

INTERIOR BOARD OF LAND APPEALS

Pete Carlson

136 IBLA 214 (August 23, 1996)

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PETE CARLSON

IBLA 93-304

Decided August 23, 1996

Appeal from a decision of the Deschutes Resource Area Manager, Bureau of Land Management, issuing special recreation permit OR-056-3-010R on a probationary basis for commercial river rafting use of the Lower Deschutes River.

Vacated in part.

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

A decision imposing administrative sanctions against the holder of a permit for commercial river rafting is properly vacated where the record does not support the basis given by BLM for invoking sanctions.

APPEARANCES: Pete Carlson, for himself and Deschutes River Tours; James L. Hancock, Prineville District Manager, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Pete Carlson, operating under the name of Deschutes River Tours, has brought this appeal from the February 22, 1993, decision of the Deschutes Resource Area Manager, Bureau of Land Management (BLM). That decision issued a "probationary" special recreation permit OR-056-3-010R for commercial river rafting use of the Lower Deschutes River. The decision also enclosed a copy of appellant's performance evaluation for the 1992 season which formed the basis for issuance of the permit on a probationary basis.

Appellant's performance evaluation, dated February 19, 1993, noted violations under the category of administrative procedures for failure to pay fees timely and for unauthorized commercial use, resulting in an overall rating of "unacceptable." The form states that appellant had been observed conducting a commercial trip on June 11, 1992, when his 1992 advance user fee had not been paid and, further, that a citation had been issued under 43 CFR 8372.0-7(a)(1) for failure to obtain a commercial use permit.

Proper resolution of this case requires an understanding of the background of permittees' actions and BLM's attempts to secure compliance with its requirements for special recreation permits for commercial

river rafting. Appellant, who had held a river rafting permit for a number of years, filed his application for a permit for the 1992 season on January 15, 1992. The permit was approved by BLM on March 13, 1992, subject to the stipulations contained therein. Stipulation number 5 provided, in pertinent part, that: "Permittee must pay the sum of estimated user fees in advance of permit issuance." (Emphasis in original.) A copy of a notice dated February 12, 1992, addressed to the appellant noted the need to file certain things with BLM by May 1, 1992, including advance user fees. Although the amount of the 1992 advance user fee was stated as \$1,083, the notice advised permittee that: "If your fee is more than \$500, check your guidelines dated December, 1991 [1/] for the fee payment schedule." The notice also advised of the option to pay the fees with a credit card.

The file contains a copy of a brief report signed by Ed Perault, BLM outdoor recreation planner, relating an observation on June 11, 1992, of a boat on the river apparently belonging to appellant. The record also discloses a Notification of Violation (NOV) dated June 17, 1992, signed on behalf of BLM by Karen Perault, which was issued to appellant. Violations checked include "Fees Paid Timely" and "Other: Unauthorized guiding." With respect to the specifics of the alleged violation, the NOV stated:

According to our records, you have not paid your 1992 advance user fee for the Deschutes River in the amount of \$1,083.00. As stated in the letter sent to you on February 12, 1992, permits are not valid until we have received your 1992 advance user fees. You were observed conducting a commercial trip on 6/11/92 with 2 clients near the Luelling property. Please respond to this notice within 30 days * * *.

(NOV at 2). Also found in the file is a June 18, 1992, record of a telephone conversation between Karen Perault of BLM and appellant which relates that appellant was advised of the NOV and BLM's position that appellant's permit "was not valid" because it had not received appellant's advance user fee. The conversation record also indicated appellant acknowledged running commercial river trips for "fourteen days straight."

The record reflects that appellant paid the advance user fees in the amount of \$1,083 by credit card on June 19, 1992.

The next communication in the record regarding this matter is a letter of September 15, 1992, from BLM, received by appellant on

1/ Guidelines For Commercial Use of Rivers in the Prineville District, (December 1991) (hereinafter cited as Guidelines). Like other BLM district offices, the Prineville District Office, in conjunction with the permittees, developed the Guidelines by which all permittees agree to be bound. Standard stipulation number 36 for permits issued by the Prineville District provides that operations under the permit are subject to an annual evaluation to determine compliance with the Guidelines.

