

CAMP RAFTING TRIPS UNLICENSED COMMERCIAL ACTIVITY

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As a general rule, as long as there is a reasonable basis for allocating public recreation opportunities in a certain manner, courts will not second-guess the judgment of park resource agencies exercising their statutory authority to manage and conserve land and water in the public interest. For example, in allocating public use and occupancy of state parks, the government may find that it is necessary to use quotas, regulating or even prohibiting certain types of recreational activities in order to conserve the resource. As long as recreational use regulations and administrative decisions are based in law and reasonable, a court will uphold and defer to the judgment of the agency in its area of expertise and legal authority, i.e., natural resource management.

WHITEWATER QUOTA

In the case of *Summer's Best Two Weeks v. Pennsylvania DCNR* (Pa.Cmwlth. 07/25/2008), a Christian summer camp (Camp) challenged a decision by the Pennsylvania Department of Conservation and Natural Resources' (DCNR) to prohibit the Camp from conducting regular whitewater rafting trips on the Lower Youghiogheny River (Lower Yough) within Ohio pyle State Park.

Ohio pyle State Park is operated by the DCNR. Approximately 14 miles of the Lower Yough, containing Class III and IV whitewater rapids, traverses through the state park.

Since 1970, the Camp, a nonprofit, nondenominational Christian summer camp in Boswell Pa., had conducted its own annual whitewater rafting trips on the Lower Yough as part of its program for campers. Campers pay a fee to attend the Camp, part of which is allocated to pay the rafting trip leaders and to purchase and maintain rafts and rafting equipment. The Camp determines which campers are permitted to raft based on an assessment of each camper's emotional and physical maturity. All campers pay the same fee regardless of participation in the rafting trip. Since 1970, over 15,000 campers and rafting counselors have rafted the Lower Yough without any accidents or fatalities according to the DCNR's records.

In 1973, in an effort to control and monitor river traffic, the Department of Environmental Resources (Department), which was the predecessor to DCNR, commissioned a study to ascertain river traffic quotas. The 1977 Report concluded that the Lower Yough could only support approximately 2,000 boaters per day. The 1977 Report proposed a system where approximately half that number would be allocated to four existing commercial outfitters and the other half to private boaters. The 1977 Report concluded that commercial outfitters should be limited to four to ensure the guide service would remain economically viable and available to the public.

Following the 1977 Report, the Department executed four identical concession license agreements with the existing outfitters to conduct rafting trips on the Lower Yough pursuant to its authority under the Conservation and Natural Resources Act, 71 P.S. §1340.313(a).

Under the terms of the concession agreement each outfitter is required to: (1) pay the Commonwealth a license fee of 7.5% of its adjusted gross receipts; (2) meet license specifications for its rafts, kayaks and equipment; (3) use qualified rafting guides; (4) agree to periodic maintenance inspections; (5) limit trip size and frequency; and (6) hold the Commonwealth harmless and indemnify it from any claims made against it by reason of the licensed outfitter's guided trips down the Lower Yough. A licensee's failure to comply with any of the provisions subjects the outfitter to termination of the license agreement.

The DCNR also implemented a launch reservation and quota system for private boaters. The quota system permits up to 50 private rafters to launch every half hour between 7:45 a.m. and 2:45 p.m., plus 30 hardboaters, such as kayakers, every hour for a daily total of 960 private boaters. Private boaters make reservations in advance by calling the DCNR or via the Internet. Each private boater must pay a three dollar launch fee on the busiest days. Clients of the outfitters are not required to make reservations in advance or pay a separate launch fee.

The Camp conducted its annual trips on the Lower Yough using the quota system as a private boater until 1984. In 1984, the Department advised the Camp that it was "engaged in commercial activity" as an unlicensed outfitter and to stop rafting or use one of the commercial outfitters.

State law prohibited commercial activities in state parks without the written permission of the Department. 17 Pa. Code §11.209(a)(5). Within this context, state law defined "commercial activity" to include "an activity in which a person directly or indirectly accepts consideration of value as compensation for the provision of goods or services, including transportation."

In 1987, the state park director granted the Camp express written permission to continue rafting the Lower Yough based upon the quota system available to private boaters. In 1998, however, the DCNR reevaluated groups rafting the Lower Yough under the private boater quota system to determine if any groups were operating as commercial outfitters without a concession license.

In 2001, the DCNR again determined that the Camp was "engaged in commercial activity" as an unlicensed outfitter. The DCNR then effectively withdrew its earlier permission and refused to allow the Camp to guide whitewater trips under the private boater quota system. Instead, the Camp was again instructed to use a licensed commercial outfitter to raft the Lower Yough.

The Camp, however, decided not to conduct rafting trips using the commercial outfitters, citing financial infeasibility and incompatibility with the Camp's core mission. Although the DCNR had the authority to grant a special use permit to allow a commercial group to raft the Lower Yough, it had not granted the Camp a special use permit. As a result, the Camp had not rafted the Lower Yough since 2002.

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In its lawsuit, the Camp did not contest DCNR's legal authority to regulate commercial activity in state parks. Moreover, the Camp did not dispute that its rafting trips constituted "commercial activity." Instead, the Camp challenged DCNR's interpretation of the "commercial activity" regulation as it applied to the Camp. Specifically, the Camp claimed the regulation was "not

rationally related to any legitimate state interest since the Camp had an exemplary safety and environmental record, offered to pay a reasonable user fee, and did not impact the public's ability to raft."

In addressing the Camp's claim, the court recognized the "well-established" principle that "courts defer to an administrative agency's interpretation of its own regulations unless that interpretation is unreasonable."

Since the Camp conceded that it was engaging in "commercial activity," the specific issue before the court was "whether the DCNR is interpreting and applying the regulation to the Camp in a reasonable manner." Under the circumstances of this case, the court found that "DCNR properly interpreted and applied its regulation in a reasonable manner to prevent the Camp from engaging in commercial activity within a state park."

In so doing, the court noted that the state legislature had provided DCNR with the legal authority to "promulgate such rules and regulations for the control, management, protection, utilization, development, occupancy and use of the lands and resources of State Parks as it may deem necessary or proper to conserve the interests of the Commonwealth." According to the court, DCNR had reasonably interpreted its statutory authority to include a right to regulate all commercial activity within the state park. Pursuant to this legal authority, DCNR had "prohibited all commercial activity in any state park without the written permission of the DCNR."

As a reasonable "matter of regulatory interpretation," the court therefore determined that the Camp could be "precluded from engaging in commercial activity inside the Ohioyle State Park without the DCNR's written permission."

Here, the DCNR has determined the Camp wishes to engage in commercial activity, and the Camp has conceded the same. The Camp previously attempted to negotiate with the DCNR for the receipt of a special use permit for the Camp to raft the Lower Yough. However, the DCNR decided not to grant the permit. Unfortunately for the Camp, 17 Pa. Code §11.209(a)(5) specifically and unequivocally prohibits all commercial activity in any state park without the written permission of the DCNR.

Given the "reasonableness of the DCNR's interpretation of its regulation," the court held DCNR had "properly precluded the Camp from rafting the Lower Yough." The court, therefore, granted summary judgment in favor of DCNR.

A concurring opinion noted that "Summer's Best Two Weeks may not be a commercial activity within the meaning of 17 Pa. Code §11.209(a)(5)," but "Summer's Best conceded this point in its litigation." Having done so, however, the concurring judge noted that the Camp still had the option to "apply for one or more of the 960 private boating permits authorized for issuance each day on the Lower Yough." Should the Camp choose to do so and its application be denied, the Camp could then file a separate appeal pursuant to the state administrative agency law.