LARRY SMITH D/B/A TOP GUN OUTFITTERS

183 IBLA 321 Decided April 18, 2013

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

LARRY SMITH D/B/A TOP GUN OUTFITTERS

IBLA 2012-290 Decided April 18, 2013

Appeal from a decision of the Bureau of Land Management terminating a Special Recreation Permit for cutting a vehicle trail on public land without authorization. SRP CO-100-12-004.

Affirmed as Modified; Petition for Stay Denied as Moot.

1. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Hearings--Federal Land Policy and Management Act of 1976: Permits--Rules of Practice: Hearings--Special Use Permits

Under section 302(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(c) (2006), the Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plans. Even when the permit and regulations in 43 C.F.R. Part 2930 do not expressly include the provision required by the statute, such omission does not excuse BLM from adhering to the statute's procedural requirements.

2. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Hearings--Federal Land Policy and Management Act of 1976: Permits--Rules of Practice: Hearings--Special Use Permits

   If a statute does not expressly require a hearing on the record and no contrary Congressional intent is evident, formal proceedings before an administrative law judge are not mandated. A special recreation permittee's hearing rights under section 302(c) of FLPMA are satisfied by applying established Department procedures for review of BLM's decision by the Interior Board of Land Appeals. Although the Board may order a hearing when a material question of fact is presented that cannot be resolved on the basis of the written case record, as supplemented by evidence or affidavits, the burden of presenting evidence and reasons to show that a hearing is necessary lies with the party requesting the hearing.

3. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Hearings--Federal Land Policy and Management Act of 1976: Permits--Rules of Practice: Hearings--Special Use Permits

   Although FLPMA requires BLM to afford appellant a hearing before terminating his permit, where appellant admitted taking action that clearly constituted cutting, destroying and removing vegetation from public lands to develop or improve those lands without authorization, he paid the forfeiture amounts specified in Violation Notices without challenging them, and other evidence in the record is consistent with appellant's admission, appellant's rights were fully satisfied by his appeal to this Board. Where the record and pleadings on appeal establish that there is no material issue of fact, no hearing is necessary.

APPEARANCES: Patrick F. Welsh, Esq., Steamboat Springs, Colorado, for appellant; Kristen C. Guerriero, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Larry Smith, doing business as (d/b/a) Top Gun Outfitters, has appealed and petitioned for a stay of the August 9, 2012, decision of the Field Manager, Little Snake Field Office (LSFO), Bureau of Land Management (BLM), terminating Smith's Special Recreation Permit CO-100-12-004 (SRP). The SRP was terminated because Smith cut an all-terrain vehicle (ATV) trail on public land adjacent to his property without authorization.[1]

Background

The essential facts are not disputed. Sometime in 2009, Smith, d/b/a/ Top Gun Outfitters, submitted his SRP Application and Permit to renew an existing SRP for a 5-year term,[2] for the purpose of guiding elk, deer, and bear hunts on public land in Unit 211 of Moffat County, Colorado. On March 20, 2009, Smith signed nine pages comprising the SRP "Terms, Conditions and Stipulations for All Permitted Activities" (Stipulations).

According to his Declaration, on July 20, 2012, K. Shane Dittlinger, Outdoor Recreation Planner, LSFO, learned that Smith had constructed an ATV trail on public

[1] The "case file" assembled in this matter consists of a few copies of documents clipped to Smith's petition for a stay. *See* 43 C.F.R. § 4.411(d)(3). These documents notably do not include a signed copy of the decision, evidence of when the decision and violation notices were served, or the typical BLM case folder labeled with the serial number. The photographs are neither explained nor identified in the "case file," and except for the stay petition, none of the documents bears a BLM time and date stamp. Moreover, there is no transmittal letter containing any explanation for the state of the record or BLM's representation that what is before us on appeal is the complete administrative record. *See Mobil Exploration and Producing Southeast, Inc.*, 90 IBLA 173, 177 (1986), where the Board commented at length on the proper compilation of an administrative record and the importance of doing it in the manner described. Smith has not challenged the adequacy or completeness of the case file directly, however, and we have determined that the record provided, with the pleadings, are sufficient to adjudicate the appeal. Nevertheless, BLM is admonished that in future cases, the Board may summarily set aside a decision and remand the case to rectify a deficient record.