September 17. The letter noted the June 17 NOV for conducting rafting trips without having paid the advance user fee in the amount of \$1,083. In support of the requirement for advance payment of the \$1,083, BLM cited the February 12, 1992, notice that "permits are not valid until we have received your 1992 advance user fees." The letter also noted that under the Guidelines on page 3 the permittee is responsible for submitting a use fee payment to BLM by May 1. ^{2/} Further, the BLM letter asserted that appellant had not responded to the NOV within 30 days as requested therein. Finally, BLM indicated that: "Based upon the evidence, a citation is enclosed for violation of 43 CFR Section 8372.0-7(a)(1) - failure to obtain a commercial use permit."

The file contains a record of a telephone conversation held by Karen Perault of BLM with appellant on September 17, 1992, after his receipt of the citation. After noting appellant's protest that he had indeed responded to the NOV by paying the advance user fee on the day he learned of the NOV, the record reflects Perault responded that the "primary issue of concern raised in the letter was the fact that he had engaged in unauthorized commercial activities and that we did not believe that there were any mitigating circumstances."

In his statement of reasons (SOR), appellant states his belief that he is "being unfairly harassed" and is "not guilty of the charge." Appellant refers to his good record with BLM since 1974 and acknowledges "an oversight in not paying my advance user fee" prior to the June 11 trip. Noting that, in a letter accompanying his application for 1992, he had expressed his belief that his "advance payment of \$603 for the 92 season exempted" him from the need to file an initial payment with the application, appellant points out that he openly acknowledged his prior use in the June 1992 conversation with BLM in an effort to clear up a "terrible misunderstanding." Appellant states that he immediately responded by charging on his credit card the \$1,083 fee he owed BLM. He further states that "like every other guide I know, I do not understand the Prineville office's accounting system for advance, current, and post user fees."

An answer has been filed on behalf of BLM, stating that appellant was sent a notice dated February 12, 1992, requesting payment of the advance user fee in the amount of \$1,083 for the 1992 season. Further, BLM notes the accompanying statement that permits are not valid until BLM has received the advance user fee. The BLM answer states that on June 11, 1992, appellant was observed conducting an "unauthorized commercial trip" on the Lower Deschutes River, and, hence, BLM sent him a NOV for unauthorized guiding because he failed to pay his 1992 advance user fee prior to conducting trips. ^{3/} Further, BLM asserts that

^{2/} BLM's letter neglects to acknowledge, however, that permittees whose estimated annual fees exceed \$500 (as is the case here) may pay 1/2 prior to issuance of the permit and 1/2 by Aug. 1 (Guidelines at 5).

^{3/} The BLM answer also addresses other alleged incidents of unauthorized use from the 1991 season. However, the record discloses that these alleged

appellant did not respond to the NOV within 30 days as requested and, hence, by letter dated September 15, 1995, appellant was issued a citation for failure to obtain a commercial use permit in violation of 43 CFR 8372.0-7(a)(1). Finally, BLM asserts that the decision to issue the probationary permit was made in accordance with procedures in the "Handling Violations" section of the Guidelines booklet.

Appellant has filed a reply to BLM's answer. He reiterates that, contrary to BLM's assertion, as noted in his SOR, he did respond immediately to the NOV when he contacted BLM and paid the advance user fees promptly after issuance of the NOV. Appellant asserts that his acknowledgement of prior use on the river in the June 1992 telephone conversation was not an admission of guilt with respect to a criminal act, but rather a candid recognition of the extent of his misunderstanding. Further, appellant responded therein to certain allegations in the BLM answer regarding a matter which has been resolved favorably to the appellant and, thus, is not properly considered in this case. See note 3 supra.

Special recreation permits other than those on developed recreation sites are issued pursuant to the regulations at 43 CFR Subpart 8372. Legislative authority cited for these regulations includes the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1994), and the Land and Water Conservation Fund Act, 16 U.S.C. § 4601-6a (1994). See 43 CFR 8372.0-3; Carrol White, 132 IBLA 141, 150 (1995); Whitewater Expeditions & Tours, 52 IBLA 80, 81 (1981). For purposes of this case, it is important to distinguish the different types of sanctions invoked by BLM against appellant. BLM has promulgated regulations stating that a special recreation permittee is prohibited from violating permit stipulations or conditions, but these regulations do not explicitly authorize sanctions for violating stipulations or conditions other than criminal penalties and civil actions for unauthorized use. 43 CFR 8372.0-7(a)(2),(b). Criminal sanctions under 43 CFR 8372.0-7 were invoked by BLM when it issued appellant a criminal citation pursuant to 43 CFR 8372.0-7(a)(1) for "failure to obtain a commercial permit." ^{4/} However, the Board has also upheld the authority of BLM to require a special recreation permit holder to consent to permit conditions or stipulations which BLM deems necessary to protect the public interest, and where a commercial river rafting permit holder is on notice that violation of such stipulations may result in administrative

