

HONDOO RIVER AND TRAILS

IBLA 85-519

Decided April 15, 1986

Appeal from a decision of the Moab, Utah, District Office, Bureau of Land Management, cancelling permit privileges under special recreation use permit MD-83-0024.

Set aside and referred for hearing.

1. Hearings--Special Use Permits

A special use permit is subject to any special condition or stipulation mandated by Departmental policy and considered by the authorized officer issuing the permit as necessary for protection of public interests, including restrictions against transfer or assignment of permit privileges. Where there are disputed facts determinative of whether or not permit privileges were assigned to a third party, the matter may be referred for a hearing for introduction of testimony and other evidence.

APPEARANCES: Teresa Silcox, Esq., and Richard C. Skeen, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Hondoo River and Trails has appealed from a decision of the Moab, Utah, District Office, Bureau of Land Management (BLM), dated February 22, 1985, cancelling permit privileges under special recreation use permit MD-83-0024. Under this permit, Hondoo was entitled to operate commercial river trips on the Green River through Desolation and Gray Canyons (Desolation Canyon area).

The record indicates that in 1977 Hondoo was issued its initial recreation use permit for commercial river trips in the Desolation Canyon area. ^{1/} Subsequently, from 1977 to 1982, Hondoo was issued a special recreation use permit for operations in this area. The permits ran from March 1 through February of the following year. In 1983, BLM changed its program and issued a permit for a 5-year period (Mar. 1983 through Feb. 1988).

^{1/} Hondoo was incorporated in 1976 by employees of Castle Country Expeditions (CCE) to handle overflow business from CCE. CCE ceased commercial river guide services in 1980.

From 1977 to 1984, Hondoo has been allocated an annual maximum usage of 900 passenger days. 2/ The actual usage, reported to BLM was as follows: 1977-154; 1978-215; 1979-349; 1980-267; 1981-218; 1982-170; 1983-0; and 1984-499. The record does not reflect any incidents of permit violation attributed to Hondoo during the period from 1977 to 1983. However, in a notice dated November 30, 1983, BLM warned Hondoo about its failure to substantially use the permit in 1983 as required by the permit terms. 3/

The events leading to cancellation of Hondoo's permit occurred during the 1984 season. After BLM's billing notice for the 1984 river use fees was submitted to Hondoo (together with a request for copies of the 1984 brochures), Hondoo sent the following reply:

Enclosed are 5 copies of the flyer we have sent out. Wild & Scenic and Adrift Adventures are also listing our dates and are acting as booking agents for us. Just to keep things on the up and up with the BLM I should also inform you that we may have to lease vehicles from them from time to time.

If you need any more info or have questions, please feel free to call.

Sincerely
/s/ Pat Kearney
Pat Kearney & Gary George

No other communication regarding equipment transfer was received before a scheduled Hondoo launch in the Desolation Canyon area on June 25, 1984. The details of the incident were described as follows in the BLM staff report:

Hondoo Launch: two boats "owned by Hondoo" (one unmarked Havasu, one unmarked Maravia) and two boats owned by Adrift (two unmarked Havasus).

All boatmen (guides) were "contract", according to Mike Hughes [4/] (owner of Adrift), the shuttle driver, and have historically worked for Adrift, ARTA and Tag-a-Long Tours. Shuttle vehicle was a 'Glacier Bay' vehicle, which is a co-advertised company with Adrift. Trailer was Adrift although the name was masked by duct tape.

2/ Passenger day is defined in Permit MD-83-0024 as one commercial passenger on the river for one calendar day, or portion thereof. Permit Provisions B.II.B.(5). See also 43 CFR 8372.0-5(h) ("User day" definition).

3/ Provision B.II.E.(6) of permit MD-83-0024 reads:

"Use authorization for river segments listed below will be subject to cancellation of [sic] the average use for two consecutive years does not meet the following minimum: (a) Green River, Desolation-Gray 200 user days."

4/ The proper spelling appears to be Myke Hughes.

