

**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS**

GREG WARREN)	IBLA Case: 2017-0225
Appellant,)	
v.)	Appeal of Bureau of Land Management
)	Decision Record Approving the
BUREAU OF LAND MANAGEMENT,)	Proposed Action (with additional criteria)
Respondent,)	Described in the Environmental Assessment
and)	for the Silverton Guides Helicopter Ski Terrain
)	Exchange (DOI-BLM-CO-S060-2016-0022-EA)
SILVERTON GUIDES, LLC)	
Intervenor.)	

APPELLANT’S SUPPLEMENTAL BRIEF

This supplemental brief is in response to the March 30, 2022, Order issued by the Interior Board of Land Appeals, and in accordance with the extension of time granted by the Board on April 22, 2022. The Board posed four questions in its March 30 Order, asking the parties to address whether the above-captioned appeal is moot because of a new special recreation permit (SRP) that BLM issued in 2019 to Silverton Guides for conducting helicopter skiing operations on BLM-managed lands near Silverton, Colorado.

(1) The Status of the Helicopter Special Recreation Permit

The May 2017 Decision Record states, “[i]t is my decision to implement the Proposed Action described in the Environmental Assessment for the Silverton Guides Helicopter Ski Terrain Exchange (DOI-BLM-CO-S060-2016-0022-EA), with these additions. Three additional project design criteria will be applied to the Proposed Action: (1) No use of explosives in the SRP area will be allowed after 9:00 a.m. (2) No use of explosives will be allowed at any time in the identified closure area in the Southeast Pod for the purposes of snow stability assessments related to heli-skiing. (3) No Landing Zones or skier drop-

offs will be allowed in the identified closure area in the Southeast pod. The Proposed Action, with the three additional project design criteria, will be implemented by the issuance of a new 5-year Special Recreation Permit (SRP) to Silverton Guides.”

In December 2019, the BLM Acting Field Manager signed a DNA decision document, described as a Decision Record (DOI-BLM-CO-F070-2020-10-DNA), issuing to Silverton Guides LLC an SRP that changed the number of permitted user days and the permitting period. In the 2019 Decision Record, the Field Manager states, “[t]he Bureau of Land Management (BLM) authorizes recreation use of the public lands and related waters through the issuance of special recreation permits and recreation use permits. The BLM's authority to issue permits is described in the Federal Land Policy and Management Act of 1976 and 43 Code of Federal Regulations (CFR) 2930...

The renewal and reissuance of a five-year permit will allow Silverton Guides to continue offering a service to the public while controlling visitor use, protecting recreational and natural resources, and providing for the health and safety of visitors. It is my belief that the increase of user days from 600 to 720 is a negligible increase in impact and still covered within the previous Environmental Analysis (DOI-BLM-CO-S060-2016-0022-EA)... I have determined that the NEPA analysis in the Silverton Guides Helicopter Ski Terrain Exchange (DOI-BLM-CO-S060-2016-0022-EA) is adequate for the implementation of this Action.”

The 2017 Decision Record continues to control implementation actions as described in the 2019 Determination of NEPA Adequacy (DNA) Worksheet (DOI-BLM-CO-F070-2020-0010-DNA). The DNA Worksheet states, “To reissue Silverton Guide's LLC permit for a period of five years. This permit would go into effect for the 2019-2020 season and expire at the end of the 2023-2024 season. All project design criteria would remain the same as noted in the Decision Record of the Silverton Guides

Helicopter Ski Terrain Exchange (DOI-BLM-CO-S060-2016-0022-EA) with the following exceptions: 1. The annual user days will be increased from 600 to 720 users.”

(2) Circumstances that May Bear on the Resolution of the Appeal

Prior to the 2022 IBLA Order, I have not received any communications from the BLM or Silverton Guides since the completion of the IBLA 2017-0335 briefings in 2017.

The 2019 DNA in part D.3 states, “[t]he existing analysis is valid as there is no substantially different information to inform a different analysis.” The 2019 DNA part D.5 states, “[p]ublic involvement and interagency review for this action is adequate. No changes or additional mitigations are needed for this new proposed action that were not addressed as a result of public issues in the completed EA.”

