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Forest
Service

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File Code: 1570-1

Date: March 15, 2002

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

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Dear Mr. Williams:

This is my decision on the appeal filed by you, concerning District Ranger Ken Anderson's April 16, 2001, decision (AR 230) to deny your requests for a five-year and/or an additional one-year Special Use Permit for outfitting and guiding on the Sedona Ranger District. The District Ranger is herein termed, Deciding Officer. This appeal is conducted pursuant to 36 CFR §251.87(c)(2). As a second level appeal, my review is limited to the existing Administrative Record (AR), which was submitted by the Forest Supervisor on January 14, 2002.

BACKGROUND

This appeal concerns the Deciding Officer's denial of the permit holder's request for either a one-year or five-year special use permit to continue Sedona Photo Tours activities. The permit holder was operating on a one-year special use permit from September 25, 1996 to December 1, 1997 at the time of their request (AR 141).

ISSUES 1 through 4: Whether the Deciding Officer properly applied the direction contained in 36 CFR 251.54 Proposal and Application Requirements and Procedures. Specifically, the appellant alleges the Deciding Officer did not properly conduct initial screening, failed to advise the proponent that the proposed use does not meet the minimum requirements of initial screening, was remiss in providing guidance and information to the proponent, and questions if any of the Deciding Officer's decisions for denial were properly based on the second-level criteria.

Comment: The regulations cited in regard to initial and secondary screening of applications at 36 CFR 251.54 (e) (10), (2), (3) and (5) were not published until November 30, 1998, and therefore, the procedures were not in place when the Deciding Officer made his decision in December 1997.

Finding: The Deciding Officer cannot be held accountable for complying with initial and secondary screening regulations that were not in effect at the time the decision was made.

ISSUE 5: Whether the Deciding Officer complied with FSM 2716.52 by among other things, making and documenting regular inspections of appellant's permitted operations and if so,



whether such inspections revealed deficiencies justifying non-renewal of appellant's one-year permit or denial of its alleged application for a new five-year permit.

Comment: The inspection frequency for an outfitter and guide service established in FSM 2716.53 is at a minimum, done annually.

The "Responsibilities of the Holder" under the Special Use Permit were clearly stated in Section III (D): "The obligations of the holder under this permit are not contingent upon any duty of the Forest Service to inspect the premises. A failure by the Forest Service, or other governmental officials, to inspect is not a defense to noncompliance with any of the terms and conditions of this permit " (AR 11, 39 and 76).

On October 4, 1993, the Sedona Ranger District established a formal evaluation and monitoring process to judge outfitter/guide performance to ensure that private businesses operate on National Forest System lands in accordance with the permit and regulations. The objectives of this evaluation and monitoring process included Operating Plan compliance, customer service, safety and first aid, resource protection, good record keeping and attestation, and prompt and correct payment of fees to the Government.

The question of transitioning to a priority use permit in a fair and equitable manner was shared in detail with the appellant in an October 1993 meeting and by letter on November 5, 1993, (AR 18). Several of the conditions of issuance established for converting from a temporary one-year permit to a priority use permit of longer duration are: a) "Company in good standing with the Forest Service, having a least two acceptable years of performance as shown in their permit file record and their Forest Service evaluations"; b) "Compliance with the Government Accounting Office (GAO) audit requirements of reasonable fee to government, performance, reasonable fee charged to public, and public health and safety"; and c) "Effective and enforceable operating plan."

The 1994 Financial Operation Evaluation documents discrepancies between the daily client totals and the monthly summary (AR 30). Appellant was told to clarify the monthly summary sheet and re-tabulate all monthly summary sheets since the business began.

The Deciding Officer concluded that the investigation identified permit violations that were significant enough to place the appellant on probation for operating outside the Operating Plan by failing to provide photo instructional tours (AR 48). During the probation period of December 22, 1994, to May 1, 1995, additional reports from the public were received expressing concern over reckless driving, jeep #2 tearing up trails, and a Photo Tour jeep crossing private land (AR 50, 58, and 63). The appellant denied the allegations (AR 55).

