

RANDALL G. NELSON

IBLA 2002-205

Decided December 20, 2004

Appeal from a decision of the Grants Pass Resource Area District Office, Bureau of Land Management, declaring that it would not reissue a special recreation permit for the 2002 operating year. MRP 5.

Set aside and remanded.

1. Special Use Permits

The holder of a special recreation permit is prohibited from violating the conditions and stipulations governing its terms. 43 CFR 8372.0-7(a)(2) (2000). An exercise of BLM's discretionary authority to refuse to renew a special recreation permit must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion. Such a decision is not supported by a rational basis if it is founded on asserted violations of an operating plan never expressly incorporated into or referenced in a permit, or on rating the performance of a former permittee under a permit never applied for or issued.

2. Special Use Permits

In the absence of express regulatory authority or permit language, the Board will not compel BLM to find a special recreation permit to be in "inactive" status so as to preserve a former permittee's ability to apply for a permit in the future, when the permittee did not apply for or receive a permit to hold "inactive."

APPEARANCES: Randall G. Nelson, pro se; Douglas C. Lindsey, Medford District Office, Medford, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Randall G. Nelson appeals a January 10, 2002, decision of the Acting Field Manager, Grants Pass Resource Area District Office, Bureau of Land Management (BLM), stating that BLM would “not reissue” a special recreation permit (SRP) for commercial fishing and rafting trips on the Rogue National Wild and Scenic River for the 2002 permit year. BLM stated that it would not issue a 2002 SRP to Nelson because of noncompliance with permit terms in the 2000 and 2001 permit years. By bringing this appeal, Nelson hopes to return his SRP to “inactive” status for the 2001 year, or any status that will allow him to resume commercial activities in the 2002 or a subsequent season.

Through his two businesses, Lower Rogue Excursions and Lower Rogue Canyon Outfitters, Nelson operated guided fishing and rafting trips on Oregon’s Rogue River. BLM, in conjunction with the United States Forest Service, issues a limited number of SRPs that allow commercial trips on this portion of the river. At the use levels in effect when this appeal was taken, SRPs were issued on an annual basis, but the system was closed. That is, existing permittees had a preference for SRP renewal, but no space for new permittees was available unless an existing SRP dropped out of the system.

In 1992, Nelson operated what was then his only guiding business, Lower Rogue Canyon Outfitters, under an SRP serialized as Medford Recreation Permit (MRP) 57. MRP 57 is relevant to this appeal in that BLM alleges that on May 12, 1992, it sent Nelson a revised copy of the Commercial Permittee Operating Plan for the Wild Section of the Rogue National Wild and Scenic River (Operating Plan) and informed him: “You are responsible for yourself and your employees knowing the plan.” (May 12, 1992, letter from Louise M. Austermuehle, Rogue River Program, BLM, to Rogue River Outfitters, Record (R.) at 69.) The record does not contain a copy of MRP 57, any proof that Nelson received the 1992 letter or Operating Plan, or a copy of the plan in effect in 1992 as allegedly sent to Nelson.

In this appeal, BLM provides us with a 1995 version of the Operating Plan, which describes how BLM manages day-to-day commercial operations on the Rogue River. See Operating Plan at 1, attachment 1 to BLM Answer. It also specifies procedures and requirements for the application, renewal, and transfer of SRPs. Id. at 4-6. Finally, the Operating Plan specifies consequences for violations of its terms, which can be as severe as permit revocation. Id. at 17-23. The Operating Plan states that it applies “in addition to and supplements the provisions of the Special Recreation Permit itself.” Id. at 1.

On March 18, 2000, Nelson and his wife contracted to purchase MRP 5 (the SRP at issue herein) from Jeff Saxon. (Mar. 18, 2000, Agreement for Sale and

Purchase of Business Assets, R. at 65-67.) The Nelsons purchased Saxon's business assets and operated MRP 5 under Saxon's company name, Lower Rogue Excursions. Id. BLM required the Nelsons and Saxon to obtain its approval for the permit transfer, which BLM granted on Mar. 27, 2000. (R. at 7.) The extent to which MRP 5 is or may be a singular document with specific requirements for implementation is not revealed in the record; the contract of sale is the only direct evidence before us of a transfer of Saxon's interests.

BLM required Nelson to file a "Special Recreation Application and Permit" for MRP 5 for the 2000 season. This document functions as the application for a permit when submitted, and then becomes the actual permit on BLM approval. Nelson submitted his application on April 3, 2000. (Special Recreation Application and Permit, R. at 5-6.) As a condition of the application, Nelson agreed "to comply with any conditions or stipulations that are required by the authorized officer when the permit is issued." Id., R. at 5. The terms of the application required Nelson to submit insurance certification, first aid certification, and evidence of a state-approved Oregon Guide Registration.^{1/} Id., R. at 6. It also required Nelson to comply with "all special stipulations attached" to the permit. Id.

BLM approved Nelson's application for MRP 5 on April 14, 2000, for a permit term of January 1, 2000, through December 31, 2000. (Special Recreation Application and Permit, R. at 5.) BLM approved Nelson's application "subject to the conditions and special stipulations on reverse and any attachments." Id. The record contains no evidence to indicate that the Operating Plan was ever incorporated into or attached to the permit as an express stipulation or condition, and BLM acknowledges that "no documentation exists of Nelson receiving the Operating Plan in 2000." (BLM Answer at 2.) Now operating Lower Rogue Excursions under MRP 5, Nelson was scheduled to run at least two trips during the 2000 season, but cancelled both. See 2000 Special Recreation Permit Itemized Statement, R. at 12. As a consequence, in November 2000 BLM penalized MRP 5 by revoking in advance two trips that would have been available to be scheduled under MRP 5 in the 2001 season on the ground that Nelson did not report the cancellations in the 2000 permit year at least one day before each trip was scheduled to leave as required in the Operating Plan. See Nov. 17, 2000, letter from William E. Ray, Jr., Acting Field Manager, Grants Pass Resource Area, BLM, to Lower Rogue Excursions, R. at 55-58; Oct. 16,

^{1/} The record includes Nelson's insurance information (R. at 10), but does not contain Nelson's approved guide registration or first aid certification for the 2000 permit. A handwritten note on record tab 9 states "see MRP 57 for Proof of Insurance." As noted above, the record contains no information from the file for MRP 57, other than the 1992 letter submitted by BLM.

2000, letter from William E. Ray, Jr., Acting Field Manager, Grants Pass Resource Area, BLM, to Lower Rogue Excursions, R. at 59-62.

The record contains an undated document entitled “Wild Section - Annual Update” (2000 Annual Update), which BLM alleges was sent to Nelson and other permittees in December of 2000. (BLM Answer at 2-3.) The record does not indicate when the 2000 Annual Update was sent or verify that it was sent to or received by Nelson. The 2000 Annual Update indicated that Nelson’s 2001 permit would require payment of 2001 fees, as well as submission of a 2001 application, a price list, and his current Oregon State Marine Board (OSMB) license. (2000 Annual Update, R. at 2.) BLM also alleges that Nelson’s 2000 Annual Update included a 2001 permit application and his “Rogue National Wild and Scenic River Annual Performance Evaluation for Permittees” (2000 Performance Evaluation) for the 2000 season.^{2/} Id. BLM issued a rating for Nelson’s performance during the 2000 season as “[a]cceptable with implementation of noted corrective actions” due to his late trip cancellations in October 2000. Id. The 2000 Performance Evaluation also instructed Nelson to review the Operating Plan. Id.

The record contains no evidence showing that Nelson submitted an application for a permit in 2001. Nor does the record contain any evidence showing that BLM issued a permit to Nelson for the 2001 season.

Nelson reports that he was incarcerated in the Oregon prison system beginning in May of 2001. (Statement of Reasons (SOR) at 1.) The parties agree that at least one telephone conversation occurred between BLM employee Austermuehle and Nelson in July of 2001 while Nelson was incarcerated. See SOR at 2; BLM Answer at 3. The parties further agree that the discussion topic was what steps needed to be taken to preserve MRP 5 in good standing, but they otherwise dispute the content of the conversation. (SOR at 2-5; BLM Answer at 3.)

