



United States
Department of
Agriculture

Forest
Service

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Supervisor's Office

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File Code: 1570-1/2720-2

Date: December 6, 2001

Seth Williams and Associates
dba Sedona Photo Tours
c/o Paul Crane, Attorney at Law
125 East Coronado
Phoenix, AZ 85004

Dear Mr. Williams:

This is my decision on Appeal #01-03-04-0001-A251 in accordance with the court order for case CIV 98-01208-PCT (HRH). The appeal decision regards denial of a one-year and five-year permit for outfitting and guiding on the Sedona Ranger District, Coconino National Forest. Documents generated by this appeal are numbered in sequence following the administrative record on file with the court, starting with AR 230.

Background – By letters dated December 1, 1997 (AR 157) and December 17, 1997 (AR 164), District Ranger Ken Anderson, herein termed the Deciding Officer, denied issuance of an outfitter-guide special use permit to Sedona Photo Tours (SPT). SPT held annual permits from 1993 to 1997. The right to appeal the 1997 decision was ordered by the U.S. District Court, District of Arizona on March 13, 2001. The following direction is found on page 22 of the court order: "...Plaintiff was entitled to receive notice of its right to appeal the denials of its requests for special use permits in 1997...This matter is remanded to the agency so that plaintiff may pursue administrative appeals of the denials of its special use permits, should plaintiff so choose." The scope of this appeal is limited to the Deciding Officer's decision not to issue a one-year or five-year permit.

You were notified of your appeal rights by letter dated April 16, 2001 (AR 230). You filed this appeal June 25, 2001 (AR 231). The Deciding Officer submitted a responsive statement on July 26, 2001 (AR 232). You were afforded the opportunity to submit a written reply to the responsive statement, but declined. On September 7, 2001 an oral presentation was held. It was attended by Seth Williams, Paul Crane (Attorney for Sedona Photo Tours), Ken Anderson, Jim Golden (Appeal Reviewing Officer), Rodger Zannotto, Deidre St. Louis, and Sue Klein (Attorney for the Department of Justice) and via phone by Christina Gonzalez (Regional Appeals & Litigation Program Manager). At the oral presentation you were given the opportunity to submit additional documents for possible inclusion into the appeal record. The deadline for submission was September 19, 2001. You submitted a number of documents for consideration. By letter of November 6, 2001 (AR 233), Appeal Reviewing Officer Jim Golden notified you regarding which documents would be included and closed the appeal record. Additional included documents are numbered 234 – 242.



Issues – The primary issue is whether the Deciding Officer’s decision to deny one-year and five-year outfitter-guide special use permit(s) to Sedona Photo Tours per letters of December 1, and December 17, 1997, was justified.

Specifically, your issues, as stated in your June 25, 2001 letter, are:

1. Whether the Deciding Officer conducted a proper initial screening of SPT’s application, as required by 36 CFR 251.54 (e)(1), to ensure that all of the minimum requirements for permit issuance were satisfied;
2. Whether the Deciding Officer complied with 36 CFR 251.54(e)(2), if in fact he determined that minimum requirements were not satisfied;
3. Whether the Deciding Officer provided to Sedona Photo Tours the sort of guidance and information required by 36 CFR 251.54(e)(3);
4. Whether the Deciding Officer’s decision, if made as part of a second-level screening, were properly based upon any of the grounds for denial set forth in 36 CFR 251.(e)(5);
5. Whether the Deciding Officer complied with FSM 2716.52 by, among other things, making and documenting regular inspections of SPT’s permitted operations and, if so, whether such inspections revealed deficiencies justifying non-renewal of SPT’s one year permit or denial of its application for a new five-year permit;
6. Whether the Deciding Officer complied with FSM 2716.12, as required when a new permit is requested for an established use;
7. Whether the Deciding Officer acted arbitrarily or capriciously, abusing his discretion, in denying SPT’s permit requests;

Response to Appellant’s Issues 1 – 4

The regulations regarding initial and secondary screening of applications at 36 CFR 251.54 (e) (1), (2), (3) and (5) were not in effect at the time of the decision being appealed. The regulations you cited were published November 30, 1998 and became effective 30 days later.