On February 2, 1995, the Deciding Officer wrote a letter to Sedona Photo Tours specifically setting forth several areas in which the company needed to comply with its plan of operations to provide a "photography-oriented touring operation, focusing on photography and instruction in photographic techniques as well as providing information on the local flora, fauna and geology" (AR 60).

The probation was lifted four months later with the admonition to keep working on the photo theme, operate only on approved roads, and make the guides aware of the permit terms to avoid probation and loss of permit (AR 70).

It appears from the record that after probation was lifted there were continued reports of permit violations as shown in the following:

AR 122 - A driver injured on October 23, 1996, filed a complaint of bad faith and/or unfair claim processing practices with the Industrial Commission of Arizona on May 9, 1997. Additionally, it appears that holder may not have complied with State law regarding salary payments to employees. Under the Special Use Permit, FS-2700-4 (AR 100), Clause III A, the holder is responsible for complying with all applicable Federal, State, and local laws, regulations and standards.

AR 126-The record reflects that two weddings were conducted through Sedona Photo Tours at Cathedral Rock on May 19, 1995 and again on September 14, 1996. These activities are outside the terms and conditions of the permit.

AR 129-The annual evaluation of July 11, 1997, noted two documented reports of a tour in the wrong place and blocking a road thus creating a hazard in violation of the Operating Plan.

AR 147-The Deciding Officer met with three individuals on October 24, 1997 and documented eleven potential Permit violations.

Finding: The record indicates that inspections were conducted, deficiencies were identified, and the holder was notified. The record indicates that holder continued to operate outside the terms and conditions of the permit through the fall of 1997. The probation action and denial of the one-year and five-year permits were reasonable and are supported by the record.

ISSUE 6: Whether the Deciding Officer complied with FSM 2716.12, as required when a new permit is requested for an established use.

Comment: The direction contained in FSM 2716.12 specifies that before approving the issuance of a new Special-Use Permit for an established use, an analysis of the conditions of the use shall be made to determine whether changes in permit conditions are needed.

The Sedona Ranger District had completed a tour jeep study and environmental assessment for the Broken Arrow and Soldier Pass roads in December 1989 (AR 1). Northern Arizona University School of Forestry prepared a study in 1996 addressing visitor expectations in the Sedona Red Rock area (AR 85).

The Coconino National Forest published an Outfitter/Guide Needs Assessment in March 1996 that described in detail the existing unsatisfactory conditions of conflict and resource concerns and the desired future conditions that protect the environment and efficiently serve the visitors on the Sedona Ranger District (AR 86). Seth and Troy Williams were provided an Executive Summary of the issues associated with commercial services and invited to a public meeting to discuss long-range management strategies (AR 87).

The Environmental Assessment for the Amendment to the Forest plan was published for public review and comment in July 1997 (AR 128). The record shows that the Deciding Officer was performing the analysis required by FSM 2716.12 prior to issuance of a new permit.

Finding: The Deciding Officer complied with FSM 2716.12.

ISSUE 7: Whether the Deciding Officer acted arbitrarily or capriciously, abusing his discretion, in denying appellant's permit request.

Comment: The Deciding Officer's responsibilities under the Permit (AR 100) provides for the following: Clause II (E) Discretion of Forest Service." The decision whether to issue a new permit to a holder or successor in interest is at the absolute discretion of the Forest Service."

A condition for the issuance of a new permit requires the holder to "show 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 D4) (AR 100).

As discussed in Issue 5, the record demonstrates that the permit holder had repeatedly operated outside the terms and conditions of the permit.

Finding: There is nothing in the record to suggest that the Deciding Officer acted arbitrarily or capriciously, abusing his discretion, in denying appellant's permit request.

DECISION

I am upholding the Deciding Officer's decision to deny your requests for a five-year and/or an additional one-year special use permit for outfitting and guiding on the Sedona Ranger District after December 1, 1997. This is the final administrative determination for the Department of Agriculture (36 CFR 251.87).

Sincerely,

/s/James T. Gladen
JAMES T. GLADEN
Reviewing Officer, Deputy Regional Forester,
Resources

cc: Coconino NF
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Recreation R3
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