[2] Smith signed the SRP Application and Permit, but for the date, entered only the year 2009. There is no BLM date and time stamp to show when it was filed. Smith states the Permit was granted on Mar. 20, 2009, and that it expired in 2013. Statement of Reasons (SOR) at 2.

lands. Dittlinger went to the area and observed a newly constructed trail approximately a half-mile long and 4 feet wide:

> 2. . . . All the vegetation that was cleared had fresh cut marks (as seen in the afore-mentioned photos [attachments 1-21]). There was no evidence of any old cuts or prior brush clearing. The trail was marked with red and pink ribbon tied onto the vegetation along the trail. At the terminus of the new trail, the flagging continued all the way to a metal t-post at the corner of Smith's property. There was no evidence of any type of old trail from the terminus of the new trail to Smith's property. Two photos (attachments 22 & 23) clearly show the presence of marking flags, but no trail.
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> 3. On 7/30/2012, I contacted Mr. Smith and he freely admitted to building the trail. He stated "I just cleared out an old horse trail." I informed him that he was not allowed to do this without a permit and he replied "I have built trails before and every time I had Bill de Vergie come out and look at them and [he] told me good job Larry, you should build more of those." Bill de Vergie is Area Manager for Colorado Parks and Wildlife. I contacted Mr. de Vergie about the alleged conversation, and he informed me it never took place[[3]] . . . . Ed Hendricks (BLM Law Enforcement Ranger) was present during this entire phone call.

Answer, Attachment A (Dittlinger Declaration, ¶¶ 2, 3).[4]

[3] Bill de Vergie submitted a statement to the Board in which he denies any conversation with Smith purporting to condone the building of new roads on public lands without BLM's authorization. Letter to Board dated Oct. 25, 2012, at 1. BLM also submitted de Vergie's Declaration repeating the substance of the letter. Answer, Attachment B.

[4] Dittlinger explains that the trails Smith built in the past to which Smith alludes are those "likely shown on attachment 24 as segments 1-3 (photos of the trail, attachments 27-37)," stating that these show that "Mr. Smith's network of trails connects his hunting base camp to the property he has historically leased for access." Dittlinger Declaration, ¶ 7. He concludes that "Mr. Smith was attempting to connect property he acquired last year to his trail system that accesses his hunting camp. Access to public land is not accessible by ATV from his property due to the terrain. This area is landlocked by private land and there is no public access." *Id.* Dittlinger's surmise appears to be borne out by the photographs and satellite images of the area in the record.

Hendricks contacted Smith on July 31, 2012. Smith admitted he had built the trail. Smith was not advised at that time that he would receive a notice of violation or that his SRP was in jeopardy. *Id.*, ¶ 4.

Hendricks completed an Incident Report (print date Sept. 5, 2012) on July 30, 2012, stating that he and Dittlinger had inspected the new trail. Hendricks confirmed the substance of Dittlinger's conversation with Smith, that Smith "admitted to the violations" during that conversation, and that Smith "stated he constructed the road/trail 'quite a while ago, a couple of months ago,'" though he could not recall precisely when. Incident Report at 2. Hendricks reported that he spoke to Smith by telephone on July 31, 2012, and Smith "admitted to the violations," further stating he was "cleaning up an old trail," and that he had no authorization to do so. *Id.* By certified mail through the U.S. District Court, Hendricks issued two Violation Notices (VNs), numbers 3318576 and 3318577. The former VN charged cutting, destroying, and removing vegetation without authorization (43 C.F.R. § 4140.1(b)(3)), and the latter charged development of public lands without authorization (43 C.F.R. § 2920.1-2(e)). The VNs offered Smith the option of paying the "Forfeiture Amount" or appearing in court. By August 13, 2012, Smith had paid the Forfeiture Amounts of $100 for the first VN and $250 for the second, plus a "Processing Fee" of $25 for each, for a total of $400. Dittlinger Declaration, ¶ 5.

On August 9, 2012, BLM issued its decision terminating Smith's SRP on the basis of the violations stated in the VNs, with the additional charge of violating the SRP terms, conditions, or stipulations, as provided by 43 C.F.R. § 8372.0-7(a)(2).[5] This appeal followed.