Guides wore Adrift T-shirts, and some had visors which displayed "Adrift Adventures" on them. Nowhere was the name 'Hondoo' displayed.

All equipment met with the Utah State boating laws and BLM regulations.

Boatmen/Guides:

Robin Hughes (D) (trip leader, contracted by Hondoo, who happens to be Mike Hughes' sister)
Jack Wood (C)
Jim Roman (B)
Ed Heinrick (A)

- Mike Hughes claims he has all receipts to verify that only 10% of the profit goes to Adrift and the booking was done through Hondoo. I did not sign the permit, and explained to them that I didn't sign it because of my questions on whether or not the trip was run in compliance with BLM regulations.

The BLM staff report for the July 6, 1984, scheduled Hondoo launch reads in part:

Another launch for Hondoo with Adrift equipment and boatmen. Three unmarked Havasus with Adrift equipment. Boatmen were:

Robin Hughes - trip leader
Saina Lekarczyk - Hondoo apprentice
Tom Wesson.

I explained to them my doubts of the Hondoo trip with all the Adrift equipment and people with Adrift shirts and visors, especially with the incident last week with Mike Hughes. Robin assured me that they had talked to Scott and everything was set. Since there was a Hondoo boatman and a little Hondoo equipment I told them I would sign their permit but would report it to Jim and have someone talk to Pat Kearny. They said fine, that she was aware of it, and etc.

Subsequent to these incidents, several explanations were submitted to BLM. In a letter received June 28, 1984, Myke Hughes of Adrift Adventures stated he had just booked a trip with Hondoo. The following statement appears in a letter dated July 19, 1984, from Pat Kearney of Hondoo:

Since our conversation on Monday, I've given my time to thinking over your request for more information on HR&T's [Hondoo] dealings with Adrift.

The simplest explanation I can give is: 1) Adrift has acted as a booking agent for HR&T and it was thought that the

listing of HR&T in Adrift's brochure properly identified us as permittee. A commission was paid for this service. 2) Some Adrift boatmen were hired by me to operate the trip. Other freelance boatmen were also hired. All boatmen used have done previous freelance work. 3) I leased a van from Adrift to assist in the transport of these passengers.

BLM did not address this matter again until it issued a notice dated December 10, 1984, in which Hondoo was given 30 days to demonstrate compliance with certain permit stipulations. BLM cited provision B.II.D. (1) of the permit dealing with unauthorized assignment of permit privileges. BLM also charged Hondoo with violating this provision in order to satisfy the minimum use requirement under permit provision B.II.E.(6). BLM surmised that, if unauthorized use of Hondoo's permit by other companies was not considered, Hondoo would not have complied with permit stipulation B.II.E.(6). In a response received January 14, 1985, Gary George, President of Hondoo, explained that all Hondoo trips in 1984 were advertised and operated by Hondoo. George asserted that all boatmen/guides conducting those trips were employed by Hondoo, and that all equipment used was leased or borrowed. In an additional response received January 28, 1985, George again claimed there had been no assignment of permit privileges. He characterized the two "Adrift" trips in question as chartered trips where Hondoo bore all operating expenses. He identified Adrift Adventures as the booking agent for the trips, and argued the permit did not prevent such a charter of an entire trip. Explaining financial arrangements he stated:

A cursory audit of our books for the 1984 season will show that Hondoo did, in fact, pay for any and all leased equipment it may have used as well as for the services of any and all guides on its scheduled trips. In the case of the Adrift trip of June 25, 1984, I will freely admit that we employed Adrift boatmen and utilized Adrift equipment. While I recognize that approved bookkeeping practices would require separate line item entries for each person or item, we nonetheless made our entry on this occasion by discounting the equipment lease and payroll costs from the charter price of the trip. The important point here is that Hondoo did, in fact, pay equipment lease and personnel costs associated with this and every other trip that we have made. At worst, I may be guilty of deviation from best accepted bookkeeping practices.

George also cited permit provision B.II.A.(5) regarding termination procedures, and asserted BLM's proposed cancellation of the permit was not in accordance with the stated procedure.

