PETE MOTT D/B/A TROUT TRICKERS

IBLA 2015-247

Decided April 10, 2018

Appeal from a decision of the Field Manager, Kremmling Field Office, Colorado, Bureau of Land Management, denying an application for a special recreation permit to provide commercial float fishing excursions on a portion of the Upper Colorado River. DOI-BLM-N02000-2015-011.

Affirmed.


An exercise of the Secretary's discretionary authority to administer special recreation permits under the Federal Land Policy and Management Act of 1976 and its implementing regulations must have a rational basis that is stated in the decision and supported by facts of record demonstrating it is not arbitrary, capricious, or an abuse of discretion. It is appellant's burden to demonstrate, by a preponderance of the evidence, that a challenged decision was in error. This burden is not satisfied simply by conclusory allegations of error or expressions of disagreement with the analysis and conclusions.


BLM properly denies an application for a special recreation permit for commercial float fishing outfitting and guiding, pursuant to its discretionary authority under the Federal Land Policy and
Management Act of 1976 and implementing regulations, when it appropriately identifies and applies the regulatory criteria for evaluating applications and where the applicant fails to demonstrate error in BLM's decision.


OPINION BY ADMINISTRATIVE JUDGE HAUGRUD

Appellant Pete Mott d/b/a Trout Trickers has appealed a decision dated July 7, 2015, by the Field Manager of the Kremmling (Colorado) Field Office (KFO) of the Bureau of Land Management (BLM) that denied his application for a special recreation permit (SRP) to conduct commercial float fishing excursions on a reach of the Upper Colorado River.

BLM's regulations afford the agency considerable discretion in deciding whether to approve SRPs. To prevail in a challenge to the denial of a SRP, an appellant must demonstrate that BLM committed a material error in its factual analysis or that the decision is not supported by a record showing that BLM gave due consideration to all relevant factors and acted based on a rational connection between the facts found and the choice made. BLM stated in its decision that it was denying Mr. Mott's permit application because there were similar services already permitted on the river and because BLM could not adequately manage and monitor the proposed use. BLM's reasons are supported by the record, and Mr. Mott does not offer evidence showing BLM's decision to be in error. Because Mr. Mott has not met his burden to show that BLM's decision was in error, we affirm the KFO's July 2015 decision.

BACKGROUND

Among other responsibilities, the KFO manages recreation activities along the Upper Colorado River and has established an Upper Colorado River Special Recreation Management Area. The Area is heavily used during the summer season by commercial outfitters and by private users for rafting, fishing, camping, and hiking.1

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Under BLM’s regulations, the KFO may authorize commercial recreation activities on BLM-administered public lands, including activities such as floatboating and float fishing on the Upper Colorado River. Authorization is granted by issuing SRPs, which are issued at the discretion of the authorized BLM officer.

Beginning in 2001, the KFO imposed a moratorium on issuing new SRPs for the Upper Colorado River. In 2014, the Field Office rescinded the moratorium and accepted applications for SRPs for the stretch of the river between the Pumphouse Recreation Site and State Bridge. BLM specified that the permits it would approve would need to provide recreational services for certain “niches” that were then not being adequately met. BLM identified six niches for prospective permittees to address in their applications: vehicle shuttles, accredited universities, fishing trips for special populations and/or people with disabilities, unique opportunities, equipment rental, and firewood vending. Between June 1, 2014, and December 31, 2014, BLM received 13 applications for new permits and 7 applications for modifications of existing SRPs. Mr. Mott submitted his application on August 31, 2014, seeking permission to conduct commercial guiding services for fly fishing float trips on the Upper Colorado River from Pumphouse to State Bridge.