Finding

Therefore, I find that these issues are not relevant to the decision under appeal and will not be considered further.

Response to Appellant’s Issue 5

The decision being appealed is denial of an application, not administration of an expired permit. FSM 2716.52 pertains to administration (inspection) of permits. This policy calls for an annual inspection of an outfitter guide permit.

Finding

I find that permit administration of the expired permit is outside the scope of this appeal. Furthermore, even though this issue is not relevant to the decision under appeal, a number of

annual evaluations were completed and are in the administrative record (AR 22, 29, 30, 99, and 129).

Response to Appellant's Issue 6

FSM 2716.12 calls for review prior to reissuance. The Deciding Officer did review prior to reissuance. The result of the review is his decision letter of December 1, 1997 (AR 157).

Finding

I find that the Deciding Officer's decision complied with policy.

Response to Appellant's Issue 7

Denial of a one or five-year permit.

Your prior permit (AR 100) provides conditions for issuance of a new permit at clause II. D. which states:

“At the expiration or termination of an existing permit, a new permit may be issued to the holder of the previous permit or to a new holder subject to the following conditions:

1. The authorized use is compatible with the land use allocation in the Forest Land and Resource Management Plan.
2. The permit area is being used for the purposes previously authorized.
3. The permit area is being operated and maintained in accordance with the provisions of the permit.
4. The holder has shown previous good faith compliance with the terms and conditions of all prior or other existing permits, and has not engaged in any activity or transaction contrary to Federal contracts, permits, laws, or regulation.”

Clause II.E. of your prior permit (AR 100) discusses the discretion the Forest Service has in whether or not to reissue a new permit. It states: “The decision whether to issue a new permit to a holder or successor in interest is at the absolute discretion of the Forest Service.”

Forest Service policy at Forest Service Manual 2712.1 also addresses the qualifications of applicants as follows: “Carefully consider the qualifications of any applicant before approving a special use application...of primary interest when a public service is involved is the applicant's ability to perform according to the permit terms.”

Additionally, the regulation at 36 CFR 251.54(i)(5) provides authority for the authorized officer to deny issuance of an authorization if the applicant does not demonstrate technical capability.

The Deciding Officer stated his rationale for denial of a new permit in two letters dated December 1, 1997 (AR 157) and December 17, 1997 (AR 164):

The stated reasons in the December 1 letter were: “...violations of the terms of your permit, including discrepancies in the amount of revenues generated, conducting commercial activities not permitted, and exceeding permitted use allocations...”

The stated reasons in the December 17 letter were "...that your operation has violated the terms and conditions of your previous permit, the plan of operations, and has violated 18 U.S.C. 1001, False Statements...."

Both letters refer to an investigation related to the SPT permit. The documents related to this investigation are under seal, and therefore have not been used in this appeal decision.

In the absence of the law enforcement records, I have reviewed the administrative record for other evidence to determine whether there is a basis for the Deciding Officer to conclude that SPT had not met the requirement outlined in Permit clause II. D, #4. I found the following:

AR 150 - 11/5/97 letter from Paul Crane to Law Enforcement Officer Phil Berendsen indicates that an investigation was ongoing.

AR 129 – 07/11/97 Outfitter-Guide Annual Evaluation

"Needs Improvement" rating given for "Fee and use worksheets done correctly and fees paid on time?" Notation states, "fee determination worksheet does not show name of locations of tours corresponding to # persons and revenue."

"Needs Improvement" rating given for "Are all operating plan criteria being met?" Notation states, "2 documented reports of violations of O.P. (operating plan)", 1) Tour in the wrong place, 2) Parking on Vultee Arch Road, blocking traffic & creating a hazard. AR 102 further describes these incidents: "On 10/09/96 at 12:45 Law Enforcement Officer Jon Nelson saw a Sedona Photo Tour Jeep parked at Encinoso Picnic area. This location is not on their permit. In a separate incident on 10/08/96, FS Officer, Terry Adams, reported at 2:15 that a Photo Tours Jeep was parked on Vultee Arch Road. There was a safety concern as the jeep partially blocked the road and the visitors were all milling around on the road taking photos. "The guide should have waited to park where there was a more definite pull out."

