

Editor's note: Reconsideration denied by order dated June 25, 1976

CANON TOURS, INC.

IBLA 75-132

Decided May 8, 1975

Appeal from decision of Monticello, Utah, District Office, Bureau of Land Management, rejecting in part special land use permit application U-24791.

Affirmed.

1. Public Lands: Special Use Permits

Issuance of a special use permit is clearly discretionary, and the Bureau of Land Management may reject an application in part for a permit for commercial river running where an evaluation of the Bureau's river management program for the Green River shows that the total passenger days applied for will exceed the river carrying capacity and would be inconsistent with the Bureau's objectives and program for environmental protection of the river area.

APPEARANCES: Bruce M. Kirkpatrick, Esq., Kirkpatrick and Candelaria, Attorneys at Law, Durango, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Canon Tours, Inc., has appealed from a decision of the Monticello, Utah, District Office, Bureau of Land Management, dated August 6, 1974, which rejected in part its application for a special land use permit for commercial river running on the Green River.

Canon Tours, Inc. originally filed its application with the Monticello District Office on December 13, 1973, for commercial river running permits on the Green, Colorado and San Juan Rivers. It requested an allocation of 1,500 passenger days on the Green River between Sand Wash and Green River, Utah [Desolation Canyon]; 50 passenger days on the Colorado River from the Utah-Colorado State line to

the confluence with the Delores River [Westwater]; and 675 passenger days on the San Juan River above Mexican Hat, Utah. 1/

The Bureau, after reviewing the capacity of these river systems and related public lands in light of the increasing demand for commercial and recreational boating, informed Canon Tours in a letter from the Bureau's Utah State Office, dated March 26, 1974, that it would be allowed only the 400 passenger days on the San Juan River. Thereafter, Canon asked the Bureau to reconsider the quotas for the 1974 allocations. The Monticello District Office in a letter of May 22, 1974, informed Canon that its permit for the San Juan was increased to 700 passenger days but that the part of its application for river trips on the Green and Colorado Rivers would not be approved. Canon filed a notice of appeal on June 18, 1974. After further discussions with Canon, settlement of outstanding trespass damages and further verification of Canon's previous use of the Green River in 1972, the Bureau issued its amended August 6 decision giving Canon an additional allocation of 400 passenger days on the Green River. 2/

Canon has proceeded with this appeal challenging the Bureau's jurisdiction to issue or deny special land use permits on the Green River. It contends that the Green River is a navigable waterway and thus, is a public highway over which the Bureau has no authority. Appellant also questions the Bureau's jurisdiction to issue permits for lands owned by private individuals and/or which are owned by Indian Tribes and are considered part of an Indian Reservation. Appellant also charges that the decision appealed from is not based upon compliance with the requirements of Title 5 U.S.C.A. Sec. 553, but is the result of "criteria" privately developed without knowledge of appellant and that, in any event, the "criteria" were not followed, so that the decision is the result of an arbitrary and capricious abuse of discretion not grounded in fact and clearly erroneous.

The Office of the Solicitor, Department of the Interior, requested and was granted an extension of time to file a response on behalf of the Bureau of Land Management. Appellant has objected to the delay in the Solicitor's answer, filed February 18, 1975. However, the case had just been reached for adjudication and appellant had not been adversely affected by the delay. Accordingly, the views of the Solicitor's Office have been made a matter of record.

1/ The Bureau's permit application form defines a passenger day as one commercial passenger on the river for one calendar day or a portion thereof. 2/ Appellant paid trespass charges of \$50 to the Price District Office July 8, 1974.

[1] Appellant in effect has questioned the Bureau's use of the special land use permit as a method of controlling commercial river running in this area. In the circumstances, this type of permit is an appropriate vehicle for the Bureau to implement its river management program. A special land use permit is not explicitly authorized by any statutory provision. However, under the general authority of the Secretary of the Interior to administer the public lands, it may be issued for a purpose not specifically provided for by existing law. See 43 CFR 2920.0-2. Wyoming Highway Department, 14 IBLA 258 (1974); Allen M. and Margery D. Boyden, 2 IBLA 128, 131 (1971); Wilderness Society v. Morton, 479 F.2d 842, cert. denied, 411 U.S. 917 (1973). Issuance of a special land use permit is clearly discretionary. Allen M. and Margery D. Boyden, supra; Desert Outdoor Advertising, Inc., 2 IBLA 344 (1971).