BLM denied 3 of the new applications and 2 of the requested modifications for failing to meet the identified application criteria, reducing the total number of pending applications to 15. The administrative record indicates that BLM initially informed Mr. Mott in early January 2015 that his application was being approved but then informed him that all submitted applications
would be undergoing environmental analysis before a final decision was reached.\textsuperscript{11}

In February 2015, BLM began preparation of an environmental assessment (EA) to analyze the possible environmental impacts of issuing any new or modified SRPs.\textsuperscript{12} As part of the scoping process to identify issues, concerns, and impacts that should be addressed in the EA, BLM sought public comment on the 15 pending applications, including the one submitted by Mr. Mott.\textsuperscript{13} This initial public comment period ran from February 27, 2015, until March 21, 2015.\textsuperscript{14} Over 20 scoping comments were received.\textsuperscript{15}

Based on its review of the public comments and its own internal review, BLM narrowed its detailed consideration in the EA to five of the applications: three permits for shuttling visitors and two for floatboating.\textsuperscript{16} BLM explained that these five were retained because they fit underserved niches, emphasizing that the two floatboating applications were retained because there were then no commercial outfitters conducting those services in that stretch of the river.\textsuperscript{17} Mr. Mott’s application for float fishing was not brought forward for detailed consideration.

BLM made its draft EA available for a 30-day public comment period beginning on May 29, 2015.\textsuperscript{18} After consideration of the comments, BLM issued its final EA and decision on July 7, 2015, deciding to issue two new permits for floatboating and to modify three existing ones for shuttle services.\textsuperscript{19}

\textsuperscript{11} Appellant’s Statement of Reasons (SOR) at unpaginated (unp.) 1 (stating that he was first told his denial was to allow for environmental analysis and then received a “formal letter months later supplying two additional reasons for my denial”).
\textsuperscript{12} 2015 EA at 7.
\textsuperscript{14} 2015 EA at 7 (noting that the comment period was extended from Mar. 14 to Mar. 21).
\textsuperscript{15} Id. at 14.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 7.
\textsuperscript{19} Id. at 35.
On the same date, BLM issued a decision letter to Mr. Mott informing him that his application was denied.\textsuperscript{20} Explaining that it had discretion over whether to issue a SRP, and citing the regulatory criteria guiding its decision, BLM informed Mr. Mott that his application was denied because “there are similar services already permitted in these areas” and because of the Field Office’s inability to adequately “manage and monitor the proposed use.”\textsuperscript{21} The decision referred Mr. Mott to the EA for additional information as to why five of the permit applications were being issued while his was not.\textsuperscript{22}

On August 7, 2015, Mr. Mott filed a notice of appeal, and later a statement of reasons. BLM timely filed its Answer on December 2, 2015.

DISCUSSION

\textit{Standard of Review}

[1] Among other authorities, BLM issues SRPs under the general authority of the Secretary of the Interior to administer use of the public lands under section 302(b) of the Federal Land Policy and Management Act of 1976.\textsuperscript{23} BLM has discretion to approve or disapprove an application to issue or modify an SRP.\textsuperscript{24} In exercising its discretion, BLM’s regulations direct the agency to consider seven broad factors, to the extent relevant, including the public interest and other information it finds “appropriate.”\textsuperscript{25} BLM’s discretionary decision must have a rational basis supported by facts of record demonstrating it is not arbitrary, capricious, or an abuse of discretion.\textsuperscript{26}

\begin{itemize}
  \item Decision Letter from Stephanie Odell, KFO Manager, to Pete Mott d/b/a Trout Trickers (July 7, 2015) (Field Office Decision).
  \item \textit{Id.} at unp. 1.
  \item \textit{Id.} at unp. 2.
  \item See 43 C.F.R. § 2932.26; \textit{Ernie P. Jablonsky d/b/a Montana Big Game Pursuits}, 184 IBLA 331, 337 (2014); \textit{David L. Antley, Jr. d/b/a High Desert Outdoors, Inc.}, 178 IBLA 194, 197 (2009).
  \item 43 C.F.R. § 2932.26.
  \item See, e.g., \textit{Ernie P. Jablonsky d/b/a Montana Big Game Pursuits}, 184 IBLA 331, 337-338 (2014); \textit{James R. Stacy}, 188 IBLA 134, 137 (2016).
\end{itemize}
An appellant has the burden on appeal to “show, by a preponderance of the evidence, that a challenged decision is in error.” This burden is not satisfied simply by conclusory allegations of error or expressions of disagreement with BLM's analysis and conclusions. Rather, the appellant must demonstrate that “BLM committed a material error in its factual analysis or that the decision is not supported by a record that shows that BLM gave due consideration to relevant factors and acted on the basis of a rational connection between the facts found and the choice made.”