Concerning is that the Field Manager in the preparation of the 2019 DNA (1) did not acknowledge the IBLA 2017-0225 appeal as being unresolved, (2) a National Trails System Act program specialist was not consulted, and (3) a Finding of No Significant Impact was not prepared for the 2019 decision (see BLM NEPA H-1790-1 part 5.1).

The Acting Field Manager in 2019 signed a DNA decision document described as a Decision Record. The Acting Field Manager 2019 decision modified the SRP and did not rescind the 2017 NEPA decision that is the subject of this appeal. This conclusion that only the permit authorization is affected by the 2019 Decision Record is supported, in part, by omissions in the 2019 Decision Record document. The 2019 Decision Record does not review (1) Finding of No Significant Impact, (2) conformance with The Tres Rios Field Office Resource Management Plan, (3) public involvement and comments, (4) conformance with the National Trails System Act and MS 6280 Policy–Management of National Scenic and Historic Trails, and (5) protest and appeal opportunities (BLM NEPA Handbook H-1790-1 part 8.5.1).

There is inconsistency in how NEPA is applied to special uses. The BLM should clearly separate “approving a use” from “authorizing a use.” In short, a NEPA decision “approves” an action/activity to take place on the landscape. Consistent with the “approving a use” decision, a special use authorization “authorizes” a specific entity to conduct the stated action/activity in a specific location on the landscape.

The BLM in the Supplemental Brief (SB) on page 4 states, “[s]ince the time this appeal was filed, BLM has received no reports or evidence of adverse impacts to the CDNST or area resources from Silverton Guides' operations, or any conflict between the heli-skiing services and other area recreational users, such as those users who might be traversing the CDNST” (BLM SB at 4).

The BLM fails to address monitoring concerns reviewed in the Appellant’s Statement of Reasons at 16 and Appellant’s Reply to BLM’s Answer at 15. I describe in part that research demonstrates that, “[t]hose seeking a nonmotorized experience would not be expected to use the area once helicopter skiing is permitted.”

Furthermore, the described reporting of adverse impacts does not address BLM policy requirements for monitoring of the conditions of National Trail resources, qualities, values, and associated settings and the primary use or uses of the trail on public lands or interests in lands; the effects of decision implementation; and in order to identify new and emerging issues (MS-6280 Section 1.6.3.e).

(3) Whether the Appeal is Moot

The appeal of the 2017 Decision Record and Environmental Assessment is not moot. The BLM did not supplant the 2017 NEPA decision of issue. The 2017 NEPA Decision Record was not withdrawn and this decision continues to direct and constrain aspects of the 2019 DR implementation actions. The 2019 Decision Record did not modify the Silverton Guides Helicopter Ski Terrain Exchange Environmental Assessment (DOI-BLM-CO-S060-2016-0022-EA). The BLM’s 2019 DR merely authorizes a

number of SRP Annual User Days to be issued to the permittee over an extended permit period.

In 2019, the BLM did not prepare a new Decision Record for the Environmental Assessment (DOI-BLM-CO-S060-2016-0022-EA). The Silverton Guides LLC SRP (CO-160-03-20-007) on page 1 states, “[p]ermission is hereby granted to Silverton Guides LLC, for "commercial recreational" use of public lands administered by the Bureau of Land Management (BLM) Gunnison Field Office in connection with guided helicopter and backcountry skiing on BLM public lands within the Silverton Special Recreation Management Area in the following areas and under the following terms as defined by the Record Of Decision signed on May 03, 2017 for the Silverton Guides Helicopter Ski terrain Exchange Environmental Assessment (DOI-BLM-CO-S060-2016-0022-EA) with the addition of 120 user days as per the Decision Record (DOI-BLM-CO-F070-2020-10-DNA)” (see BLM SB, Exhibit B).