AR 127 – Complaint from the public dated 06/02/97. The reporting party stated that "Jeep Tour driver, tall, gray hair, refused to let us pass him, said 'NFS requires cars to travel between 6 and 18 mph and states cars cannot pass other cars.' It was a Photo Tours jeep, driver was insulting." That was approximately 9 a.m. on Forest Road 152 off Dry Creek Road.

AR 126 – Papers submitted by public to the Deciding Officer, stating that weddings were booked by Sedona Photo Tours in 1995 and 1996. Weddings were not an authorized use in the permit.

AR 60 – 02/02/95 Letter from the Deciding Officer to Sedona Photo Tours. This letter documents meeting and discussions between the two parties. The Deciding Officer explained that SPT was not meeting the intention of the operating plan to offer photography-oriented tours.

AR58 – Complaint letter from a Red Rock Jeep Tours guide stating that on 12/27/94 he had observed SPT jeep #2 spinning cookies and cutting 6" ruts in the dirt, with a full load of passengers, and endangering hikers or other vehicles in the area.

AR50 - Complaint letter from a Time Expeditions guide stating that on 12/26/94 he observed that an SPT guide was speeding, throwing mud, dirt, rock, and other debris, and driving in a manner that endangered the jeep passengers.

AR 48 – 12/22/94 Letter of non-compliance for commercially using the National Forest for purposes other than conducting a photo instructional tour. SPT was placed in probationary status. Probation was later removed through a letter dated 05/01/95, AR 70.

AR 29 – 06/03/94 Outfitter/Guide Annual Performance Evaluation – item 15 – Comments or corrective measures needed. “Safety corrective measures include: Seatbelts to be worn by all passengers and guide at all times, knowledge of fire prevention practices, and have first aid kit in jeep at all times.”

AR 22 – 02/09/94 Outfitter/Guide Annual Evaluation – item 9 – Comments or corrective action needed. “12/26/94, 1245 (p.m.), Schnebly Hill Road. Sedona Photo Tours vehicle driving too fast for conditions”.

Finding

In reviewing the record, I conclude that you did not show good faith compliance with the terms and conditions of all prior permits, as required by clause II.D., item 4, for issuance of a new permit. SPT has had a history of difficulty in complying with many aspects of the terms and conditions of your permit and operating plan. The record indicates that your company was operating in areas where you were not authorized to operate, conducting activities that were not authorized by the permit, and breaching basic safety procedures. Further, clause II.E. of your previous permit gives the Deciding Officer “absolute discretion” regarding whether or not to issue a new permit.

The Deciding Officer followed Forest Service Manual direction at 2712.1, which directs him to carefully consider the qualifications of an applicant before approving a special use application, with special consideration given to the ability to perform according to permit terms, when the use involves public service. As documented in his letters of December 1, 1997 and December 17, 1997, he considered your ability to perform according to permit terms, and concluded that you were not performing satisfactorily.

The Deciding Officer’s decision was consistent with the 1997 regulations at 36 CFR 251.54(i) regarding denial of an application. As mentioned above, this regulation provides authority for the authorized officer to deny issuance of an authorization if the applicant does not demonstrate technical capability. It is clear from the record that you had a history of difficulty complying with the terms and conditions of your permit, and this shows a lack of technical capability to satisfactorily operate under an outfitter-guide permit.

Furthermore, permits do not convey a perpetual right of occupancy. As provided by 36 CFR 251.56, the permit specified its duration and renewability. The permit expired on its own terms. The Deciding Officer was within his discretion not to issue a new permit.

Denial of a five-year permit.

Additional direction is available to the Deciding Officer regarding issuance of a five-year permit. Forest Service policy at Forest Service Handbook 2709.11, chapter 41.53g provides that a holder may be eligible for assignment of priority use (five-year permit) if it is in the interest of the Forest Service and the use is compatible with the forest land and resource management plans. The policy also states that assignment of priority use is at the discretion of the authorized officer.