Mr. Mott Has Not Shown Error in BLM's Decision

[2] Mr. Mott has failed to meet his burden of proof. In his statement of reasons, Mr. Mott provides what he terms as his “thoughts, observations, conflicts and quite simply, frustrations with current policy and regulation regarding the permitting process of the Colorado River controlled by the Kremmling Office.” To the extent appellant simply disagrees with the current regulations and practices followed by the KFO, those disagreements do not constitute error in BLM's decision-making process.

Mr. Mott first contends that his permit was “approved, then denied.” He asserts that the necessary environmental analysis should have been completed before the KFO “approved so many permits.” Mr. Mott has provided no documentation on this issue, and the administrative record is not clear on whether the KFO formally “approved” Mr. Mott’s permit application in January 2015. Regardless of whether the KFO initially indicated that the application had been approved, BLM committed no error in making the decision on Mr. Mott’s permit application after the National Environmental Policy Act process had been completed.

Mr. Mott also argues that the two reasons given by the KFO for denying his permit are “confusing, non-detailed, and very contradictory.” In essence, Mr. Mott argues that the reasons given for his denial would apply equally to the

28 James R. Stacy, 188 IBLA at 138.
29 Id. (quoting Ernie P. Jablonsky, 184 IBLA at 338).
30 SOR at unp. 1.
31 See, e.g., James R. Stacy, 188 IBLA at 138.
32 SOR at unp. 1.
33 Id.
34 Id.
applicants who were granted permits, thereby showing he has received disparate, unjustified treatment when compared to the two applicants who received new permits. More specifically, with respect to the KFO’s determination that it lacks the ability to manage and monitor his proposed use, Mr. Mott notes that the KFO approved two new permits and provided no explanation in the decision denying his permit as to why those permits could be managed and monitored while his could not. As to the second rationale provided by the KFO – that there are similar services to his already permitted – Mr. Mott asserts that the two applicants granted new permits offer services that are already being offered by other permittees, and that he explained in detail to BLM how his business provides a superior outfitting service not currently being supplied to the public.

In its decision denying Mr. Mott’s permit, KFO stated two reasons for its denial: (1) Mr. Mott would not be providing a unique service, and (2) the Field Office could not manage and monitor Mr. Mott’s proposed use. The KFO added that more information explaining its rationale is provided in the 2015 EA prepared for the decision.

We find that the 2015 EA provides a rational connection between the facts found and the choice made by explaining that the two new floatboating permits were indeed unique in offering services to the public that were not currently provided:

Two floatboating permits are being analyzed in detail as part of the Proposed Action because there are currently no commercial outfitters conducting these services in the Kremmling Field Office. East Grand School District has teachers who are certified guides in the State of Colorado and own their own equipment which makes the price lower than any commercial company and allows for team building between teachers and students. The other outfitter, Colorado Wilderness Rides and Guides, is offering to meet the small niche of multi-day, multi-sport trips (mountain biking, hiking, and rafting) which is a unique service not being offered by other outfitters.

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35 Id.
36 Id. at unp. 1-2.
37 Field Office Decision at unp. 1.
38 Id. at unp. 2.
39 2015 EA at 14.
In contrast to the unique services offered by these two floatboating applicants, the operating plan submitted by Mr. Mott offers services already provided by other permittees. The 2015 EA states that at the time of the decision there were 30 commercial fishing permits on the Upper Colorado River. Although Mr. Mott argues that his services are of a unique quality, offering a “higher level of guiding,” the 2015 EA adequately supports BLM’s determination that similar types of service were already being provided and provides a rational basis for distinguishing between Mr. Mott’s application and the two floatboating applications that were granted.