The record shows that on July 31, 2001, BLM received a letter from Nelson advising BLM that he would not be running trips under MRP 5 during the 2001 season. (July 29, 2001, letter from Nelson to Austermuehle, BLM, R. at 53-54.) Nelson indicated that he planned to resume his business in the 2002 season, but he also indicated: “I will keep my fees and everything else there is to be done, but due

^{2/} While BLM alleges that it sent Nelson’s 2000 Performance Evaluation attached to the 2000 Annual Update in December 2000, the 2000 Performance Evaluation was signed on Jan. 23, 2001. (2000 Performance Evaluation, R. at 14.) A letter dated Dec. 11, 2001, purports to attach performance evaluations for both 2000 and 2001. (Dec. 11, 2001, letter from Austermuehle, BLM, to Nelson, R. 48.)

to me being out of town for the 1 year time, I request that these permits be put down as non active.” Id., R. at 54.

The record shows that on November 23, 2001, BLM received a letter from Nelson inquiring about the status of MRP 5. (Nov. 11, 2001, letter from Nelson to Austermuehle, BLM, R. at 51–52.) Nelson expressed concern over having received an offer from a competing outfitter to purchase his business. Id. at 51. He stated that his fees should be paid by the time BLM received his letter, and, as he understood prior correspondence with BLM, only the payment of fees was necessary to maintain MRP 5 in “inactive” status until he resumed operations in 2002. Id.

As noted above, the record does not contain any evidence showing that Nelson had applied for a 2001 permit, paid a 2001 permit fee, or submitted his price list, insurance certification, first aid certification, and current OSMB license by the close of the 2001 permit season on December 31, 2001. The record also contains no evidence that Nelson ever attempted to apply for a 2002 permit.

On December 6, 2001, BLM issued a 2001 “Annual Performance Evaluation for Permittees” (2001 Performance Evaluation) for MRP 5. (2001 Performance Evaluation, R. at 13.) Nelson’s overall performance was rated as “unacceptable” based on his alleged failure to follow the Operating Plan. Id. Specifically, the 2001 Performance Evaluation noted that Nelson did not apply for a 2001 permit, and that failure to apply could possibly result in permit suspension or revocation. Id. Nelson received this letter on January 7, 2002. (Jan. 3, 2002, letter from Austermuehle, BLM, to Nelson, R. at 44-45.)

On January 10, 2002, BLM issued the decision that is the subject of this appeal. (Jan. 10, 2002, letter from Acting Field Manager, Grants Pass Resource Area, BLM, to Nelson (Decision).) The Decision was based on “unsatisfactory/unacceptable performance in regard to permit stipulations and conditions. These stipulations and conditions were clearly addressed on the Special Recreation Permit and in the [Operating Plan].” Id. at 1. The Decision noted that as part of the 2000 Annual Performance Evaluation, Nelson was instructed to review the Operating Plan, which specified permit renewal procedures. Id. The Decision asserted that Nelson had been sent a 2001 permit application in December of 2000 and that he was to “submit the application or notify the authorized officer of intent to release the permit or place it on inactive status.” Id. at 1-2. BLM found that “[i]n 2001, [Nelson] did not submit an application or notify the authorized officer of [his] intentions,” and therefore that Nelson’s 2001 performance was rated “unacceptable.” Id. at 2. Based on the 2001 “unacceptable” rating and the “noncompliance with permit stipulations and conditions” apparently from 2000, BLM stated that it would “not reissue” MRP 5 to Nelson in 2002. Id.

Nelson submitted a timely Notice of Appeal and SOR. Nelson asks the Board to reverse BLM and declare MRP 5 to have been on “non-active” status in 2001 so that he can resume guiding trips in the 2002 season or thereafter. (SOR at 2, 9.) He thus seeks a ruling that will place his permit on some type of placeholder or preference status, which would excuse his non-use during 2001 and allow him to resume permit use as one of a limited number of current permittees on the Rogue River in 2002 or thereafter. Nelson argues that his various communications with BLM were sufficient to place his permit on inactive status because he consistently indicated that he would not use MRP 5 during the 2001 season and would resume use in 2002. (SOR at 6.) Nelson argues that BLM cannot refuse to reissue MRP 5 because, to the extent that the steps he took were insufficient to maintain inactive status, he fully complied with advice from BLM personnel. Id.