BLM based its decision to cancel permit MD-83-0024, on a lack of "information from Hondoo which identifies errors in the facts that support our conclusion." BLM noted that, of seven trips in 1984 under the Hondoo permit, five were led by boatmen who were known primarily as employees of Adrift or Wild & Scenic. BLM stated none of the five trips included boatmen identified

as Hondoo employees on trip notification documents submitted earlier by Hondoo. BLM acknowledged Hondoo is listed in Adrift's brochure but commented that Hondoo is unidentified as the actual outfitter permittee for the trip. BLM concluded that "Adrift (1) served as advertiser and booking agent, (2) provided transportation, (3) provided equipment, (4) provided guides, and (5) assumed responsibility for organizing and conducting Hondoo trips in whole or in large part." BLM reasoned its conclusion was "consistent with available information concerning equipment, boatmen, vehicles, and shuttle drivers used."

In its statement of reasons, Hondoo argues the record upon which the decision is based contains insufficient evidence to support BLM's conclusion. Appellant asserts it should be given an opportunity to present evidence that an assignment or transfer of permit privileges has not occurred. Hondoo also argues BLM's action was arbitrary, capricious, and an abuse of discretion. Appellant alleges BLM's interpretation of permit stipulation B.II.D.(1) is inequitably applied against Hondoo for activities which are the customary practices of many commercial outfitters in Utah. Appellant also asserts BLM improperly applied termination procedures by not allowing Hondoo an opportunity to cure or remedy the alleged violation. Hondoo has requested a hearing on the legal and factual issues raised in its statement of reasons.

A petition for stay of BLM's decision pending resolution of the appeal was granted by the Director, Office of Hearings and Appeals, in an order dated April 22, 1985.

[1] Special use permits are issued under the general authority of the Secretary of the Interior to regulate use of the public lands and related waters pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1982), and special recreation use permit requirements are set forth in the regulations at 43 CFR Subpart 8372. A policy statement explaining BLM's administration of the permit program was published by the Department at 49 FR 5300 (Feb. 10, 1984). In addition, special guidelines for river recreation use permits in Utah were established and published at 46 FR 3642 (Jan. 15, 1981). Each permit is also subject to special conditions and stipulations which the authorized officer issuing the permit deems necessary to protect the public lands, resources, and public interests. See 43 CFR 8372.5(b).

Hondoo has been charged with violating provisions in the permit which proscribe unauthorized assignment or transfer of permit privileges. Although the general regulations in 43 CFR Subpart 8372 do not specifically provide for such a restriction, the prohibition against unauthorized assignments or transfers is clearly stated elsewhere.

As noted, the permit issued to Hondoo was subject to special conditions attached to the permit. Permit provision B.II.D.(1) reads:

(1) No transfer or assignment by the permittee of this permit or of any part thereof or interest therein, directly or indirectly, voluntary or involuntary, including but not limited to the assignment or transfer or [sic] stock shall be made unless such transfer or assignment is first approved in writing by the BLM. In the event of default on any mortgage or other indebtedness, wherein the creditor may succeed to the interest of the permittee in permittee assets, such creditor does not thereby acquire the passenger day allocations or any other interest in the permittee's permit. Permittee must not sublet or enter into any third party agreements involving the privileges authorized by this permit, and violation hereof may be the subject of a trespass action under 43 CFR 9230. Termination procedure may be applied in accordance with Part A (5).

This restriction is consistent with the special guidelines, 46 FR at 3643, at I.E.3: "The permit may not [be] transferred, sublet or entered into third party agreements without BLM approval." Moreover, the Department's recently formulated permit policy includes a provision which declares that "[a]ssignment of permit privileges is not allowed." 49 FR at 5305, D.4.

The focus of this appeal is whether permit privileges were, in fact, transferred. Our review of the facts therefore must first focus on the question of how we should be able to determine whether permit privileges have been transferred.