The courses of the Green and San Juan Rivers cross and run past national resource lands administered by the Bureau of Land Management. Commercial and recreational boating on the river in the Desolation Canyon area of the Green River may also involve use of campsite facilities on the public lands. The Bureau has developed a program to regulate the use of these rivers in order to maintain the environmental quality of the river and the adjacent public lands. The partial rejection of appellant's application is therefore not arbitrary and capricious, but is merely consistent with the Bureau's objectives based on studies for recreational programs for public use of the area.

Before applications for 1974 commercial tour permits were allocated, the Bureau conducted an extensive environmental impact analysis of the river areas. Studies were undertaken to determine the capacity of the river systems and related lands. Detailed information on the amount of river use and the problems involved were gathered through the use of questionnaires and public meetings. All segments of the interested public were encouraged to participate in the discussion and preparation of management proposals. 3/ The

3/ A letter of March 20, 1973, from the Bureau's Utah State Director, to prospective permittees typified the Bureau's attempts to seek public cooperation and to include their views. He stated: We will undertake a program to inventory resource capability and present use and plan for the future. We will work closely with others such as the Uintah Ouray Tribal Council in Desolation Canyon and the Utah State Division of Parks and Recreation towards identifying and solving sanitation problems, access and congested beach use. Your help is needed to assure that all the problems and opportunity for use along these rivers are identified and considered. I would especially appreciate your thoughts on this matter. We have recently held a series of meetings through the state to explain

record also shows that Donald L. Baars of Canon Tours was aware of the preliminary review and was invited to participate in discussions of management proposals for commercial operators. ^{4/}

After pertinent information was gathered, permit applications were considered as to history and extent of use and scheduling of trips. Factors such as protection of the environment, provision for public safety, and minimizing user conflicts were of primary concern in the allocation of use. In the Desolation Canyon area alone there were 38,248 passenger days applied for by 46 commercial outfitters. This amounted to almost five times the recorded 1973 river use of 8,420 passenger days. At a meeting held October 11, 1973, between the Bureau and commercial river guides to discuss plans for river use, the consensus of the guides at that time was that Desolation Canyon applications would far exceed the carrying capacity in the 1974 season. A total of 20,400 passenger days were ultimately allocated to 36 commercial users. The total carrying capacity of 30,000 passenger days including private flatboat use had been established from the Bureau's review. Accordingly, Canon was not granted more use where evaluation showed that the total passenger days applied for would exceed the river carrying capacity and would be inconsistent with environmental protection of the river area. While appellant alleges that the criteria used in allocating use of the rivers were not followed it has made only a general allegation, unsupported by particulars. We find ample support in the record for the Bureau's determination.

Appellant's challenge of the Bureau's jurisdiction to issue the special use permits for the Green River is without merit. Appellant has relied on an assumption that the Green River is a navigable waterway and thus a public highway. This is error. That portion of the Green River upon which appellant seeks a special use permit has been determined to be nonnavigable in fact and within the legal meaning and definition of the term by the District Court for the District of Utah. United States v.

fn. 3 (continued)

the procedures being implemented for a recreation use permit system to manage commercial and non commercial group use on lands and waterways administered by this Bureau. A question and answer brochure is enclosed which explains this program in more detail.

^{4/} In a letter of October 2, 1973, the Monticello District Manager informed Mr. Baars of a meeting to be held on management proposals October 9, 1973, in the Utah Power and Light Auditorium in Salt Lake City, Utah.

Utah, U.S. Dist. Ct., C.D. Utah, Civil No. C-201-62 (January 8, 1965). 5/ The Court's ruling is dispositive of appellant's argument in this regard. See also, United States v. Utah, 283 U.S. in this regard. See also, United States v. Utah, 283 U.S. 64 (1931).

Further the Special Land Use Permit does not control appellant's use of private or Indian lands, but only areas within the jurisdiction of the Bureau of Land Management.

Finally, since the Special Land Use Permits are concerned only with public property, the provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1970), which except public property from its provisions are not pertinent.

Accordingly, 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.

Martin Ritvo
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Joan B. Thompson
Administrative Judge

5/ The District Court in determining title to portions of the bed of the Green River ruled in pertinent part:

* * * * *

3. All of said Green River between said Mile 12 and a point which is known as the mouth of Sand Wash Creek (which point is 212.7 miles above the confluence of the Green and Colorado Rivers and 95.7 miles above the railroad bridge at Green River, Utah) is nonnavigable in fact and within the legal meaning and definition of said term.

* * * * *

5. All of said Green River lying within the State of Utah and above said Mile 312 above the confluence of the Green and Colorado Rivers is nonnavigable in fact and within the legal meaning and definition of said term.

* * *