The BLM asserts in the Supplement Brief on page 2 that, “the activities conducted under the SRP have had no adverse impacts on the Continental Divide National Scenic Trail, or to resources or other recreational users along it.” This statement is unsubstantiated. There is no documentation that is associated with a National Scenic Trail monitoring program which demonstrates that permitted activities have not substantially interfered with the nature and purposes¹ of the CDNST.

The BLM fails to recognize and provide for the conservation and preservation purposes of the Continental Divide National Scenic Trail.² I describe in the Statement of Reasons for this appeal,

¹ Nature and Purposes - “The term used to describe the character, characteristics, and congressional intent for a designated National Trail, including the resources, qualities, values, and associated settings of the areas through which such trails may pass; the primary use or uses of a National Trail; and activities promoting the preservation of, public access to, travel within, and enjoyment and appreciation of National Trails.” (BLM MS-6280)

² 16 U.S.C. §§ 1242(a)(2), 1244(f)(1); E.O. 13195 – Trails for America in the 21st Century – Federal agencies will ... protect, connect, promote, and assist trails of all types throughout the United States. This will be accomplished by: ... (b) Protecting the trail corridors associated with national scenic trails...to the degrees necessary to ensure that the values for which each trail was established remain intact.

“Management actions allowed by this [2017] decision are inconsistent with the requirements of the National Trails System Act (NTSA) as implemented through the BLM National Trails Directive MS-6280, the Continental Divide National Scenic Trail (CDNST) Comprehensive Plan, and related regulations. Furthermore, planning steps that led to this decision are inconsistent with some of the National Environmental Policy Act (NEPA) analysis and disclosure requirements” (SOR at 2).

The BLM did not conduct an analysis to determine if the permitted activities substantially interfere with the nature and purposes of the CDNST. As reviewed in Draft EA comments, BLM Manual 6280 states, “The BLM may not permit proposed uses along National Trails which will substantially interfere with the nature and purposes of the trail, and the BLM shall make efforts, to the extent practicable, to avoid authorizing activities that are incompatible with the purposes for which such trails were established” (MS-6280, Sec. 5.3 A.2.).

(4) Evading Board Review

Past actions are capable of repetition yet evading review. The BLM SB on page 4 states, “[i]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed as moot.” This situation is not applicable to this appeal.

Relief sought in this appeal would protect the nature and purposes of the CDNST corridor from degradation. The existing Special Recreation Permit authorizations could be modified to add an additional project design criteria to address the relief sought: “No-Landing-Zones/No-Fly-Zone and skier drop-offs are allowed for (1) the area that is within one-half mile of the established CDNST route (trail path), and (2) the area that is within the Maggie Gulch/Minnie Gulch pod.” A means for addressing this relief is through the Annual Operating Authorization. The SRP states, “Multi-Year Permits: A multi-year permit is not valid unless accompanied by a current Annual Operating Authorization” (see BLM SB,

Exhibit B, SRP IV.F.). Any relief granted by the Board could be in effect until such time that NEPA and National Trails System Act legal deficiencies are remedied through the preparation of a new Environmental Assessment or Environmental Impact Statement with a new appealable NEPA decision.

The BLM 2019 Helicopter Skiing permitting practices reflect a means to potentially evade Board review if the IBLA accepts the BLM position that this appeal is moot and if the Board does not retain jurisdiction. The BLM SB on page 2 states, “there is no prejudice to Appellant Greg Warren in dismissing the current appeal, because he would be able to raise the same issues regarding permitting on a future SRP ... would not evade Board review.” This statement is not accurate.

Challenges to this action will likely occur again and could evade review. The Silverton Guides LLC SRP (CO-160-03-20-007) on page 1 states, “[t]his permit is eligible for an additional five-year renewal at the end of the authorized period term if the permittee is in acceptable standing” (see BLM SB, Exhibit B). The BLM may evade Board review by repeatedly (1) making modifications to and reissuing the Helicopter Skiing permit for an extended period, (2) declaring the adequacy of the Environmental Assessment (DOI-BLM-CO-S060-2016-0022-EA), and (3) declaring that any unresolved IBLA appeal is moot.