We also find the following provision under section B.II.D. of the permit conditions (Transfers and Ownerships) to be pertinent:

(3) Notice of Intent to use equipment with markings (names, logos, etc.) other than those of the permit holder must be made to the appropriate resource area office administering the river segment you plan to float at least one (1) week prior to the scheduled launch date. Notice is only required if the markings are not those of a permitted outfitter on the river segment you plan to float.

Although the purpose for the language in this section is not stated, its function appears to be at least two-fold. First, full advance disclosure alleviates any suspicions which would be properly entertained by BLM if, at the time a launch party arrives at the launch site, the party is using equipment not belonging to the permittee. Such disclosure helps BLM police against unpermitted launches or improperly transferred permit privileges. Second, disclosure affords an opportunity for BLM to keep abreast of general business conditions and problems experienced by the outfitters. Accordingly, the failure to give advance notice of the use of equipment identified or marked as belonging to an outfitter other than the permittee is a relevant factor in the determination of whether there has been an unauthorized permit transfer.

Adrift is not a permitted outfitter on the Desolation-Gray segment of the Green River. The record discloses that Hondoo did, however, inform BLM that it would "lease vehicles from [Adrift and others] from time to time." However, intended use of "other" Adrift equipment was not brought to the attention of BLM in advance of scheduled trips. The BLM staff report states that "unmarked" boats and other equipment belonging to Adrift were used during the two trips principally challenged by BLM. Obviously, the equipment used was marked in some manner which enabled BLM to identify it as Adrift equipment. Such use of equipment without prior notice was adequate grounds, in light of the permit provisions, for BLM to question the underlying nature of the business arrangement for the river trip.

In addition to scrutinizing the equipment used, BLM closely reviewed the manner in which the guides were employed. Appellant argues the guides/boatmen used on the two "Adrift-Charter" trips were employed by Hondoo. Statements have been entered into the record from several other outfitters to the effect that it is common practice for outfitters to temporarily hire guides and boatmen who primarily work for other outfitters. Statements were also received concerning the charter/booking process used by companies such as Adrift Adventures.

The preamble to BLM's permit policy statement published at 49 FR 5303, includes the following statement: "One comment requested a definition of 'assignment of permit privileges.' This means a permittee may not assign or otherwise transfer user days that he/she has been authorized to use. Only bona fide employees of the permittee of record may guide trips allocated to him/her." Accordingly, a determination of whether there have been unauthorized assignments depends in large part on whether or not the trip guides were bona fide employees of the permittee.

The Board does not conclude there is a policy which would strictly prohibit an outfitter from borrowing and renting equipment or hiring temporary help as necessary. It appears such practice may be an essential factor for the economic survival of the commercial river running industry. The primary problem in the relationship between Hondoo and Adrift is whether the river trips at issue were actually conducted by Hondoo as the permittee. The only evidence offered by appellant as to the employer-employee relationship is its statements that the guides were hired by Hondoo. Appellant has not tendered written evidence such as copies of employment contracts, salary or paycheck stubs, unemployment and workmen's compensation insurance payment records etc. Hondoo has stated wages were paid by deducting the amount from monies owed by Adrift. This statement has little probative value because there is no evidence wages were treated as an itemized expense in the transaction between Hondoo and Adrift. Since the statements describing the general details of a transaction between the two parties are unsupported, the Board is left to imagine the possibilities of business arrangements between Hondoo and Adrift. Besides the explanation provided by appellant, a one-lump sum payment by Adrift to Hondoo covering all the details such as equipment and guides may also suggest a sublet of permit privileges.

Another factor to consider is the manner in which the trip was represented. As noted, Adrift's brochure casually mentions Hondoo, but does not describe Hondoo as having the responsibilities and duties associated with its functions as the permittee. Thus, the brochure creates the impression Adrift was responsible for the river trips. The record contains various comments on whether Hondoo was readily identifiable as the permittee, including the following statement from another outfitter on the river:

I am writing in response to your questions regarding encountering Adrift Adventures last summer. I did see Adrift Adventures in Desolation Canyon during our trip of June 28 - July 1, 1984. They had a number of boats on the water with Robin Hughes leading the trip. We passed back and forth throughout the 4 days and pulled off close together. There was no question in my mind that it was an Adrift Adventures trip. Their personnel were from Adrift, the boats, equipment, van and trailer were Adrift's. When they had a confrontation with some private people at Swasey's pull-out, I was asked by those people to identify the Outfitter. I told them it was Adrift.