Discussion

On appeal, Smith contends there was a "pre-existing" trail and that he admitted only to "trimming the vegetation on a 'pre-existing' trail," not "developing a new trail." SOR at 2. He maintains the trail was "trimmed" by a third party "a few years prior to July 1, 2012 and was initially cleared and created many years ago by yet another third party." *Id.* at 3. He states he asked Dittlinger and Hendricks what he could do to "rectify the situation" and inquired about what would transpire and was advised by both that "at most, he would receive a violation and a fine for the 'damage.'" *Id.* Smith concludes that BLM's decision was "made upon a mistake of fact and law, without a rational basis." *Id.* at 4. Smith argues he was never "properly advised of these violations, nor of any potential adverse collateral consequences,"

[5] The regulation at 43 C.F.R. § 8372.0-7(a)(2), Enforcement, was removed effective Oct. 31, 2002. 67 Fed. Reg. 61732 (Oct. 1, 2002). Those rules were recodified as 43 C.F.R. § 2932.57(a)(1) through (5), and (b)(1) through (3), with only minor changes in wording. The decision is modified to cite the current regulation.

further stating that he "erroneously relied on conversations with the BLM officers and the incorrect advice, or lack thereof of proper advisement, he received from these officers regarding the implications of the alleged offenses." *Id.* at 7. He maintains BLM should have temporarily suspended the SRP, that it failed to follow proper procedure in terminating his SRP, and that he did not receive the due process guaranteed by the U.S. Constitution and the Colorado Constitution.[6]

As BLM notes in its Answer, Smith's argument that he had no knowledge of the consequences that might be imposed for breaches of the terms and conditions of the SRP is without merit. He applied for and executed the SRP and is presumed to have read it before accepting it. The SRP provides as follows:

> Condition 1 states the SRP is "revocable for any breach of conditions or at the discretion of BLM, at any time upon notice." SRP at 3.
>
> Condition 2 states that the SRP is subject to "all applicable provisions of the regulations (43 CFR Group 2930)." *Id.*
>
> Condition 6 requires compliance with all Federal, State, and local laws. *Id.* Condition prohibits cutting timber on public lands without prior written authorization from BLM. *Id.*
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> The Stipulations provide as follows:
>
> The first paragraph states that the Stipulations apply to all SRPs and that "[f]ailure to comply with these stipulations may result in remedial actions listed on page 9. Per [43 C.F.R. §] 2932.40, violations of SRP terms or stipulations may be subject to fines and imprisonment, in addition to administrative penalties." Stipulations at 1. Smith signed the Stipulations immediately below this notification.
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> Section III A and B reiterates that the SRP is subject to all applicable laws. *Id.* at 2.
>
> Section VII B requires the Permittee to practice "tread lightly and leave no trace" land ethics. *Id.* at 4.
>
> Section XVII H requires permitted activities to be conducted in a manner that "prevents damage to or loss of vegetation cover," and more

[6] The Interior Board of Land Appeals has no jurisdiction over Constitutional claims; such matters must be raised in a court of competent jurisdiction. We address such claims no further.

specifically provides that "[c]utting, clearing or defacing of standing trees, alive or dead, or clearing and cutting of shrub/ground cover . . . shall require specific advance authorization." *Id.* at 8.

Section XVII N prohibits "[c]onstruction of permanent facilities or improvements of any kind, including but not limited to roads, trails or structures" and expressly states that separate authorization is required. *Id.*

Section XVIII A advises that BLM will conduct inspections and evaluate performance. *Id.* at 9.

Section XVIII B states:

> Any violation of permit terms, conditions and stipulations may be subject to penalties prescribed in 43 CFR 2932.40, which may include fines up to $1,000 and/or imprisonment up to 12 months. Additionally, any such violation may result in permit revocation, suspension or probation. Violations may also be cause for the BLM to deny approval of a Special Recreation Permit or Operating Authorization for subsequent years. If a permit is canceled or suspended, permit applications will not be approved for any person connected to or affiliated with the operation under a canceled or suspended permit.
>
> . . . .
>
> **Unacceptable** means that the permittee has not operated in accordance with the terms and conditions of the permit and cannot be allowed to continue. This performance level will result in suspension, termination, or revocation of permit privileges as appropriate to the circumstances.
>
> *Id.*

In Section X[IX],[7] Smith signed the Stipulations, thereby certifying he had read them and understood that "I must abide by them while performing activities in connection with permitted operations." *Id.*

[7] The final section of the Stipulations is erroneously numbered XVIII, like the section preceding it.

We find that, contrary to his assertions on appeal, Smith clearly knew or should have known the terms and conditions that governed his SRP. Dittlinger and Hendricks reported their conversations with Smith, which occurred in each other's presence, and they did not report or suggest they responded to questions about what would occur following Smith's admissions. Regardless, however, Dittlinger and Hendricks owed Smith no duty to review the terms and conditions of his SRP with him or to remind him of the potential consequences of noncompliance before proceeding with the investigation. In any event, the decision with respect to sanctions was not theirs to make or predict, and Smith could not reasonably rely on their personal opinion, if they expressed one, to negate the decision made by the BLM authorized officer.

