



File Code: 1570; 2720
Date: June 29, 2016

Andy Morrison
Alaska Backcountry Access
P.O. Box 1721
Girdwood, AK 99587

Dear Mr. Morrison:

This letter is in response to the appeal you filed on April 16, 2016 under Forest Service regulations at 36 CFR 214, (Appeal #16-10-04-0001 A214). You appealed the March 4, 2016 decision to award services as solicited in the October 26, 2015 Spencer Glacier Whistle Stop Outfitting & Guiding Prospectus (Prospectus). The Responsible Official for the March 4th decision is Glacier District Ranger Tim Charon. The specific relief you requested in your appeal letter was that "Alaska Backcountry Access should be reconsidered as an operator in the Spencer area and awarded use." During the oral presentation you clarified and elaborated that your relief requested was to be awarded use for equipment (watercraft) rentals.

Background

On October 26, 2015, the Glacier Ranger District announced they were soliciting applications to provide outfitting and guiding services and vendor services at the Spencer Glacier Whistle Stop through a competitive (Prospectus) process. The Prospectus under Offering (pp. 6-8) identified needed services and included Table 1 which listed available recreation and related service opportunities including service days, daily limits, party size and limits by activity. Applications were accepted through close of business December 15, 2015.

On March 4, 2016, three of the seven applicants were awarded services through a special use authorization. On April 16th, you appealed this decision and requested an oral presentation. On May 9th, the Responsible Official submitted his Responsive Statement, addressing your appeal points. On May 9th, I granted 4 parties intervenor status at their request after determining they were eligible and timely to intervene as solicited applicants. They included:

- Erik & Cory Route, Alaska Rivers Company;
- Matt Szundy, Ascending Path LLC;
- Ari Stiassny, Chugach Adventures;
- James Gonski, Alaska Kayak Academy.

You and the four intervenors were provided the opportunity to respond to the Responsible Official's May 9th Responsive Statement. I received 2 replies to the Responsible Official's Responsive Statement:



- May 18, 2016: Andy Morrison, Alaska Backcountry Access
- May 14, 2016: Ari Stiassny, Chugach Adventures (intervenor)

On Tuesday, May 31st, the oral presentation was held in the Supervisor's Office and included you and 3 intervenors (Matt Szundy, Ascending Path; Ari Stiassny, Chugach Adventures; James Gonski, Alaska Kayak Academy). During the oral presentation, you clarified that your issues and relief requested was with equipment (watercraft) rentals. You elaborated that while you applied for multiple services requested for under the Prospectus your application focused on equipment rentals. You stated your concern was that the Responsible Official had not awarded equipment (watercraft) rentals and that you should be awarded that use. Consistent with the 36 CFR 214.16(h) regulations, there is no transcript of the oral presentation.

I closed the appeal record on Wednesday, June 1st. My appeal decision must be issued within 30 days of the date the appeal record closed.

Appeal Deciding Officer Official Review & Decision

As Appeal Deciding Officer, I carefully reviewed your application to the requirements in the Prospectus, including, but not limited to:

- Allocation of Use (p. 8)
- Selection of Successful Applicants (p.10)
- Evaluation Criteria (pp. 12-13)
 - Description of Activities and Services Offered to the Public
 - Experience
 - Financial Capability
 - Operating and Safety Plan
 - Type and Quality of Customer Service
- Evaluating the Proposals (pp. 13-14)
- Submitting the Proposal (pp. 14-15)

I reviewed your application based on the relief requested in your appeal letter, your response to the Responsible Official's Responsive Statement and your concerns and information presented during the oral presentation. The relief you requested is to be reconsidered as an operator in the Spencer area and awarded use. Based on your relief requested, my review and decision is based upon your application and oral presentation as to whether you met the Prospectus application requirements. The Responsible Official's decision to award final allocations is noted in his March 4th letters to each of the seven applicants noting several factors that he integrated into his decision. These included the application package degree of completion, type of services to be offered, and quality of responses to the five selection criteria.

Upon review of your application, the Prospectus requirements and your comments during the oral presentation, I find your application to be incomplete and inadequate to award the multiple services that you requested, including equipment rentals (ABA application: Exhibit A; p. 7). **My decision is to affirm the Responsible Official's decision; your requested relief is denied. My decision does not provide any further instruction to the Responsible Official on this Appeal.**

The specifics associated with your four appeal issues and two other topics discussed in the oral presentation as they relate to your appeal are outlined below. For continuity, I structured the discussion in the same order as the Responsible Official's May 9th Responsive Statement recognizing that Appeal Issue 3 is the substantive issue tied to your relief requested.

