempt to find a solution after August 1991, and contends that the public was "locked out of a plan that modified the management of the public's land without an environmental analysis for public comment." In essence, Exodus objects to the imposition of the jet back restriction without prior management plan modification, stating its opinion that the restriction should not be imposed without further public input and planning.

Exodus contends that the decision is arbitrary and capricious, stating that there is no basis in fact for concerns regarding the safety of jet backs. It offers a number of detailed specific reasons favoring jet backs and for discounting BLM concerns for public safety. BLM has filed a detailed response to each of Exodus' allegations. The underlying premise of Exodus' primary argument is that jet back use should remain unrestricted until the management plan has been properly changed.

[2] We agree with Exodus and the amicus 2/ that issues relating to the advantages of providing jet back service as well as the hazards posed by that service are appropriately considered and resolved in the planning process. However, BLM is not powerless to restrict recreation permits while such management plan revisions are being contemplated. In Patrick G. Blumm, supra, we rejected arguments similar to those made by Exodus when we affirmed restrictions on existing uses which had been imposed to protect wildlife habitat pending management plan revisions. 3/ In Four Corners Expeditions, supra, we expressly endorsed a moratorium on additional river use pending the development of a management plan. After a review of the record of this case we find BLM's decision to limit commercial jet backs during the control period a proper exercise of its discretionary authority. There is ample evidence that BLM's decision was not arbitrary or

2/ In a June 12, 1992, order we permitted the Northwest Powerboat Association (Northwest) to appear as an amicus curiae. Northwest's motion to intervene was based on its perception that BLM's decision established a precedent for eliminating all powerboat use on the Lower Salmon. As indicated in the body of this opinion, we believe this perception to be incorrect.

3/ The Blumm case is not identical to this one because there has not been a substantial restriction of historic jet back use by imposing the stipulation.

capricious, and it did not constitute an abuse discretion. Thus we can find no compelling reason for modification or reversal.

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.

R. W. Mullen
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge