

**Editor's note: Reconsideration denied -- See 98 IBLA 13 (May 29, 1987)**

PEAK RIVER EXPEDITIONS

IBLA 85-550

Decided October 1, 1986

Appeal from a decision of the Moab, Utah, District Office, Bureau of Land Management, cancelling permit privileges under special use permit MD-83-0028.

Affirmed in part; set aside in part and remanded.

1. Special Use Permits

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum use requirements. Where BLM notifies a permittee that its permit will be subject to cancellation unless certain described use is made in accordance with a permit stipulation, and the permittee fails to make that required use, the permit is properly cancelled.

APPEARANCES: Robert C. Cummings, Esq., and Gordon A. Madsen, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Peak River Expeditions (Peak River) appeals from a decision of the Moab, Utah, District Office, Bureau of Land Management (BLM), dated February 28, 1985, cancelling permit privileges under special use permit MD-83-0028.

By notice dated January 19, 1983, BLM informed Peak River that it was accepting applications for river use. BLM enclosed a special recreation application, permit form and a copy of amendments to operating procedures and permit stipulations to be included in the 1983-1987 permit. The BLM notice made the following reference: "Minimum use levels have been established. See Stipulations Exhibit B, II E (6)." Peak River completed its application on February 5, 1983, and on March 4, 1983, BLM issued 5-year special use permit MD-83-0028 to Peak River for commercial river trips on the Desolation/Gray Canyons segment of the Green River. <sup>1/</sup> Since at least 1973, permits had been issued to Peak River on an annual basis, with an

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<sup>1/</sup> Permit MD-83-0028 was actually issued to "Travel Institute/Peak Outdoor Experiences." A certificate of incorporation was issued by the Utah Secretary of State on Feb. 16, 1967, to "Travel Institute School, Inc.," and the

allocation of a maximum of 400 passenger days per year for the Desolation/ Gray Canyons segment. 2/ The text of MD-83-0028 provides that the "Permittee must abide by all special stipulations attached hereto." (Emphasis in original.) Those stipulations include Exhibit B.II.E.(6) (hereinafter "stipulation B.II.E.(6)") which states in unequivocal terms:

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

\* \* \* \* \*

By letter dated November 30, 1983, BLM notified Peak River that it had not made "substantial use" of permit MD-83-0028 during the 1983 season. In fact, Peak River had made no use of its permit privileges during that season. BLM notified Peak River that:

In order to promote the use of the allocation to best serve the public, you are hereby notified that if substantial use of your permit allocation is not made during the 1984 river season, your permit will be cancelled. Under Stipulation B.II.E.(6), you are required to make the following use during the 1984 season to avoid cancellation of your permit on the river segments listed:

| <u>River Segment</u>    | <u>User Days</u> |
|-------------------------|------------------|
| Desolation/Gray Canyons | 400              |

Subsequently, by letter dated December 19, 1984, BLM informed Peak River that permit MD-83-0028 had been cancelled for failure to make substantial use of that permit:

Our records show that Peak River Expeditions used 241 user days during the 1984 season in Desolation and Gray Canyons. Thus, the company did not meet minimum use requirements of the permit.

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fn. 1 (continued)

Articles of Incorporation give the same name. The record indicates that over the years Travel Institute School, Inc., also operated under the names "Peak Outdoor Experiences," "Peak Outdoor Adventures," and most recently "Peak River Expeditions, Inc." Throughout this decision we will refer to appellant as "Peak River."

2/ The term "passenger day" is defined in exhibit B.II.B.(5) to permit MD-83-0028 as "one commercial passenger, paying or nonpaying, \* \* \* on the river for one calendar day, or portion thereof." See also 43 CFR 8372.0-5(h) ("User day" definition).

\* \* \* \* \*

This letter provides notice under stipulation B.II.A.(5) that permit privileges under permit MD-83-0028 for Desolation and Gray Canyons in the amount of 400 passenger days and for the Green River Daily (unallocated) are cancelled.

BLM stated that Peak River was given 30 days to "clearly demonstrate that permit privileges should not be cancelled for noncompliance with minimum use requirements under stipulation B.II.E.(6)." BLM further informed Peak River that if no response was received within that time period, the decision to cancel would become final.

On December 31, 1984, BLM received a letter from Scott Savage, Director of Peak River, in which he expressed surprise at the December 19, 1984, letter, stating that his impression was that Peak River "would need to use at least 50% of our user days each year." He requested that BLM not cancel the permit, since the use of passenger days in 1984 constituted a "vast improvement" over that of prior years, and since a number of reservations were already booked for the 1985 season. In a second letter received by BLM on January 9, 1985, Savage stated that there were passengers on all four scheduled trips in the Desolation/Gray Canyons during the 1984 season, but in order "to meet your (now I find out) minimum guidelines," each of those four trips would have had to be totally full. He again cited the use of 241 passenger days in 1984 as being a substantial improvement over Peak River's past performance.

Nevertheless, BLM issued its final decision on February 28, 1985, cancelling all Peak River's permit privileges:

Your letter of January 9, 1985, stated that you were unaware of the minimum use requirement. However, it appears as a stipulation to your permit and you were sent a notice on November 30, 1983 indicating the use that would have to be made in 1984 to meet the permit stipulation requirement. That notice was received in your office on December 3, 1983 by certified mail.

The minimum use stipulation requires an average of at least 200 passenger days per year over 2 consecutive years. Your average for the 1983-1984 period is 121 passenger days and well below the required minimum. Over the last 8 years Peak River Expeditions (dba: Travel Institute) has averaged just over 76 passenger days per year with 3 seasons having no use at all. The history of the company's lack of use extends back at least until 1977 (for which we have readily available records).

Peak River argues that the term "substantial use" should not be construed to require that Peak River had to use all 400 allocated passenger days

in 1984. It asserts that a BLM employee, James Kenna, represented that Peak River would only be required to utilize its permit to the extent of 50 percent for each of the 1984 and 1985 seasons. According to Peak River, Savage interpreted the term "substantial use" in the November 30, 1983, letter consistently with this information, concluding that Peak River would need to use only 200 passenger days for each of those years in order to meet the minimum-use condition. In connection with this argument, Peak River asserts that the November 30, 1983, letter did not provide adequate notice (1) that Peak River would be expected to comply with the minimum use requirement in 1983, since it was sent after the completion of the season or (2) that BLM would require "strict compliance" by demanding that Peak River use all 400 passenger days in 1984 to avoid cancellation of permit MD-83-0028.

[1] Special use permits are issued under the general authority of the Secretary of the Interior to regulate the use of the public lands, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1982). The issuance of a special use permit is discretionary, and the Department may accept or reject a permit application in furtherance of the objectives, responsibilities, and programs for management of the public lands involved. Don Hatch River Expeditions, 91 IBLA 291 (1986); see also National Public Lands Task Force, 70 IBLA 214 (1983); Cascade Motorcycle Club, 56 IBLA 134 (1981). The exercise of Secretarial discretion to issue special use permits also includes the authority to set permit conditions. Osprey River Trips, Inc., 83 IBLA 98 (1984).

The general requirements for issuance of special use permits are set forth in 43 CFR Subpart 8372. In addition, special guidelines for river recreation use permits in Utah were established and published at 46 FR 3642 (Jan. 15, 1981). The provisions found in MD-83-0028 were established in accordance with the two above-noted authorities.

Special guidelines for management of river-running permits in Utah include the following instruction (I.E.4): "Allocations may be reduced for failure to make substantial use for two or more consecutive years." 46 FR at 3643. Moreover, the Department's Special Recreation Permit Policy states: "Consistent non-use of user days by a permittee may be a determining factor in future use allocations and award of permits." 49 FR 5300, 5305 (Feb. 10, 1984). A preamble explanation for the preceding comment reads: "When an area's maximum allowable use has been allocated, it is important to ensure the allocation is fully utilized. The authorized officer must determine if non-use is excuseable without penalty of future adjustments." Id. at 5303. See Don Hatch River Expeditions, supra.

This Board has previously considered a challenge to BLM's authority to cancel a special use permit for river trips on the Desolation/Gray Canyons portion of the Green River pursuant to stipulation B.II.E.(6). The facts in Don Hatch River Expeditions, supra, are similar to those of the instant appeal. Therein, the special use permit held by Don Hatch River Expeditions (Hatch) was cancelled for failure to comply with the minimum use requirements

of stipulation B.II.E.(6). Hatch had not used any of its 400 passenger-day allocation in 1983, and despite notice from BLM that its permit privileges would be cancelled if the allocated use level authorized by the permit was not achieved during the 1984 season, Hatch failed to use any of its passenger days during that year. In responding to Hatch's challenge to stipulation B.II.E.(6), the Board noted the various factors affecting permit use which BLM considered in deciding to cancel Hatch's permit. While BLM recognized that adverse weather and economic conditions could affect permit use, Hatch's use was not consistent with use by other outfitters on the Desolation/Gray Canyons segment of the Green River during the seasons under question. The Board reached the following conclusion:

Accordingly, the record supports a finding that Hatch chose not to comply with permit requirements with full knowledge that this decision might result in loss of the permit privileges, as well as BLM's ability to make the ultimate decision to cancel appellant's permit privileges. When there has been a considered decision that use on a river must be limited to protect the environment, requiring actual use of special use permits which have been issued is in the public interest. Cancellation of a permit for nonuse is proper to provide the opportunity of assigning the privileges under the permit to a party who will use them. [Footnote omitted.]

91 IBLA at 294.

The Board's reasoning in Don Hatch River Expeditions applies with equal force to Peak River's appeal. Peak River has demonstrated a consistently low use of permit privileges in the Desolation/Gray Canyons areas. In fact, by letter dated April 9, 1982, BLM notified Peak River that its allocation was not being "effectively used," with no use at all in 1980 and use of only 36 passenger days in 1981. That letter warned if substantial use of permit privileges was not made during the 1982 river season, the permit would not be reissued in 1983. Peak River used 157 passenger days in 1982, a low usage in BLM's view, but since it was due in part to depressed economic conditions, BLM elected not to cancel Peak River's permit. However, Peak River again made no use of its permit privileges in 1983, prompting the November 30, 1983, letter from BLM. Peak River's contention that the November 30, 1983, letter did not provide adequate notice ignores the unequivocal statement in that letter that under stipulation B.II.E.(6) "you are required to make the following use [400 user days] during the 1984 season to avoid cancellation of your permit \* \* \*." Peak River clearly had notice of the possibility of cancellation of its permit when it received the November 30, 1983, letter. Its representation that a BLM employee provided it with erroneous information concerning necessary use in 1984 has not been established.

We conclude, based upon the ruling in Don Hatch River Expeditions, that BLM was well within its authority in cancelling Peak River's permit as to the Desolation/Gray Canyons segment. See 49 FR 5305; 46 FR at 3643 (discussed

supra). We note, however, that BLM's December 10, 1984, and February 28, 1985, decisions also stated that the permit cancellation covered the "Green River Daily" segment. BLM characterized the passenger-day allocation for that segment as "unallocated." In its statement of reasons Peak River argues that inasmuch as it was not required to use any specific allocation for that segment, "there is no way that it can be held to have failed to perform when it was not required to perform in any particular manner or to any particular extent" (Statement of Reasons at 8). Our review of the record reveals no reference to the "Green River Daily" segment until those decisions. Neither BLM's November 30, 1983, nor December 19, 1983, letters to appellant mention that segment, nor does the permit specifically address such a segment. If appellant's permit, in fact, did contain the right to use the "Green River Daily" segment, we find it was improper for BLM to cancel the permit as to that segment without providing appellant notice of the contemplated action and an explanation of the basis for such action. For that reason, we must set aside the BLM decision as it relates to that segment.

In addition, Peak River requested, and we granted, an extension of time in which to submit documentation in support of its argument that stipulation B.II.E.(6) is discriminatory on its face and as applied by BLM in this specific case, since it allows "more favored permittees" to operate at a lower capacity (Statement of Reasons at 6). Peak River did not submit such documentation. Peak River illustrates the alleged discriminatory impact of stipulation B.II.E.(6) with two examples: (1) Harris Boat Trips, which has an allocation of 600 passenger days, need operate at only a 33-1/3 percent capacity to meet the 200-passenger-day minimum use requirement, and (2) Holiday River Expeditions, with an allocation of 800 passenger days, can meet the minimum use requirement by using 25 percent of its allocation. Peak River reasons that it should be expected to utilize only 25 percent of its 400-user day allocation in order to avoid cancellation; this it accomplished in 1984.

In one respect appellant's example does disclose an inequity in a 200-minimum passenger day requirement when comparing operations with varying allocations. Thus, it might be better to establish minimum use at some certain percentage of use for all permits such that each permittee would have to make the same percentage of use. However, BLM has determined that the 200-passenger-day requirement is a proper minimum use figure. Appellant has not established that any operator with an allocation of 400 or more passenger days has an assigned minimum of less than 200 passenger days. When coupled with BLM's authority under stipulation B.II.E.(5), we can not find that stipulation B.II.E.(6) is discriminatory as applied to appellant. Moreover, stipulation B.II.E.(5), also incorporated into special use permits beginning in 1983, provides that "if all or part of a permittee's annual passenger day allocation is not used during two or more consecutive years, BLM reserves the right to reduce future yearly allocations up to but not exceeding, the average amount not used during the two or more consecutive year period." If use by Harris Boat Trips or Holiday River Expeditions falls below their passenger day allocations during 2 consecutive years, BLM could invoke stipulation B.II.E.(5) in reducing those allocations by the average amount not used

during that period, thereby increasing the percentage use required to meet the minimum requirement. 3/ In addition, as noted, appellant submitted no documentation to show that BLM has utilized its authority in a discriminatory fashion.

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 as to the Desolation/Gray Canyons segment and set aside and remanded as to the "Green River Daily" segment.

Bruce R. Harris  
 Administrative Judge

I concur:

John H. Kelly  
 Administrative Judge

3/ Peak River's analysis is further weakened by information in the case file which shows actual use by both Harris Boat Trips and Holiday River Expeditions in the Desolation/Gray Canyon segment of the Green River that vastly exceeds Peak River's use. Following is a table comparing their respective usages during the 1977 through 1982 seasons:

| <u>Year</u> | <u>Peak River</u> | <u>Harris Boat Trips</u> | <u>Holiday River Expeditions</u> |
|-------------|-------------------|--------------------------|----------------------------------|
| 1977        | 0                 | 224                      | 767                              |
| 1978        | 84                | 153                      | 556                              |
| 1979        | 92                | 231                      | 558                              |
| 1980        | 0                 | 438                      | 669                              |
| 1981        | 36                | 297                      | 493                              |
| 1982        | 157               | 172                      | 352                              |

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I concur with the ultimate resolution of this appeal, I do so with some hesitation. There is no gainsaying that, historically, appellant has shown only minimal usage of his permit allotment on the Desolation/Gray Canyons segment of the Green River. The following chart is illustrative of this fact:

| <u>Year</u> | <u>Permitted Use<br/>(Passenger Days)</u> | <u>Actual Use<br/>(Passenger Days)</u> |
|-------------|---|--|
| 1977        | 400                                       | 0                                      |
| 1978        | 400                                       | 84                                     |
| 1979        | 400                                       | 92                                     |
| 1980        | 400                                       | 0                                      |
| 1981        | 400                                       | 36                                     |
| 1982        | 400                                       | 157                                    |
| 1983        | 400                                       | 0                                      |

Paradoxically, however, in the year immediately preceding the Bureau of Land Management (BLM's) decision to cancel the permit, appellant's actual use rose to the level of 241 passenger days or roughly 55 percent of the total permitted use. <sup>1/</sup> Moreover, it should be noted that after the 1983 season a new executive director was appointed by appellant, who apparently provided an infusion of capital. Thus, it appears as if BLM's action to cancel the permit occurred just as efforts were underway to improve appellant's performance.

Counsel for appellant generally adverts to these facts in arguing that, since BLM had not cancelled the permit during the period when actual use was virtually nonexistent, it is unfair to do so just when actual use is beginning to come into line with permit requirements.

One obvious flaw in this argument is that, prior to the 1983 permit, there was no provision establishing a level of minimum use below which would subject the permit to cancellation. Rather, the standard provision (II E.(8)) merely provided that "if all or part of a permittee's annual passenger day allocation is not used during two or more consecutive years, BLM reserves the right to reduce future yearly allocations up to but not exceeding, the average amount not used during the two or more consecutive year period." This

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<sup>1/</sup> I am not unaware that there is some question as to whether the 241 passenger days used are properly attributed to appellant. There are allegations that appellant may have assigned these permit privileges in violation of the permit. See Memorandum to File dated Dec. 11, 1984. BLM, however, chose not to rely on this basis and I have similarly proceeded on the assumption that the 241 passenger days were correctly credited to appellant.

provision is now found as stipulation II.E.(5). There was simply no extant provision prior to 1983, which authorized total cancellation for failure to maintain a specific level of use.

Additionally, by letter dated June 8, 1982, appellant was informed that "if no substantial use of the permit is made over two consecutive seasons, the permit may not be reissued for the following season." Appellant had earlier been informed that "use of 200 passenger days constitutes substantial use." See Letter of May 12, 1983, from the Area Manager to Carl Harline. Appellant's passenger use that season was only 157 passenger days. BLM, however, did not refuse to reissue the permit, apparently because consideration was given to depressed economic conditions. See EA UT-066-84-05 at 5. The next year, appellant once again made no use of its permit. Thus, appellant's problems were of a long-standing nature of which it had been put on notice.

Viewed in the light of these facts, I think some action on BLM's part was clearly appropriate. The more difficult question, as I view it, is whether BLM correctly determined to cancel the permit under stipulation II.E.(6), rather than invoke the permit reduction provisions of stipulation II.E.(5).

The choice of action was clearly one committed to BLM's discretion. This realization, however, does not necessitate our affirmance since this Board has the authority to review such discretionary actions and substitute its judgment for that of BLM. See, e.g., George Schultz, 81 IBLA 29, 39 (1984); United States Fish & Wildlife Service, 72 IBLA 218 (1983). Had appellant's use in 1984 more nearly approximated its authorized use, I would vote to set aside the decision and remand the case to BLM with directions to invoke the percentage reduction provisions of stipulation II.E.(5). But, even in 1984, appellant's actual use barely exceeded 55 percent of its authorized use. When taken in conjunction with the past pattern of nonuse, I do not feel the Board would be justified in reversing BLM's exercise of discretion in this case. Accordingly, I agree that the decision to cancel the permit should be affirmed.

James L. Burski  
Administrative Judge