If another outfitter was unable to distinguish the operation as Hondoo's, it is understandable that BLM should also question the propriety of the situation.

Appellant alleges the procedure used by BLM to terminate the permit is in violation of the termination procedures set forth in paragraph B.II.A.5. of the permit stipulations. These procedures call for giving permittee written notice of the alleged violation with an opportunity to respond to the charges within 30 days (Permit Provision B.II.A.5(a) and (b)). The procedure also calls for BLM to issue a decision notifying a permittee of any violation found to exist (Permit Provision B.II.A.5.(c)). If the permittee subsequently fails to remedy the violation within a reasonable period of time fixed by BLM, the permit may be terminated by BLM (Permit Provision B.II.A.5.(d)). We find appellant was given notice of violation (i.e., improper use or nonuse of the permit privileges) in the November 30, 1983, notice which warned Hondoo of its failure to use the permit. The November 30, 1983, notice afforded appellant another season in which to remedy the violation. The issue before us is whether Hondoo used the permit properly in accordance with its terms after having been given notice of violation. We do not interpret the permit termination procedures to require a second notice of violation for improper assignment or transfer of permit privileges and an additional time to remedy this violation prior to determining whether there has been a violation which would support termination of the permit.

After reviewing the record and evidence presented on appeal, we find material issues of fact remain unresolved. Unfortunately, there is insufficient evidence to resolve the issue of whether an improper assignment occurred. Because most of the critical evidence is within Hondoo's control, the responsibility to verify compliance with permit provisions rests with the permittee. Appellant, when provided the opportunity to respond to charges which would result in lease cancellation, failed to satisfy BLM that it was in compliance

with permit requirements. While we conclude BLM followed the outlined procedures in terminating the permit, we must withhold judgment regarding BLM's conclusions pending resolution of the material facts.

When there are disputed facts which are determinative of the legal issues posed, this Board has the discretionary authority to order a hearing before an Administrative Law Judge, pursuant to 43 CFR 4.415. State of Alaska, 86 IBLA 263 (1985); Alumina Development Corp. of Utah, 77 IBLA 366 (1983); Patricia C. Alker, 70 IBLA 211 (1983). A key factor in the issue of whether Hondoo has transferred its permit privileges is the relationship between Hondoo and the guides/boatmen who conducted the river trips. We find this issue to be sufficiently material to the outcome of this case to warrant a hearing, where the parties can present evidence, be examined, and be cross-examined. Therefore, this case is hereby referred to the Hearings Division, Office of Hearings and Appeals, for a hearing and decision as to whether the permit privileges were transferred, assigned, or improperly made the subject of a third-party arrangement contrary to permit provisions. At the hearing, Hondoo shall have the burden of showing its bona fide employees conducted the river trips on launch dates June 28 and July 6, 1984. The Administrative Law Judge may request briefing on what represents a bona fide employee for this industry, taking into consideration the rights and duties concomitant to an employer-employee relationship in the State of Utah. Appellant shall also have the burden of showing that Hondoo had a bona fide employee on each of the two river trips in question, and that it was that employee who was responsible for the conduct of those trips. Hondoo shall have the obligation to demonstrate that the permit privileges had not been transferred, assigned, or improperly made the subject of a third-party arrangement contrary to permit provisions. The Administrative Law Judge's decision shall constitute the final Department decision in the matter unless an appeal to the Board is filed within 30 days from receipt of the decision. See 43 CFR 4.410, 4.411.

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 is set aside and the case referred for hearing and decision by an Administrative Law Judge.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