On appeal, Smith continues to argue the trail was cut by someone else, and that he is responsible for nothing more than "minor modifications to the vegetation" on this "'pre-existing' trail." SOR at 8. He further argues BLM failed to investigate the matter properly, as shown by the fact that the VNs identified July 1, 2012, as the date when the violation occurred, a date when he was not in Colorado.

As noted, the trail is a half-mile in length and 4 feet wide. It had been flagged past its terminus to a metal post on Smith's property. BLM avers there is no evidence of an old trail from the terminus of the new trail to Smith's property. Satellite images provided by BLM confirm there was no evidence of any trail resembling that shown in the photographs in 2011 (print date Oct. 23, 2012). *See* Dittlinger Declaration, ¶ 7 and Attachments 25 and 26 (satellite images). Even assuming *arguendo* that an unknown party cut a trail before Smith acted, we cannot agree that the photographs show "minor modifications to the vegetation." To the contrary, the photographs show significant disturbance, large tire marks, and freshly cut trees and shrub. If the trail once was an old horse trail as Smith claims – and we are not persuaded that it was – we perceive no plausible reason why it would abruptly end where the trail at issue ends. Moreover, it is plain that the trail was recently cut or bladed, and that it was intended to accommodate motorized vehicles. While Smith would make much of BLM's alleged failure to investigate the possibility that third parties built the trail, the allegation is ultimately beside the point: Smith's admissions that he cleared or brushed out a trail, coupled with payment of the forfeiture amounts without challenge, required no more of an investigation than that demonstrated in the record, and those admissions are clearly sufficient to establish a violation of the SRP terms and stipulations set forth above.

Our conclusion is not changed by the July 1 date stated in the VNs. Nothing in the record or Smith's SOR shows or suggests that Smith contested or questioned the date either formally by electing to appear in court or through his attorney, or by contacting BLM to discuss this issue himself. More fundamentally, Hendricks' Incident Report stated that Smith informed him that he could not remember when he

had done the trail work, stating that he had done so "'quite awhile ago, a couple of months ago.'" Incident Report at 2. Hendricks obviously was only estimating a date because Smith could not remember it or declined to provide it. That Hendricks did so does not vitiate the VNs or alter the facts of the case because, again, Smith admitted that he had cleared vegetation on public lands without authorization from BLM. He does not claim he had authorization to do so, and the record does not offer any basis for believing or assuming he did. However, the record does contain evidence that Smith unsuccessfully sought a right-of-way to build access to his property to aid his outfitting business. *See* e-mail message from Assistant Field Manager Timothy J. Wilson to Anna L. McMinn, dated June 28, 2012, and from McMinn to Dittlinger, copy to Hendricks, dated July 30, 2012. *See also* Hendricks' July 30, 2012, Incident Report at 2 ("Smith had previously asked for a Right of Way, from the BLM and was denied. . . . After being denied, Smith refused to comply and constructed the trail on his own accord.").

Two final matters require a response. Citing 43 C.F.R. § 2920.9-3(b)(1), Smith contends BLM was required to first temporarily suspend his SRP. Citing 43 C.F.R. § 2920.9-3(c)(1), he argues BLM did not follow procedure to terminate his SRP in that he was not given written notice or a reasonable time to correct noncompliance, implicitly admitting he committed the violations with which he was charged.

BLM correctly observes that the provisions contained in 43 C.F.R. Subpart 2920 are not applicable to SRPs. Subpart 2920 applies only to uses "not specifically authorized under other laws or regulations." 43 C.F.R. § 2920.1-1. Smith's SRP is authorized under 43 C.F.R. Part 2930, as set forth in the SRP; Subpart 2920 therefore is not relevant. Part 2930 does not provide for temporary suspensions, and it does not provide for the procedures specified in 43 C.F.R. § 2920.9-3.[8]

[1] Smith nonetheless is correct in contending that he was entitled to a hearing before BLM could terminate his SRP. Section 302(c) of FLPMA provides as follows:

[8] Among other things, the procedure set forth in 43 C.F.R. § 2920.9-3 requires the issuance of an immediate temporary suspension when noncompliance with the terms and conditions of a land use authorization adversely affects the public health, safety, or welfare, or the environment. In addition, that regulation requires written notice of the grounds for suspending or terminating the land use authorization and a reasonable time to correct the noncompliance before proceedings to suspend or terminate can be commenced. If the noncompliance is not corrected, written notice to the holder of the land use authorization is required before the matter is referred for a hearing before an administrative law judge pursuant to 43 C.F.R. §§ 4.420-4.439.