fn. 3 (continued)

incidents were contested by appellant, the charges were subsequently withdrawn by BLM, and appellant was issued an "acceptable" performance evaluation for the 1991 season. See Letter of James G. Kenna, Deschutes Area Manager, BLM, dated Mar. 12, 1992. Under these circumstances, these allegations were not properly considered in the proceeding under appeal. See Red Rock Hounds, Inc., 123 IBLA 314 (1992).

^{4/} The BLM letter of Sept. 15, 1992, addressed to appellant, which enclosed the citation, described the specific basis of the citation as the quoted language indicates. Unfortunately, the record does not contain a copy of the criminal citation itself.

sanctions, we have upheld BLM decisions invoking such sanctions upon noncompliance. See Carrol White, supra; Dvorak Expeditions, 127 IBLA 145 (1993). Upon appeal from a decision imposing administrative sanctions, we will review the case file to determine whether the record supports the sanctions imposed by BLM. See Dvorak Expeditions, supra at 152.

[1] As previously noted, the June 1992 NOV issued by BLM charged appellant with certain violations including "Fees Paid Timely" and "Other: Unauthorized guiding." The NOV called upon appellant to respond to BLM within 30 days. As set forth above, appellant promptly responded to the NOV as reported in the record of his June 18 telephone conversation with Karen Perault and the accounting advice reflecting his June 19 payment of user fees in the amount of \$1,083. Notwithstanding this, BLM maintained in its letter of September 15, 1992, that it "had not received a response from" appellant and, hence, issued a criminal citation under 43 CFR 8372.0-7(a)(1) for "failure to obtain a commercial use permit." While it appears that appellant violated a condition of the permit and the relevant Guidelines by failing to tender advance payment by May 1 of 1/2 of the advance user fees, 5/ we find that violation of that permit condition or regulations is properly distinguished from guiding without a commercial use permit. See, e.g., Spurlock Mining Co. v. OSM, 135 IBLA 396, 401 (1996) (coal surface mining reclamation); Oil Gas & Other Minerals, 131 IBLA 279, 281 (1994) (oil and gas drilling); Northland Royalty Operating Co., 129 IBLA 164, 165-66 (1994) (oil and gas drilling). By applying for a BLM permit in early 1992 (as he had for many consecutive years) appellant was ensuring his compliance with BLM requirements regarding insurance, licensing with State regulatory agencies, record keeping, financial accountability, etc. While this Board has no jurisdiction over criminal citations issued under 43 CFR 8372.0-7(a)(1), 6/ the propriety of the citation may be considered to the extent it was relied upon by BLM as a basis for the administrative sanction which we have jurisdiction to review. In this case the criminal citation was issued for a charge which did not fit the facts of the case and on the basis that appellant had not responded to the earlier NOV when he in fact had responded promptly by acknowledging his mistake and making full payment. The subsequent February 1993 evaluation which formed the basis for issuance of a probationary permit was predicated on this citation for "failure to obtain a commercial use permit."

5/ An account summary in the record dated February 1992 shows that appellant was entitled to a credit from the prior season for overpayment in the amount of \$61.50. Thus, the amount due was slightly less than 1/2 of \$1,083.

Appellant alleges that he submitted an "advance payment of \$603 for the" 1992 season. The record shows that \$603 was paid on July 31, 1991, but that amount was for the balance due for fees for the 1991 season.

6/ Such matters are reviewable in the United States District Court. It appears that, in this case, appellant elected to pay a reduced fine rather than to contest the matter.

While the authorized BLM official has broad discretion to invoke administrative sanctions, a decision to issue a permit on a "probationary" basis is properly vacated where the basis given by BLM for the sanction is not supported by the record. See Dvorak Expeditions, supra at 152; Red Rock Hounds, Inc., supra at 318-19.

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 vacated in part to the extent the permit was issued on a probationary basis.

C. Randall Grant, Jr.
Administrative Judge

I concur.

David L. Hughes
Administrative Judge