In its Answer, BLM argues that an SRP is inactive, according to the Operating Plan, only during the time period in which any of the multiple application requirements is incomplete and the permit has not yet been approved. (Answer at 4.) According to BLM, inactive status may continue only up until 30 days before an outfitter’s first scheduled trip; after that deadline, the SRP is subject to revocation under the Operating Plan. Id. Because Nelson never applied for a 2001 permit, BLM argues that Nelson’s application was not complete by that deadline, so the decision not to reissue it in 2002 was valid under the Operating Plan. Id. at 4-5. Responding to Nelson’s argument that he followed the advice of its personnel, BLM first states that its personnel consistently told Nelson that he must file all proper permit documents and certifications to keep MRP 5 valid. Id. at 5. BLM contends as well that the permit and the Operating Plan place the application filing responsibility on Nelson, so that his failure to file a 2001 application would not be excused even if he did rely on incorrect advice from BLM personnel. Id.

An appeal involving a permit for the 2002 season is now moot. Nonetheless, we consider this appeal on the basis of the long-standing principle that “when an appeal raises issues which are capable of repetition, but yet of evading review, it is proper to adjudicate the appeal even though the relief sought by an appellant cannot be granted for the particular event.” Klamath-Siskiyou Wildlands Center, 153 IBLA 110, 112 (2000), citing Coalition for the High Rock/Black Rock Emigrant Trail[s] National Conservation Area, 147 IBLA 92, 94-95 (1998); Wildlife Damage Review, 131 IBLA 353, 355 (1994); Checker Motorcycle Club, 126 IBLA 251 (1993); Southern Utah Wilderness Alliance, 114 IBLA 326, 329-30 (1990); Southern Utah Wilderness Alliance, 111 IBLA 207, 208-10 (1989). Specifically, the Board has applied this exception in appeals from SRP decisions where the time for granting relief had passed. E.g., Klamath-Siskiyou Wildlands Center, 153 IBLA at 112; Daniel T. Cooper, 150 IBLA 286, 290 (1999). Since Nelson’s ability to receive MRP 5 permits in the future appears to be at risk, we turn to the merits of his appeal.

[1] The Land and Water Conservation Fund Act, 16 U.S.C. § 460l-6a(c) (2000), 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 U.S.C. § 1732(c) (2000) (provisions for revocation or suspension of permits on the public lands). At all times relevant to this appeal, the regulations governing SRPs issued by the Department of the Interior were set forth in 43 CFR Subpart 8372 (2002).^{3/}

Under 43 CFR 8372.3 (2002), approval of an application for and subsequent issuance of an SRP is discretionary with BLM. Dirt, Inc., 162 IBLA 55, 58 (2004); William D. Danielson, 153 IBLA 72, 74 (2000). The holder of an SRP is prohibited from violating the conditions and stipulations governing its terms. 43 CFR 8372.0-7(a)(2) (2002); Judy K. Stewart, 153 IBLA 245, 252 (2000). “It follows that BLM has the discretionary authority to refuse to renew an SRP on the basis of a documented violation of a permit term.” Larry Amos d/b/a Winterhawk Outfitters, Inc. (Larry Amos), 163 IBLA 181, 188 (2004). Although BLM has broad authority over SRP renewal, discretion is not unfettered. The decision to deny permit renewal “must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion.” Larry Amos, 163 IBLA at 188, citing Obsidian Services, Inc., 155 IBLA 239, 248 (2001).

BLM argues that its decision not to reissue Nelson’s 2002 SRP should be affirmed because BLM evaluated Nelson’s performance under his 2000 and 2001 permits and issued its decision according to procedures specified in the Operating Plan. BLM contends that Nelson’s failure to apply for a permit in 2001 properly caused his performance for the 2001 permit year to be rated “unacceptable,” and that this rating carried a potential penalty of permit revocation. (Decision at 2.)

We disagree. Neither justification provided by BLM—noncompliance in the 2000 or 2001 permit years—is supported on this record. While BLM is correct in stating that past violations of permit terms provide sufficient reason to deny permit renewal, Larry Amos, 163 IBLA at 189-90, Nelson never applied for a 2001 permit, and BLM never issued a permit for that year. Therefore, BLM’s reliance on an “unacceptable” rating for the 2001 permit has no rational basis in that it is premised upon a performance rating for a permit that Nelson never applied for or received. To the extent BLM’s rating for that year presumes the existence of a set of broad requirements establishing annual permit filing obligations within a document embodying MRP 5, no such document appears in this record.