Appeal Issues 1 and 2: Cold Water Thermal Protection and Unfair Competitive Advantage

I concur with the Responsible Official's Responsive Statement under Appeal Issues 1 and 2 that drysuits are not the only means by which to address hazards associated with cold water and therefore were not a specific requirement in the prospectus. Your application did not adequately address the financial implications or include a complete safety and operational plan associated with the use of drysuits.

Specifically:

- Your application did not provide sufficient information to demonstrate financial impacts either adversely or positively as they relate to the use of drysuits.
- As part of the oral presentation, I asked you to provide me any legal requirement associated with requiring drysuits in Alaska for the type of services offered at Spencer Glacier. You indicated there is none.
- I could not locate anything in your appeal, the Prospectus, nor did you provide any additional information during the oral presentation, that shows or demonstrates that your choice to offer drysuits gives your competitors an unfair advantage.
- During the oral presentation, one intervenor asked if you as a guide always use drysuits. You stated that depending on the day you did or did not use them.
- My review of your application notes inconsistent intent on where and when your proposed Spencer Glacier services would require drysuits. Specifically:
 - Page 2: "To safely rent watercraft in a glacial lake like Spencer, it is imperative for an outfitter/guide to provide/require all participants to wear a drysuit or wetsuit on the water".
 - Page 5 (Lake boating): "Participants in both guided and non-guided glacial lake boating activities would be provided a drysuit...".
- Your application (Exhibit A, p. 7) is confusing and inconsistent on your proposed use of drysuits. The description of activities and restrictions describes guided outfitting under equipment rentals includes drysuit; for lake and river boating there is no drysuit noted. Your proposed December 14, 2015 operating plan notes under Personal Protective Equipment (p. 4) that kayaking or rafting would include either rain gear or drysuit. The Operating Plan only mentions equipment rentals under Operation on Public Lands (p. 3) and doesn't describe the rental operations or specific safety considerations.

Appeal Issue 3: Whether you should have been awarded equipment (watercraft) rentals.

I concur with the Responsible Official's Responsive Statement under Appeal Issue 3 that your application did not provide sufficient information to demonstrate financial viability, a complete operational description, and did not adequately address (at all or in part) the type and quality of customer service for the services you were requesting as required and described in the Prospectus.

The financial information in your application was incomplete. The Prospectus requires that the applicant demonstrate their financial capability through a balance sheet or financial records for the past 3 years and the business projections for the next 3 to 5 years (p. 13 -VII(C) and p. 15 - IX(B)(4)). I could not conclude from the graph in your application (p. 12) how you had the financial capability or capacity to provide your requested services at Spencer. Your description of your financial capability (pp. 11-12) is vague and non-descript between your existing outfitting business and your proposed Spencer services. When I asked in the oral presentation where in your application I could locate the financial information as described and required in the Prospectus, you referenced the graph. My review concludes that your application does not constitute a complete or thorough financial statement, as requested in the Prospectus. Your application does not demonstrate your capability and capacity to operate multiple services including equipment (watercraft) rentals at Spencer Glacier.

Operational requirements in the Prospectus was to be addressed through an Operating and Safety Plan (p. 13 – VII(D) and p. 15 – IX(B)(2)). Your proposed operating plan dated December 14, 2015 in your application is generic and looks to cover your existing operations rather than those proposed for the Spencer area. Your operating plan does not describe or show how the proposed Spencer activities would be integrated into your existing plan. Your application is silent, unclear and confusing on whether or not you have the equipment to operate and provide the services you were applying for with your existing business within the Prospectus requirements. Your operations and safety plan does not adequately address all the applicable safety items noted in the Prospectus including section VII(D). Further clarity was not provided during the oral presentation.

The type and quality of customer service with six listed services in the Prospectus (p. 13 – VII(E)) was not specifically addressed in the application.