The Sedona Ranger District policy on issuing priority use permits was documented in a November 5, 1993 letter to you (AR 18). It states that conditions for issuing a priority use permit included that locations and use limits qualify under environmental and archaeological laws and Sedona Ranger District criteria. Concerns relative to environmental impacts of outfitter-guide use and high demand are documented in AR 1, 62, 86, and 128. Due to these concerns, Sedona Ranger District has not converted any annual permits to priority use since 1995.

The Environmental Assessment for an Amendment to the Forest Plan for the Sedona Area (AR 128) states that for the proposed action and preferred alternative, commercial tour operations would be adjusted as needed to achieve management area goals, ROS objectives, and address site-specific issues. The Amendment itself, AR 215, requires that new business opportunities be competitively offered. The amendment also requires that existing permits be reviewed and adjusted to ensure their compliance with new Forest Plan goals and objectives. The review of existing use has not been completed at this time, but such review could result in a reduction of use for existing permits rather than conversion of more annual permits to priority use. Key goals and objectives of the amendment were to reduce impact on the lands and natural resources, visitor experiences, and the residents of the community.

Sedona Photo Tours never had a five-year permit. 36 CFR 251.61 provides that a holder must file a new or amended application for a special use authorization for changed or additional use or area, and 36 CFR 251.55 (b) provides that all rights not expressly granted are retained by the United States. There is no evidence that an application meeting the requirements of Forest Service Manual 2712 and 36 CFR 251.54 was received by the Forest Service for the 1997-1998 season.

The document dated August 26, 1997 (AR 234), which was submitted to me after the oral presentation for this appeal (September 2001), was not received by the Forest Service prior to the Deciding Officer's decision not to renew the permit (AR 157, Responsive Statement page 1, and November 6, 2001 letter closing the record). Sedona Photo Tours' earlier request for a five-year permit, dated May 3, 1996 (AR 92), was responded to by issuance of a one-year permit (AR 100) on September 25, 1996. Sedona Photo Tours could have appealed the issuance of a one-year permit instead of a five-year permit at that time, but they did not. I conclude that no application for a five-year permit was pending.

Finding

The Deciding Officer was within his authority to not issue a five-year permit for a number of reasons. First, the Forest Service Handbook states that it is a discretionary action. The Handbook also states that the use must be compatible with the forest land and resource management plan. The Forest Plan Amendment for the Sedona area discourages the issuance of priority use permits, until existing permits are reviewed and adjusted. This review has not been

completed. The District's 1993 priority use policy letter states that locations and use limits must qualify under environmental and archaeological laws and Sedona Ranger District criteria. The District had concerns relative to environmental impacts of outfitter-guide use and high demand, and therefore has not issued any priority use permits since 1995. It was reasonable for the Deciding Officer to conclude that priority use permits should not be issued at the time of his decision on SPT's permit, because of concerns about impacts to the environment and to visitor experiences due to outfitter-guide use.

In addition, the record does not show that an application for a five-year permit was pending.

APPEAL DECISION

In summary, issues 1 – 4 are not relevant to the decision under appeal because the cited regulation was not in effect at the time of the Deciding Officer's decision. Issue 5 is outside of the scope of this appeal. Even so, it should be noted that the Deciding Officer's actions were consistent with policy regarding administration of permits.

Regarding issue 6, the Deciding Officer's decision was consistent with policy regarding review before reissuance of a permit. Regarding issue 7, I have determined that the Deciding Officer did not act arbitrarily or capriciously in denying SPT's permit requests, and that in fact he did so consistent with the permit previously issued to SPT, and consistent with policy and regulation. Specific to his decision to not issue a five-year permit, there was no application pending, and an application is required by policy and regulation.

It is my decision to affirm the Deciding Officer's denial of one-year and five-year permits to Sedona Photo Tours.

Appeal Rights

In accordance with 36 CFR 251.87, you may file an appeal for a second level of review with the Regional Forester at: Regional Office, Southwestern Region, 333 Broadway SE, Albuquerque, NM, 87102. This appeal must be filed within 15 days of the date of this letter.

Sincerely,

/s/ Jim Golden
JIM GOLDEN
Appeal Reviewing Officer

cc:
Seth Williams
Sedona District Ranger
Regional Forester, R3