^{3/} These regulations were superseded by the regulations at 43 CFR Part 2930, which became effective Oct. 31, 2002.

Likewise, BLM's reliance on Nelson's failure to comply with the terms of his 2000 permit as a basis for refusing to "reissue" a permit in 2002 lacks a rational foundation. As a practical matter, the fact that BLM did not issue a permit in 2001 means that the concept of its "reissuing" a permit in 2002 is misleading. More importantly, we cannot affirm BLM's conclusion that Nelson violated the permit in 2000 on the basis of noncompliance with the Operating Plan. While BLM acts within its discretionary authority to require compliance with SRP stipulations, 43 CFR 8372.5(b), the record must demonstrate that the stipulations were incorporated into the SRP. Here, BLM's claim that Nelson violated the 2000 permit is based on violations of the Operating Plan, not the permit itself, and the record does not verify that the Operating Plan was ever incorporated into Nelson's 2000 permit.

Nelson's 2000 permit states unequivocally that he is required to comply with all attached stipulations and conditions in addition to the terms listed on the permit itself. (Special Recreation Application and Permit, R. at 5-6.) However, the Operating Plan was not attached to the 2000 permit, and the permit does not incorporate the Operating Plan as a term or stipulation or otherwise mention it. BLM concedes that "no documentation exists of Nelson receiving the Operating Plan in 2000." (BLM Answer at 2.) The Operating Plan's comment that it is incorporated into Rogue River SRPs cannot bind Nelson to its terms if the record does not show that plan was incorporated into the permit Nelson signed and accepted.^{4/} BLM's 1992 letter relating to Nelson's permit MRP 57, at best put Nelson on notice of the Plan's existence, at least in the version issued by 1992. This notice is insufficient to demonstrate to this Board that the 1995 Operating Plan, or any version of it, was incorporated into the 2000 permit.

We will not find that Nelson violated a permit term to which he did not expressly commit.^{5/} In Larry Amos, we affirmed that portion of BLM's decision

^{4/} Notably, in Rogue Excursions Unlimited, Inc., 104 IBLA 322 (1988), the Board applied a version of the Operating Plan to another Rogue River SRP. There is no indication in that decision that the incorporation of the Operation Plan as a permit term was in question. More significantly, in that case the permittee had been issued a 5-year SRP. Id. While this record is amenable to the suggestion that Nelson's predecessor in interest, Saxon, received and meant to transfer such an "umbrella" SRP to Nelson to which annual permits would relate, no such document appears in the record. Moreover, the 2000 annual SRP issued to Nelson states it "may not be reassigned or transferred by permittee," indicating that its terms must have differed from any MRP 5 issued to Saxon, since BLM affirmatively approved such reassignment of MRP 5 to Nelson. (R. at 6.)

^{5/} In a 1993 concurring opinion in Dvorak Expeditions, 127 IBLA 145, 154-55

(continued...)

refusing to reissue a permit for a past violation verified in the record. Larry Amos, 163 IBLA at 188. However, we also decline to affirm on grounds not sustained in the record.

We refuse to affirm on the other factual grounds asserted in the decision. First, BLM's recitation of facts regarding prior violations is not sustained point by point in the record. As noted above, we cannot verify that many of the documents which would support various BLM assertions of violations in prior years were ever received, or even left unclaimed, by Amos, because BLM did not submit records supporting such information. Moreover, we cannot sustain BLM's assertions regarding the dates of Amos' documents because BLM did not date-stamp them. Second, the record does not show that the violations of particular permit terms issued prior to the 2000 SRP, as enumerated in the decision, were ever expressly conveyed to Amos * * *. BLM may not identify violations from years past as support for a decision, when in fact it did not identify those violations at the time or pursue to conclusion such violations that it did assert. Accordingly, we affirm the decision as modified to account for the facts of record which we can verify.

Id. at 189. We therefore cannot affirm BLM's decision because neither justification offered to refuse to reissue Nelson's 2002 SRP is supported by a rational basis.