The 2015 EA also explains the KFO’s concerns over managing and monitoring new permits. The EA notes that many comments received by BLM stated that the Upper Colorado River was already overcrowded and did not need increased commercial uses that duplicated existing services. Based on these comments and its own internal evaluation, BLM agreed that more study was needed on the capacity of the river to withstand additional uses before issuing permits that duplicated existing services:

A capacity study should be conducted to gain a better understanding of what services current permittees are providing before new floatboating, float and wade fishing permits will be issued. The study would help determine how to protect the Outstanding Remarkable Values for Wild and Scenic Values and how to best manage to meet the needs of other resources. For these reasons, the issuance of these [10] permits has been considered but eliminated from detailed analysis in this EA.

The management concerns identified by the KFO in the 2015 EA provide sufficient explanation as to why the KFO determined that it could not adequately manage and monitor the proposed use of Mr. Mott and nine others. The fact that some new and modified permits were issued does not make the KFO’s decision arbitrary or otherwise erroneous. The KFO simply determined that it could manage a limited number of new, unique services but did not have the information or resources needed to manage additional uses that duplicated existing services.

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40 Id. at 32.
41 Appellant’s proposed operating plan (Aug. 8, 2014) at 1.
42 2015 EA at 14.
43 Id.
Mr. Mott raises the following additional concerns which address the KFO's management of SRPs generally but do not raise issues relevant to the denial of his permit application:

1. The SRP application process may be circumvented by purchasing a current permittee's business;
2. Current permittees can be unfairly and improperly awarded for their business by incorporating the value of their permit into the sales price of their business;
3. The public interest would be better served if BLM required permittees who choose to discontinue services to surrender their permit so it could be reissued to the next, best available applicant;
4. BLM should more frequently monitor each permittee's performance and consider quality of performance in making renewal decisions;
5. BLM should better monitor and limit the number of outfitting trips being made in any single day; and
6. Current permittees are given an unfair advantage because they can meet privately with BLM officials “and lobby against other potential users.”[44]

Mr. Mott concludes by emphasizing the thoroughness of his application and the quality and integrity of his business practices. He states that within the outfitting community there is “common confusion and frustration and an overwhelming desire to modify and improve the permit process, for all.”[45]

Regardless of the merits of the management concerns raised by Mr. Mott, none provides evidence that BLM unlawfully or arbitrarily denied Mr. Mott's application. Although Mr. Mott suggests that improper lobbying occurred by current permittees, he provides no evidence that such lobbying occurred. BLM explains in its Answer that under the terms of the SRPs, outfitters typically have an informal annual meeting with BLM to discuss their performance over the previous year and plans for activities to be conducted in the upcoming year.[46] There is nothing illegal or nefarious in holding such a meeting. In sum, Mr. Mott's remaining concerns raise strenuous disagreement with BLM's

[44] SOR at unp. 2-3.
[45] Id. at unp. 3.
management practices, but these differences of opinion do not constitute error in BLM’s decision.\textsuperscript{47}

\section*{CONCLUSION}

Appellant Pete Mott has not met his burden to show error in BLM's decision denying his SRP application. Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,\textsuperscript{48} we affirm BLM’s July 7, 2015, decision.

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K. Jack Haugrud
Administrative Judge

I concur:

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\textbf{/s/}
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Amy B. Sosin
Acting Deputy Chief Administrative Judge

\textsuperscript{47} \textit{See, e.g., Western Watersheds Project}, 184 IBLA 106, 121 (2013) (appellant who “profoundly disagrees with BLM's conclusions and management decisions” has not shown error).

\textsuperscript{48} 43 C.F.R. \textsection 4.1.