Appeal Issue 4: Outfitter Growth and Sustainability in Portage, Twentymile and Spencer Valleys

When we discussed this issue, I shared that the scope of this appeal is limited to the Spencer Glacier Whistle Stop Prospectus. Thus, my decision would only consider the area covered in the Prospectus which doesn't include Portage or Twentymile. As explained in the Responsible Official's Responsive Statement under Appeal Issue 4, the outfitting and guiding scope and scale was determined through an environmental analysis. This analysis solicited and integrated public comment. A Decision Notice was signed by Glacier District Ranger Tim Charnon on October 15, 2015. This decision authorized an increase and expansion of commercial recreation and related services to be provided under special use permits at the Spencer Whistle Stop and surrounding

area during the snow free season. This decision was implemented through the Prospectus, which described the expanded services and activities being sought. The Prospectus outlined the requirements and information to be submitted by an applicant. The Responsible Official made the decision to award services under the Prospectus based upon the evaluation and his review of the applications. The Responsible Official's March 4th award letter under Attachment A shows the commercial recreation and related services that were awarded and increase growth in this location.

Two concerns discussed in the Oral Presentation

In addition to the appeal issues described above, two additional concerns were discussed at the oral presentation:

- I sought clarification from you regarding a statement made in your appeal about Forest Service decision makers telling some applicants not to include watercraft rentals; and
- You sought clarification from me on the Forest's intent to award equipment rentals.

During the oral presentation, I sought clarification on your appeal statement (p. 3, 4th paragraph): "It appears that after requesting that applicants provide rental watercraft, Forest Service decision makers told some potential applicants not to include the rental of watercraft and selected outfitters that did not apply to rent watercraft, which adversely affected ABA." Your appeal stated you were adversely affected based on "The decision and insider information to scale back the opportunities from those requested in the prospectus adversely affects ABA because the watercraft rental market has less overhead and therefore expense for potential clients who would rent kayaks with thermal protection for less money than a guided operation." I asked you to provide me information to support the validity of your accusation and to understand the context of being adversely affected. You replied that your statement was speculative and you chose not to provide me any names or offer any further clarification or information. I asked the three intervenors at the oral presentation if any employees on the forest had suggested they not submit for equipment rentals. All three stated that they had not been contacted and two intervenors explained why they did not include watercraft rentals in their applications. I conclude that you were not adversely affected. Had your application been complete and met the requirements in the Prospectus, the Responsible Official could have awarded you one or more of the services you requested including equipment (watercraft) rentals.

During the oral presentation, you asked me more than once whether we (USFS) intended to award use of equipment (watercraft) rentals. You implied that by not awarding you this service that we had never intended to offer equipment (watercraft) rentals. I explained multiple times that awarding any of the offered outfitting and guiding services was based on applicants applying to and meeting the Prospectus requirements. I explained that we do not automatically award use solely on an applicant applying for a service; that the applicant has to meet the requirements stated in the Prospectus. Even though the Responsible Official chose not to award any equipment (watercraft) rentals under the Prospectus, I shared that the Responsible Official could solicit for equipment rentals in a new prospectus in the future.

Summary

My review and decision under this Appeal confirms that the Responsible Official's decision is consistent with the requirements of applicable laws, regulations, and policies. Where the Responsible Official exercised discretion related to this action, the discretion was fully within his authority. I find nothing in regulation, policy, or the appeal record that would warrant remanding this decision.

My decision on your appeal is eligible for discretionary review (36 CFR 214.7(b)(1)). Pursuant to 36 CFR 214.19, I will send a copy of my appeal decision, appeal, and the appealable decision to the Discretionary Reviewing Officer, the Alaska Regional Forester, who will determine within 30 days upon receiving my appeal decision whether or not discretionary review of my decision will be conducted. The Discretionary Reviewing Officer may notify you, in writing, whether or not she decides to conduct a discretionary review. If the Discretionary Reviewing Officer takes no action within 30 days of receipt of the appeal documents, my appeal decision shall constitute the final administrative decision. The automatic stay under 36 CFR 214.13(c)(1) remains in effect until a final administrative decision is issued in the appeal.

Sincerely,

A handwritten signature in cursive script that reads "Terri Marceron". The signature is written in black ink and is positioned above the typed name.

TERRI MARCERON
Forest Supervisor

cc: Tim Charnon, Kori Marchowsky, Kelly Chase, Teresa Paquet, Matt Szundy, Erik and Cory Route, Ari Stiassny, Jim Gonski