[2] This does not mean we can grant Nelson the relief that he requests. Nelson asks the Board to find that his 2001 permit was on inactive status, which would preserve his preference to renew his permit for 2002 and avoid his having to compete for a permit with applicants from the general public. This result is not possible because the regulations governing SRPs make no provision for "inactive" permits or otherwise require BLM to maintain as valid a permit never applied for during a non-use period. See 43 CFR 8372.0-1 to 8372.6 (2002). Accordingly, we find no basis for reversing BLM for not reaching such a conclusion.

Undoubtedly, BLM is free to place an SRP holder on "probationary" status when BLM discovers a violation of a permit term. In Dvorak Expeditions, we held:

A special recreation permit holder is subject to any permit condition or

^{5/} (...continued)

(1993), Judge Hughes expressed concern about the lack of certainty associated with "commercial river rafting SRPs," and advised BLM to ensure that applicable terms are expressly stated within permits or regulations.

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, [94 IBLA 98 (1986)]; Don Hatch River Expeditions, [91 IBLA 291 (1986)]; Osprey River Trips, Inc., [83 IBLA 98 (1984)]. Recognized sanctions include placing the permit holder on probation. Rogue Excursions Unlimited, Inc., 104 IBLA 322 (1988); Robert L. Snook, 100 IBLA 151 (1987).

127 IBLA at 152.^{6/} However, “probationary” status is distinct from the “inactive” status Nelson seeks. In the cited cases, the Board acknowledged BLM’s authority to place an actively used permit on probation during a use year. Rogue Excursions Unlimited, Inc., 104 IBLA at 325; Robert L. Snook, 100 IBLA at 156. It did not endorse the notion that a permittee may eschew application for and use of a permit during a permit year and still retain the future preference status as a permittee to the exclusion of other applicants. Particularly here, where the permit is issued within a closed universe of permits and other applicants could claim harm from being denied the right to apply for a permit slot, we find no basis upon which to reverse BLM and require it to hold SRP 5 in some sort of suspended status.

Finally, Nelson’s argument that his communications with BLM personnel throughout 2001 were sufficient to establish inactive status does not affect the result. Nelson argues that, even if he did not follow appropriate procedures, BLM is estopped from denying his 2002 permit because he relied on the advice of a BLM employee. In David E. Best, 140 IBLA 234, 236 (1997), we noted, *inter alia*, the following critical elements of an estoppel argument:

We have recognized that estoppel in the case of public lands must be based on affirmative misconduct such as a misrepresentation or concealment of a material fact. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D. F. Colson, 63 IBLA 221, 224 (1982); Arpee Jones, 61 IBLA 149, 151 (1982). Erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official decision. See, e.g., Rudy S. Sutlovich, 139 IBLA 79, 82

^{6/} We also noted that such authority is discretionary with BLM subject to whether the decision is supported by the record. *Id.*; see also Obsidian Services, 155 IBLA at 248. Consistent with this discretionary authority, it is worth noting that the Operating Plan permits BLM to put a permit on “probation” for permit violations. See Operating Plan at 13.

(1997); Leitmotif Mining Co., 124 IBLA 344 (1992).

This record supports no finding of affirmative misconduct by BLM, nor were the disputed discussions ever put to writing by BLM. Nelson's claims, at best, amount to a disagreement over who said what over the telephone. This factual dispute would provide no support for a defense of estoppel.

This discussion brings us to the question of the appropriate ruling to enter. We cannot affirm the decision refusing to "reissue" a 2002 permit for the reasons discussed above. An appropriate course for BLM to have taken would have been to respond to Nelson's November 23, 2001, letter inquiring as to what was necessary to keep MRP 5 valid on "inactive" status. At that juncture BLM should have advised Nelson of the facts that no 2001 permit had been applied for or issued and that his 2000 permit expired on December 31, 2000. Nelson was then free to apply for a new permit. To the extent Nelson chooses in the future to apply for a permit coextensive with that established in MRP 5, BLM will render a decision on his application in its discretion.

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 set aside and remanded.

Lisa Hemmer
Administrative Judge

I concur:

David L. Hughes
Administrative Judge