> The Secretary shall insert *in any instrument* providing for the use, occupancy, or development of the public lands *a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument*, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan: Provided, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: Provided further, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: Provided further, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: Provided further, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail.

43 U.S.C. § 1732(c) (2006) (emphasis added).

Neither Smith's SRP nor the regulations in 43 C.F.R. Part 2930 refer to or acknowledge section 302(c) of FLPMA. Even when the SRP and regulations do not expressly include the provision required by the statute, as is the case here, such omission does not excuse BLM from adhering to the procedural requirements of section 302(c):

> The requirements of section 1732(c) are not restricted to instruments issued by BLM under section 1732(b). Inclusion of the fourth proviso makes it clear that Congress intended this requirement to extend to all land use authorizations issued by the Department under any law for lands managed by BLM. Congress provided that the requirements of this section can be avoided only if the law under which the authorization was issued or other law contains specific provisions for the suspension, revocation, or cancellation of a land use authorization.

James C. Mackey, 96 IBLA 356, 365, 94 I.D. 132, 137 (1987). In *Mackey*, the Board set aside BLM's decision permanently excluding appellant from conducting permitted activities under the Archaeological Resources Protection Act, 16 U.S.C. § 470aa (1982), which effectively revoked his existing land use authorizations. The Board

concluded that Mackey had a statutory right to a hearing prior to the issuance of BLM's decision and referred the matter for a hearing before an Administrative Law Judge.

In *San Juan County*, 102 IBLA 155, 158, 95 I.D. 61, 62-63 (1988), the Board found that section 302(c) of FLPMA extended to the suspension or revocation of leases issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. §§ 869-869-4 (1988).

[2] In *Dvorak Expeditions*, 127 IBLA 145 (1993), the Board concluded that the principle in *Mackey* is applicable to SRPs for commercial river rafting. However, we held that if a "statute does not expressly require a hearing 'on the record' and no contrary Congressional intent is evident, formal proceedings before an administrative law judge are not mandated." 127 IBLA at 150. We determined that a "special recreation permittee's hearing rights under [section 302(c) of FLPMA] are satisfied by applying established Department procedures for review of BLM's decision by this Board. When Dvorak was given notice of BLM's adverse decision and afforded the right to appeal to this Board, his rights were fully satisfied." *Id.* More specifically, we stated:

> The Board has the authority to order a fact-finding hearing before an administrative law judge when it finds material issues of fact not resolved by the record. 43 C.F.R. § 4.415; *see San Juan County*, [102 IBLA at 158] and *James C. Mackey*, [96 IBLA at 365]. This procedure is adequate to ensure that the Department "has sufficient information so that its final decision reflects a consideration of the relevant factors." *See Sea-Land Service, Inc. v. United States* [683 F.2d 491,] 496 [D.C. Cir. 1982]; *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971).

Id. at 151 n.3.

[3] In *Obsidian Services, Inc.*, 155 IBLA 239, 248 (2001), the Board stated:

> [H]earings may be ordered when a question of fact is presented that cannot be resolved on the basis of a written case record, as supplemented by documents or affidavits submitted on appeal. 43 C.F.R. § 4.415; *Lazy VD Land and Livestock Co.*, 108 IBLA 224, 228 (1989). However, the burden of proof lies with [Obsidian Services, Inc.], as the party requesting the hearing, to show evidence or offer of proof to raise adequate doubt that a hearing should be ordered. *Alfred G. Hoyl*, 127 IBLA [297], 303 [(1993)]. It has not done so.

The Board exercises its discretionary authority to order a hearing under 43 C.F.R. § 4.415 sparingly. Thus, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. A genuine issue of material fact is one that could change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Here, Smith admitted taking actions that clearly constituted cutting, destroying, and removing vegetation from public lands to develop or improve those lands, he paid the VN forfeiture amounts without challenging the citations for taking those actions, and other evidence in the record is consistent with Smith's admission. Smith's allegations that unknown third parties originally created or maintained the trail, even if true, are simply immaterial to the question of whether his admitted conduct provides a rational basis for, and justifies, BLM's decision to terminate his SRP. Accordingly, although FLPMA required BLM to afford Smith a hearing before terminating his SRP, in the circumstances of this appeal, Smith's rights were fully satisfied by his appeal to this Board. *Dvorak Expeditions*, 127 IBLA at 150. The record and pleadings on appeal establish that there is no material issue of fact: No hearing is necessary when the essential facts are not disputed. *Obsidian Services, Inc.*, 155 IBLA at 248.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as modified to correct the regulatory citation supporting the third charge, and the petition for a stay is denied as moot.

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge