BLACK ROCK CITY LLC

173 IBLA 49 Decided November 19, 2007

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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BLACK ROCK CITY LLC

IBLA 2006-230 Decided November 19, 2007

Appeal from that portion of the special recreation permit authorization decision of the Winnemucca, Nevada, Field Office, Bureau of Land Management, imposing a stipulation requiring the permit holder to contract with the County for and pay for State and local law enforcement in association with a permitted event, in addition to collecting the fixed-rate permit fee. NV-020-06-EA-11.

Decision reversed in part.

1. Public Lands: Special Use Permits-Special Use Permits

The Federal Lands Recreation Enhancement Act of 2004 authorizes the Secretary to "issue a special recreation permit, and charge a special recreation permit fee in connection with the issuance of the permit, for specialized recreation uses of Federal recreational lands and waters, such as group activities, recreation events, [and] motorized recreational vehicle use." 16 U.S.C. § 6802(h) (Supp. V 2005). The statute is the "sole recreation fee authority," and "[r]ecreation fees charged under this chapter shall be in lieu of fees charged for the same purposes under any other provision of law." 16 U.S.C. § 6813(d) (Supp. V 2005).

2. Public Lands: Special Use Permits--Special Use Permits--Federal Land Policy and Management Act of 1976: Applications: Generally

For a special recreation permit for a group event, BLM may either charge the fixed-rate minimum fee under 43 C.F.R. § 2932.31(a) (which may be adjusted by the Director under 43 C.F.R. § 2932.31(b) and (c), or the State Director under 43 C.F.R. § 2932.31(d)) or a cost recovery fee under 43 C.F.R. § 2932.31(e), but not both.

Under section 303 of the Federal Land Policy and Management Act, 43 U.S.C. § 1733 (2000), and section 806 of the Federal Lands Recreation Enhancement Act of 2004, 16 U.S.C. § 6805 (Supp. V 2005), the Secretary has authority to enter into cooperative agreements and contracts with State, County, and local agencies for law enforcement "in connection with administration and regulation of the use and occupancy of the public lands." Both laws authorize the Secretary to reimburse the local agencies for their expenses. This reimbursement is a cost of the Federal Government. It is thus both a "direct or indirect cost" considered in establishing the fee schedule for SRP fees, 43 C.F.R. § 2932.31(b), and also an actual expense collected from a permittee when fees are charged on a cost recovery basis, 43 C.F.R. § 2932.31(e).

3. Public Lands: Special Use Permits--Special Use Permits--Federal Land Policy and Management Act of 1976: Applications: Generally

BLM does not have authority under 43 C.F.R. § 2932.41 to impose a stipulation on a special recreation permittee requiring the permittee to incur costs that are compensated for and covered by the fixed-rate permit fee when the permit is also subject to the payment of the fixed-rate fee.

APPEARANCES: Joseph S. Schofield, Esq., Sacramento, California, for Black Rock City LLC; Luke Miller, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Black Rock City LLC (BRC) appeals a portion of the June 7, 2006, decision of the Winnemucca, Nevada, Field Office, Bureau of Land Management (BLM), awarding a special recreation permit (SRP) authorizing BRC to conduct annual "Burning Man" festivals on public lands in the Black Rock Desert located in Pershing County, Nevada, for the 5 years from 2006 through 2010, subject to a fixed-rate permit fee and annual permit reauthorizations. BRC challenges only stipulation 16, which places the burden on BRC to "provide for adequate law enforcement of State and local laws." It requires BRC to enter into contractual arrangements with Pershing

County to perform State and County law enforcement duties at BRC's expense. We review that particular stipulation here.

BRC challenges BLM's authority to require BRC to enter into contracts with local agencies for State and local law enforcement on the public lands, which it claims is a job vested in the Secretary of the Interior by section 303 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1733 (2000). BRC challenges BLM's authority to require BRC to bear financial responsibility for such FLPMA-mandated duties, at the same time BLM is collecting a permit fee intended to cover BLM's direct and indirect costs of administering the permit. BRC contends that prior to 2006 BLM entered into law enforcement contracts with the County, consistent with FLPMA, and reimbursed the County for its State and local law enforcement costs. BRC explains that the permit fee more than adequately covered those BLM reimbursements. BRC claims that BLM has no authority under the Federal Lands Recreation Enhancement Act of 2004 (the FLREA), 16 U.S.C. § 6801-13 (Supp. V 2005), or the Department's SRP rules at 43 C.F.R. Subpart 2932, to collect from an SRP holder a fixed-rate fee to cover the United States' actual costs of permit administration and then also to condition the permit on a second fee for recovery of the same costs.

BACKGROUND

The Burning Man event is a "combination art festival, social event, and experiment in community living" that has been held for several decades in various locations in the western United States. Since 1990, the festival has been held most often on public lands in the Black Rock Desert in northwestern Nevada.[1] The event is 8 days long, from the weekend prior to the Labor Day weekend through Labor Day. Attendance at the event has grown from 250 attendees in 1990 to 35,500 in each of 2004 and 2005. According to Environmental Assessment (EA) NV-020-06-EA-11, prepared for purposes of the 2006 permit decision, BRC expected the number of potential participants to rise annually for the half-decade under consideration, potentially approaching 50,000. In response to such anticipated growth, the permit granted by BLM requires a 6% annual growth cap on attendance, which would effectively limit peak attendance to a maximum population of 47,500 in 2010. *See* Decision Record, Burning Man 2006-2010 Special Recreation Permit at 1.

Since at least 2000, BRC has paid a permit fee for its SRP based upon use "per person per day" (pppd). Accordingly, the fee has grown commensurate with the

[1] In 1997, the festival was held on private land in Washoe County, Nevada. In 1998, the festival organizers decided to return to a location on public land at the southern end of the Black Rock Desert, in Pershing County near the city of Gerlach. All Burning Man festivals have taken place on public land since that time.

attending population and individual participants' length of stay. The fee paid for attendance in 2005 was approximately $710,000, rising from $484,000 in 2000.

The pppd SRP fee assessed on BRC for the Burning Man event is a minimum fee derived from a fee schedule published in the *Federal Register*, 64 Fed. Reg. 41133 (July 29, 1999), and authorized by BLM regulations at 43 C.F.R. § 2932.31(c). The standard minimum fixed-rate fee in the fee schedule, and the one paid by BRC, is $4 pppd. *See* Permit at 2 ¶ 5 (handwritten "scheduled payment"). Of the $710,000 in fees paid in 2005, 78 percent (or approximately $553,000) of the total amount collected by BLM was used to cover BLM's costs of processing and administering the permit; it is undisputed that this amount covered BLM's direct and indirect costs for providing law enforcement for the event. BLM Answer at 2; EA at 25. BLM used the remainder of the collected monies (a net proceeds of 22 percent of the total SRP fees collected, or "$150,000 to $200,000") to cover general management of the Black Rock Desert–High Rock Canyon Emigrant Trails National Conservation Area (NCA) during the remainder of the year.[2] BLM Answer at 2; EA at 25, 42. This includes resource protection, visitor services, and public education. *Id.* BLM identifies this portion of its collections as "net proceeds" and avers that it confers a public benefit on recreational resource values and resource protection. EA at 42.

Prior to the 2006 permit decision, BLM provided and funded Federal law enforcement and also reimbursed Pershing County for a share of the local law enforcement it provided for the event. Answer at 2. In 2005, BLM entered into a cooperative agreement with the County pursuant to section 303 of FLPMA, 43 U.S.C. § 1733 (2000), to provide "for the adequate protection of persons and property on the public lands and roads administered by [BLM]." SOR Ex. C, Letter from BLM to Senator John Ensign, attached BLM/County contract at 1. The agreement expressly authorized employees of the Pershing County Sheriff's Department to enforce State and County civil and criminal laws on the public lands within the County during the period of time covering the 2005 Burning Man event. *Id.* at 2, 5. The agreement made "reimbursable" six services, including uniform law enforcement patrol assistance on public lands rendered at the Burning Man event, in an amount up to a maximum of $60,000, subject to a 5 percent adjustment of employee time expended for emergency search and rescue officers. *Id.* at 3-4. The contract created a $10,000 contingency fund for unforeseen investigations. *Id.* at 5.

[2] The 800,000-acre NCA was established by the Black Rock Desert–High Rock Canyon Emigrant Trails National Conservation Area Act, Pub. L. No. 106-554 (Dec. 21, 2000). This legislation endorsed the continued permitting of large-scale group events, presumably including the Burning Man festival which is the largest such event in the region.

According to information provided by attachment to the letter to Senator Ensign, BLM's law enforcement costs for the 2005 Burning Man event totaled $476,041, which included $314,894 for BLM law enforcement, $73,415 for County/State law enforcement agreements, and $87,732 in law enforcement support costs, including such things as trailers, golf carts, and hotel rooms required by law enforcement personnel. SOR Ex. C, telefax to Senator Ensign page 13, "BLM Costs for Managing Burning Man Special Recreation Permit and Event." BLM's Answer gives slightly different figures: BLM claims that it spent $500,000 for 63 (43 Federal) law enforcement officers, $112,000 for Pershing County, and $10,000 for 6 Nevada State officers. Answer at 13. Stating that "BLM management of the event also contributes to local economies," including such things as "hotel rooms, meals, gas and miscellaneous items purchased to support event overhead and law enforcement operations," the EA also asserts, however, that, in 2005, BLM directly spent $300,000 in Nevada for event administration. EA at 25. On the same page, the EA states that $553,000 of the fee was used to process the permit and provide law enforcement. These various dollar figures make it difficult to pin down BLM's position on the Department's "actual expenses" for law enforcement. Nonetheless, BLM plainly represents that the SRP fee collected by BLM from BRC "was used by BLM to process the permit, assure that the permit stipulations were met, and to provide law enforcement at the event." EA at 25. Accordingly, we infer that the 78 percent of fees collected from BRC has, in the past, covered the costs of law enforcement, including BLM's costs to reimburse local agencies for State and local law enforcement.

According to BRC, for a previous Burning Man event for which BLM collected (or considered collecting) fees on a "cost recovery" basis, BRC offered to pay the County directly for local law enforcement expenses, as part of its SRP fee. Statement of Reasons (SOR) at 2 n.2.[3] According to the EA, BRC directly compensates Washoe County, the Nevada Highway Patrol, and the Pyramid Lake Reservation for "direct and indirect costs associated with impacts of the event." EA at 26. Neither party

[3] Departmental rules applicable in years prior to 2000, like those now in effect, required permittees to pay fees either by the fee schedule rate or on a cost recovery basis. In the latter case, "[a]ctual costs to the United States shall be charged in lieu of the fees provided in the schedule." 43 C.F.R. § 8372.4(a)(2) (2000). Thus, where it was obligated to pay fees on a cost recovery basis and make reimbursement for local law enforcement costs as one of the "actual costs of the United States," BRC alleges that it willingly offered to pay the money directly to the County. From this, we infer that BRC does not oppose the obligation to reimburse the United States for law enforcement or to perform that reimbursement by direct payment to the County. Rather, BRC's complaint is that the set $4 pppd fee already covers such "actual costs to the United States," and that, once the fee is collected, BRC cannot be compelled to make a second reimbursement.

explains whether these local agencies are reimbursed directly by BRC for expenses that the United States would otherwise reimburse them for, or whether these local fees would otherwise be considered as costs covered by the pppd fee.

In 2006, BLM imposed stipulation 16, which requires BRC to bear the burden of arranging for State and local law enforcement on the public lands where the event is held. It requires BRC to contract with Pershing County for the County's law enforcement at BRC's expense. This stipulation imposed a substantive change from prior years in which the United States reimbursed the County for its costs from fees collected from BRC. Answer at 2. The stipulation provides:

> *BRC shall provide for adequate law enforcement of state and local laws.* At a minimum, the level of local law enforcement coverage will be *equivalent to that provided for the 2005 operation. BRC will make arrangements with Pershing County to provide reasonable levels of patrol, investigation, and operational overhead capabilities*. Nothing within this stipulation is intended to limit local law enforcement's authority or ability to provide additional levels of coverage as it may deem appropriate. Written evidence of the agreement showing compliance with this stipulation must be provided to BLM by BRC within 45 days after issuance of the Special Recreation Permit, or 30 days prior to the start of the event, whichever is sooner.

(Emphasis added). BRC contends that this stipulation effectively imposes a second permit fee, the first being the $4 pppd and the second being the cost of the Pershing County law enforcement formerly borne by BLM. BRC documents that it has entered into a contract with Pershing County formulated on the basis of the contract established in prior years between BLM and the County. The contract, similar to BLM's previous contract, imposes an additional $66,000 fee on BRC along with a $10,000 contingency fee for 2006. SOR at 3, Exhibit A (BRC/County contract). BRC contends that the financial effect of the stipulation is to increase BLM's "net proceeds" used for non-Burning Man purposes, by increasing the percentage of the $4 pppd fee that exceeds BLM's costs of permit administration. BLM does not discount the accuracy of this statement and mathematically it appears to be so.

BRC contends that it agreed to the stipulation over objection and proceeded to enter into the required agreement with the County. SOR Exhibit A. The record documents not only that BRC objected to the stipulation, but also that the issue of law enforcement has been the subject of open debate among BRC, BLM, members of the public, and members of Congress. The record reflects considerable public comment on law enforcement at the events, and opinion over how it should be provided. *See* Comment Letters and e-mails. News articles assert that BLM has faced increasing law enforcement burdens as the size of the event has grown, and that in

2006 BLM insisted that BRC pay for County law enforcement, while at the same time refusing to reduce the total cost of the SRP fee which previously covered Pershing County's law enforcement costs. *See* May 11, 2006, "Event funding will cease," Lovelock Review (periodical name illegible). Members of Congress, in response to constituent inquiries and concerns about the issue, requested information from BLM about the use of the fees it collects. *E.g.*, SOR Exhibits B and C (Congressional communications).

BRC's position regarding the issue of law enforcement is detailed in a document prepared by consultant Dana Harrison and entitled "Too Much of a Good Thing: How Spiraling Law Enforcement Costs for Burning Man are Threatening Conservation in the [NCA]," June 1, 2005 (Harrison Report). In summarizing BRC's position, this report documents with respect to drug-related arrests that the Burning Man event has significantly fewer law enforcement problems than other mass gatherings, due to its generally educated and older demographic. *Id.* at 5-7. The report documents that as attendee population has steadily risen, per capita incidence of crime has declined. It shows, nonetheless, that BLM's law enforcement costs have increased at a higher rate than the rate of festival population increase. *Id.* at 4-5, Charts 1 and 2. The Harrison Report asserts that, given that BRC privately contracts for a "first-responder" force, the "Black Rock Rangers," the "unprecedented and unwarranted increase in [BLM] law enforcement costs" is an "unmasked grab for cash" that is directly tied to the change in SRP fee management from a cost recovery system to a user fee system. *Id.* at 2.

On the other hand, the record documents BLM's concern that the burgeoning annual population of the festival, rising from 250 to 35,500 in 15 years, poses an unacceptable drain on Federal, State, and local resources. BLM documents the many demands placed upon it and on Nevada local agencies by the "staggering amount of traffic" and "the potential for catastrophic criminal activity," which BLM describes in some detail in refuting the notion that the event is largely crime-free. Answer at 14-15, citing Law Enforcement Reports (SOR Exhibits D-E) and comments therein of Nevada Department of Public Safety; *Hudson v. Warden, Nevada State Prison*, 22 P.3d 1154, 1156-57 (Nev. 2001) (describing life-threatening and violent conduct of a Burning Man participant acting under the influence). BLM also documents the liability it faces for any failure sufficiently to enforce applicable local, State, and Federal laws. Answer at 15, *citing Reed v. U.S. Department of the Interior,* 231 F.3d 501 (9th Cir. 2000).

In fact, BLM's decision to transfer responsibility for law enforcement to BRC is a direct consequence of the increasing liability imposed on governmental agencies from the Burning Man festival, and the general public objection to rising Federal spending for law enforcement services. BLM sought legal advice from the Office of the Solicitor as to the authority to condition BRC's SRP on the stipulation,

complaining that BRC has argued that BLM has "been inefficient in controlling local law enforcement costs for the Burning Man event." In a Memorandum dated April 12, 2006, the Regional Solicitor, Pacific Southwest Region, found legal support for the stipulation and noted that "if BRC is required to directly pay for local law enforcement coverage, then BRC will be able to monitor and control such costs by working directly with local law enforcement officials." Apr. 12, 2006, Regional Solicitor's Memorandum at 1.[4]

ANALYSIS

Our holding is quite narrow and so we begin by explaining what we do not decide. Our ruling is dependent on no particular factual finding regarding either the general law-abiding nature of the festival participants or the justification for BLM's rising law enforcement costs. Both positions are warranted. BRC documents the low number of drug arrest incidents at the Burning Man festival by contrast with the same factor at rock concerts and motorcycle gatherings in or near American cities. Harrison Report at 7. BLM documents the increased risk and liability that the Burning Man festival poses for all law enforcement agencies associated with it, and the related increase in costs and manpower needs. *See also Coalition for the High Rock/Black Rock Emigrant Trail National Conservation Area,* 147 IBLA 92, 199 (1998) (demand by appellants that BLM guarantee "sufficient law enforcement staffing" for Burning Man events).

Likewise, we do not analyze BLM's contentions, Answer at 4-10, that the FLREA's fee provisions authorize BLM to collect, in total, an amount in fees which exceeds the Government's costs of administering the permit. BRC does not challenge the fixed-rate SRP fee for the 2006-2010 permits, nor is it seeking a refund of amounts paid in excess of Government expenses.

BRC's appeal is limited to a challenge to BLM's authority to require, in addition to the fixed-rate fee for the event, which it does not contest, what BRC claims is a cost recovery fee for the same event. BRC's discussion of the relationship between event costs and fee collection comes from its contention that the FLREA generally requires fees to be associated with actual Government costs and that BLM's imposing a burden to reimburse over $66,000 in law enforcement costs that the Department is authorized by law to make to the County, in addition to the fixed-rate pppd fee, reduces the association between the fixed-rate fee and the Government's expenses for the Burning Man event. Whatever BRC's opinions about the fix-rate fee relative to the Government's actual costs, our understanding of its appeal is that it challenges

[4] Considering BLM's contentions regarding the inevitability of cost hikes due to liability and the sheer size of the Black Rock City population, it is unclear whether any expectation that BRC can reduce costs is realistic.

BLM's authority to impose a second fee. Even if we find that the Government has such authority, the ultimate effect of a second fee on the percentage of the SRP fixed-rate fees collected that constitutes "net proceeds" is not before us.

BRC argues that both the FLREA and FLPMA deny BLM authority to impose a second fee. BRC contends that FLPMA's authorization for BLM to permit County involvement in law enforcement for events on public lands and to reimburse the County for its costs is evidence that Congress anticipated that State and local law enforcement costs are an expense of the Federal Government. BRC argues that actual costs of the Government in administering an SRP are chargeable to the permittee, but that such reimbursement derives from either a fixed-rate SRP fee or a cost recovery fee, but not both. BRC claims that BLM may not evade FLPMA and the FLREA, by imposing the burden of State and local law enforcement on a private entity.

BLM reads its regulations to permit BLM to charge the fixed-rate pppd fee, and also to require BRC to bear responsibility for reimbursing the County for State and local law enforcement costs. BLM denies, however, that the stipulation is or imposes a fee and explains that it has "chosen not to pursue cost recovery." Answer at 11. BLM contends instead that stipulation 16 is consistent with the FLREA and Departmental SRP regulations, which permit BLM to impose stipulations at its discretion. BLM claims that FLPMA authorizes BLM to ensure reimbursement of the County's costs of law enforcement for events held on public lands and that BLM has merely ensured that reimbursement will be made by BRC instead of by the Government.

I. The FLREA

Discussion of the current authority governing SRP fees requires addressing the FLREA, and a digression into applicable law prior to the enactment of that legislation in 2004. Sections 303(a) and 310 of FLPMA authorize the Secretary to promulgate regulations to carry out the purposes of FLPMA, including the management, use and protection of the public lands. 43 U.S.C. §§ 1733(a) and 1740 (2000). Section 4(d) of the Land and Water Conservation Fund Act of 1965 (LWCFA), 16 U.S.C. § 460*l*-6a (2000), as amended by section 315 of the Department of the Interior and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, authorized the Secretary to collect fees for recreational use of the public lands and to issue SRPs for group activities and recreation events on those lands. The fees were to be "fair and equitable, taking into consideration the direct and indirect costs to the Government, the benefits to the recipient, the public policy or interest served, the comparable recreation fees charged by non-Federal public agencies, the economic

and administrative feasibility of fee collection and other pertinent factors." 16 U.S.C. § 460*l*-6a(d) (2000).[5]

In 1978, the Department updated pre-existing rules governing SRPs at 43 C.F.R. Subpart 8372, 43 Fed. Reg. 40734 (Sept. 12, 1978). In 1984, it amended the fee provisions for SRPs to ensure that BLM could collect fees to cover its "direct and indirect costs" associated with such permits. 49 Fed. Reg. 34332, 34337 (Aug. 29, 1984). In 2002, the Department revised its regulations at 43 C.F.R. Subpart 8372 (2000), replacing them with new regulations governing SRPs at 43 C.F.R. Part 2930. The regulations were recast in "plain English" and "update[d]" to reflect "changes over the last 15 years in recreational activities and large-scale events." 67 Fed. Reg. 61732, 61740 (Oct. 1, 2002). This rulemaking was promulgated under the authority of the LWCFA, 16 U.S.C. § 460*l*-6a (2000), and section 310 of FLPMA, 43 U.S.C. § 1740 (2000). Subpart 2932 addresses, *inter alia*, SRPs for organized events.

In December 2004, Congress enacted new legislation authorizing the issuance of SRPs and the collection of recreation fees. The FLREA repealed the relevant provisions of the LWCFA, 16 U.S.C. § 6812(a) (Supp. V 2005), subject to a grandfather provision for existing permits, *id.* at § 6804(f)(2). The Departmental rules covering SRPs at 43 C.F.R. Subpart 2932 thus predate enactment of the current statutory authority for them. The Department issued proposed rules in 2005 to modify the regulations to comport with the FLREA in ways not relevant here, 70 Fed. Reg. 70570 (Nov. 22, 2005), finalizing the changes in 2007. 72 Fed. Reg. 7832, 7836 (Feb. 21, 2007) (changes to 43 C.F.R. § 2932.57).

[1] The FLREA authorizes the Secretary to "issue a special recreation permit, and charge a special recreation permit fee in connection with the issuance of the permit, for specialized recreation uses of Federal recreational lands and waters, such as group activities, recreation events, [and] motorized recreational vehicle use." 16 U.S.C. § 6802(h) (Supp. V 2005). The FLREA addresses six criteria with which recreation fees, including special recreation permit fees, *see* 16 U.S.C. § 6801(8) (definition of recreation fee) and (13) (definition of SRP fee), shall be consistent:

> (1) The amount of the recreation fee shall be commensurate with the benefits and services provided to the visitor.

[5] Section 6.a(2)(a) of OMB Circular A-25, released July 8, 1993, ensured that "user charges will be sufficient to recover the full cost to the Federal Government (as defined in Section 6d) . . . ." Section 6.d(1) defines "full cost" as "all direct and indirect costs to any part of the Federal Government" and sections 6.d(1)(a) and (d) ensure that such costs include direct and indirect personnel costs and the costs of enforcement.

> (2) The Secretary shall consider the aggregate effect of recreation fees on recreation users and recreation service providers.
>
> (3) The Secretary shall consider comparable fees charged elsewhere and by other public agencies and nearby private sector operators.
>
> (4) The Secretary shall consider the public policy or management objectives served by the recreation fee.
>
> (5) The Secretary shall obtain input from the appropriate Recreation Resource Advisory Committee . . . .
>
> (6) The Secretary shall consider such other factors or criteria as determined appropriate by the Secretary.

16 U.S.C. § 6802(b) (Supp. V 2005). Though the parties debate the meaning of the first of these criteria, they both agree that it maintains the authority to consider the value of the services provided to the permittee, consistent with the LWCFA's authorization to consider the Government's expenses, as part of the SRP fee. *See also* OMB Circular A-25. We need not decide how much relevance this factor must have for the fee, because both the FLREA and BLM regulations govern the more pertinent question of whether two separate fees may be charged. Both authorities prohibit this.

The FLREA is the "sole recreation fee authority." 16 U.S.C. § 6813(d) (Supp. V 2005). "Recreation fees charged under this chapter shall be in lieu of fees charged for the same purposes under any other provision of law." *Id.* While the FLREA contains a number of provisions governing different types of fees and fee areas, and the proper use of collected monies, nothing in the FLREA authorizes the Secretary to impose fees other than recreation fees, nor does it specify SRP terms. Accordingly, the FLREA is not a direct source of authority for imposing stipulation 16 as a condition of the permit.[6]

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[6] BLM asserts that stipulation 16 requiring "BRC [to] itself ensure adequate local law enforcement through an agreement with" the County is consistent with the FLREA. Answer at 11. BLM cites 16 U.S.C. § 6805 (Supp. V 2005), which is an FLREA provision authorizing the Secretary to enter into cooperative agreements and contracts with governmental and nongovernmental entities. Answer at 13. This provision, however, only authorizes the Secretary to contract with a "governmental entity . . . to obtain law enforcement services." Nothing in this statutory provision relates to SRP conditions BLM may impose on permit holders to provide for law enforcement.

Departmental regulations at 43 C.F.R. Subpart 2932 continue to address fees to be charged for SRPs. The parties appear to be in agreement that the SRP at issue is one for an "organized group activity," defined as "a structured, ordered, consolidated, or scheduled event on, or occupation of, public lands for the purpose of recreational use that is not commercial or competitive." 43 C.F.R. § 2932.5. Fees for SRPs for organized group events are set forth at 43 C.F.R. § 2932.31. This regulation authorizes the BLM Director to establish minimum annual fees, *id.* at § 2932.31(a), which he may adjust based upon enumerated factors, *id.* at § 2932.31(b), and which are to be published as adjusted in the *Federal Register*, *id.* at § 2932.31(c). In adjusting the fee schedule rate, the BLM Director may do so "to reflect changes in costs and the market, using the following types of data: (1) *The direct and indirect cost to the government*; (2) The types of services or facilities provided; and (3) The comparable recreation fees charged by other Federal agencies, non-Federal public agencies, and the private sector located within the service area." 43 C.F.R. § 2932.31(b) (emphasis added).

The parties are in agreement that the $4 pppd fee charged for the Burning Man event is the minimum annual fee described above and was published in the *Federal Register* at 64 Fed. Reg. 41133 (July 29, 1999). This publication established "the [SRP] minimum fee for both competitive and organized group activities or events at $4.00 per person per day. . . . The intended effect is to ensure fees cover administrative costs of permit issuance, a fair return to the U.S. government for use of the public lands, and approach fair market value in certain cases." *Id.* While the publication suggested that BLM and the Forest Service would jointly announce a fee increase, this does not appear to be an issue in this appeal.

BLM implies that the $4 minimum pppd fee is subject to discretionary adjustment by BLM because it is a "general minimum fee . . . whereas event-specific costs may be taken into account by BLM in adjusting such fees or imposing a stipulation that the applicant pay such costs directly." Answer at 12. In fact, BLM's authority to adjust the minimum fee is found in the rule at 43 C.F.R. § 2932.31(b)-(d). If the BLM Director wishes to adjust the minimum annual fee, he must do so through the process identified in 43 C.F.R. § 2932.31(b) and (c), and this adjustment must be published in the *Federal Register* and will apply to all covered permits. Likewise, a State Director may adjust fees in particular circumstances, subject to newspaper publication or "other appropriate public notice." 43 C.F.R. § 2932.31(d). To the extent BLM contends that BLM may adjust the standard SRP-fee on an event-specific basis, however, that authority would appear to be confined to the State Director, as established in the rules just cited.[7]

[7] The *BLM Manual* applicable at the time of the BLM decision on BRC's SRP is consistent with this construction. It explained that group event fees "are set by the

(continued...)

None of the above provisions, however, permits a Field Office to "adjust" the fixed-rate fee by imposing a second and separate fee on a permittee.[8] The regulation at subsection (e) provides the only authority for BLM to charge a fee based on cost recovery instead of the standard fee, permitting BLM to impose (1) *additional* cost recovery for "commercial" use permits for "recovery of processing costs," and (2) *alternative* cost recovery for organized competitive or organized group event permits. 43 C.F.R. § 2932.31(e). BLM may choose the alternative of a cost recovery basis fee for a group event SRP in the following circumstance:

> (2) *Competitive or organized group/event use.* BLM may charge a fee for recovery of costs to the agency of analyses and permit processing *instead of the [SRP] fee, if--*
>
> (i) BLM needs more than 50 hours of staff time to process [an SRP] for competitive or organized group/event use in any one year, *and*
>
> (ii) We anticipate that permit fees on the fee schedule for that year will be less than the costs of processing the permit.

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[7] (...continued)
Director in the form of a minimum fee ($4.00 [pppd] in 2002). State Directors may establish a higher fee when warranted by circumstances." H-2930-1, Oct. 7, 2003, Chap. 1, III.G.d. Notably, BLM updated this portion of the *BLM Manual* 2 months after the decision at issue here, in part to address relevant provisions of the FLREA. BLM Handbook H-2930-1, Aug. 7, 2006. This version of the manual is not applicable here, nor can it amend duly promulgated rules of the Department; nonetheless, its issuance has relevance to BLM's interpretation of the FLREA.

[8] BLM contends that the standard fee assessments are so low that they have no effect on recreation users' decisions to use the public lands. Answer at 8, citing FLREA House Report No. 108-790; *see also* 16 U.S.C. § 6802(b)(2). BLM documents that the standard fee of $4 is "minuscule" in comparison with recreation industry revenues. Answer at 9; *see also* 16 U.S.C. § 6802(b)(3). If BLM believes, as it suggests in its Answer, that the FLREA envisions that the Department's standard fee should more closely approximate market rate revenues realized by the recreation industry, the Director's prerogative is to adjust minimum fees by publication in the *Federal Register*, or to encourage the State Director to adjust event-specific fees with appropriate public notice. 43 C.F.R. § 2932.31(b)-(d). This apparently has not happened, and therefore the propriety of BLM's doing so under its own rules or the FLREA is not before us. *But see* H-2930-1, Aug. 7, 2006, Chap. 2 (addressing FLREA terms in context of special use permits, as opposed to special recreation permits (Chap. 1)).

43 C.F.R. § 2932.31(e) (emphasis in text added). Thus, Departmental rules provide BLM no authority to supplement the fixed-rate minimum permit fee on an event-specific basis with a fee based on the Government's cost recovery. Rather, an SRP fee based on cost recovery is "instead of" the fixed-rate fee, and may be utilized by BLM only under the circumstances set forth in 43 C.F.R. § 2932.31(e)(2).

Accordingly, under both applicable statutory and regulatory authority governing SRP fees, BLM is obligated to impose fees for SRPs. The authority found in the FLREA for recreation fees is exclusive and supplants any other authority in law. For an SRP for a group event, such as the Burning Man festival, BLM may either charge the fixed-rate minimum fee under 43 C.F.R. § 2932.31(a) (which may be adjusted by the Director under § 2932.31(b) and (c), or the State Director under § 2932.31(d)) or a cost recovery fee under 43 C.F.R. § 2932.31(e), but not both. Therefore, to the extent Stipulation 16 is a separate cost recovery fee additional to the $4 pppd minimum fee established by the Director and adopted in its permit, it is not allowed by statute or rule.[9]

As noted above, however, BLM denies that the stipulation is a cost recovery fee. Rather, BLM asserts that authority for the stipulation is found in that portion of the SRP rules providing BLM authority to make stipulated terms a condition of the granting of SRPs, 43 C.F.R. § 2932.41. Answer at 12. This rule states: "What stipulations must I follow? You must follow all stipulations in your approved [SRP]. BLM may impose stipulations and conditions to meet management goals and objectives and to protect lands and resources and the public interest." BLM thus relies on this rule as authority to require, by stipulation, that BRC absorb additional costs over and above the minimum published fee.

BLM is correct in large part. BLM has wide discretion to impose permit stipulations, even ones that might ultimately compel a permittee to contract with another party for services, and we accept that stipulated permit terms might have the consequence of imposing a financial burden on the permittee. For example, BLM is required by section 302(b) of FLPMA to prevent unnecessary or undue degradation of the public lands. 43 U.S.C. § 1732(b) (2000). The record documents a recurrent issue of oil leaks from the many cars visiting the festival site. BLM reasonably may

[9] Notably, 43 C.F.R. § 2932.31(e)(2)(ii) permits cost recovery only if BLM anticipates the "permit fees on the fee schedule for that year [to] be less than the costs of processing the permit." BLM's admission that only 78 percent of the fees collected from the Burning Man event in 2004 and 2005 covered its costs, and that it used 22 percent of the fees collected for other uses within the NCA, would lead to the conclusion that, without more information for 2006, imposing a cost recovery fee would not have been permissible.

impose a stipulation for clean up. Such a stipulation could easily compel BRC to contract with a petroleum product clean-up crew, and to pay for its services.

On the other hand, in reviewing the rule and its regulatory history, it seems clear to us that 43 C.F.R. § 2932.41 was never intended to allow BLM to add a stipulation for a cost recovery fee. Rather, all recovery of the United States' direct and indirect costs was intended to be addressed in the fee provision.

The 2002 rulemaking establishing 43 C.F.R. § 2932.41 explained that it was a revision and recodification of a rule in place since 1978. In publishing the proposed rule in 2000, the Department discussed the rule related to stipulations, proposed at sections 2932.41-.44, and explained: "*Permit Stipulations and Terms*[.] The next several sections deal with permit terms, insurance requirements and bonding requirements. These sections are all based on paragraphs in existing section 8372.5, and do not contain substantive changes." 65 Fed. Reg. 31234, 31237 (May 16, 2000). The final 2002 rulemaking adopted the same version of section 2932.41, without further discussion. 67 Fed. Reg. 61732 (Oct. 1, 2002).

The pre-existing rule addressing stipulations, 43 C.F.R. § 8372.5, appeared in 1978. Until it was revised and recodified in 2002, that rule stated: "*Stipulations*: A special recreation permit will contain such stipulations as the authorized officer considers necessary to protect the lands and resources involved and the public interest in general." 43 Fed. Reg. 40740 (Sept. 12, 1978); 43 C.F.R. § 8372.5(b) (2001). That neither this rule nor the one promulgated in 2002 had anything to do with recovery of the United States' expenses is shown from a side-by-side history of the fee regulation.

The Department established SRP fees in 1978 at 43 C.F.R. § 8372.4 (1979). This fee provision set fees ranging from $1 to $25, with refunds authorized for non-use. *Id.;* 43 Fed. Reg. 40740 (Sept. 12, 1978). This changed in 1984, when the Department established the first fee schedule and fees based on cost recovery in the rule that remained in place until 2002. Notably, while the 1984 rulemaking amended the fee regulation at 43 C.F.R. § 8372.4, it did not change the stipulation rule in place since 1978 at 43 C.F.R. § 8372.5.

A look at this 1984 rulemaking makes clear that the Department meant to address all of the Government's cost recovery in the fees established in 43 C.F.R. § 8372.4. Subsection (a) established a set fee schedule to be phased in over a 3-year period, and published in the *Federal Register* thereafter as "adjusted from time to time to reflect changes in costs." 43 C.F.R. § 8372.4(a) (2001); 49 Fed. Reg. 34334 (Aug. 29, 1984) (phased-in fee schedule published). The Department explained that the factors to be considered in the fee schedule rate derived from the LWCFA, which "requires consideration to be given to . . . direct and indirect costs to the Government

. . . ." 49 Fed. Reg. 34332. Rejecting commenters' suggestions that fees should be based on the amount of environmental degradation caused by permittees, the rulemaking explained that environmental degradation was not a consideration for the fee recovery established in the LWCFA, but was instead considered through means such as the Department's general authority to impose stipulations. Specifically, the rulemaking explained that environmental effects are to be considered in the context of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4370. To the extent impacts are discovered in that process, "as required in 43 CFR 8372.5(b), stipulations to mitigate adverse impact are made part of the terms and conditions of the permit, if it is issued." 49 Fed. Reg. 34332.

The 1984 fee regulations also permitted BLM to charge fees based on actual costs, in lieu of the fee schedule. "Actual costs to the United States shall be in lieu of the fees provided in the schedule when the estimated cost of issuing and monitoring the permit . . . exceeds $5,000, except when the total estimated fees from the schedule over the term of the permit exceed the estimated actual cost." 43 C.F.R. § 8372.4(a)(2) (2001). But the rulemaking prohibited BLM from unilaterally raising fees above the schedule rate if the schedule was used. As proposed, subsection (a)(2) allowed BLM to charge fees higher than the fee schedule in particular circumstances. In response to public comment, however, this provision was deleted. Commenters "feared the authorized officer could indiscriminately raise fees. This provision has been removed in the final rulemaking." 49 Fed. Reg. 34336 (Aug. 29, 1984).

When the Department revised and recodified the rule in 2002, it maintained the fee schedule for commercial, competitive and group permits, but proposed to allow BLM to also charge a cost recovery fee "in addition to those set by the schedule" for "recovery of our administrative costs" when more than 50 hours was required for BLM to process a permit. This appeared in the proposed rule at 43 C.F.R. § 2932.31(d). 65 Fed. Reg. 31242 (May 16, 2000). BLM received considerable public comment on this proposal, the majority from Burning Man festival participants. 67 Fed. Reg. 61734 (Oct. 1, 2002). "Nearly all the comments opposed imposition of both cost recovery and use fees for the same permit." *Id.* Proceeding to consider various authorities, the Department issued the final rule described above, allowing an additional cost recovery element for commercial permits, but only alternative cost recovery in lieu of schedule fees for group events under the conditions established in 43 C.F.R. § 2932.31(e)(2). In response to comments, the rulemaking stated:

> [W]e have made several changes in paragraph (e) [proposed as (d)]. These changes should have the effect of clarifying when cost recovery charges apply and when permit fees apply to commercial, competitive, and organized group activities or events. We separated cost recovery

> requirements for commercial use from competitive or organized group/event use. . . .
>
> . . .
>
> • In cases where we charge for cost recovery for recreational events (as opposed to commercial use), the final rule provides that the charges will be in place of permit fees.
>
> • In some cases where we would normally charge for cost recovery, we may elect to charge a permit fee instead of cost recovery if the permit fee is greater than cost recovery would be.

67 Fed. Reg. 61735 (Oct. 1, 2002).[10]

[3] Considering this history, several things are clear. The stipulation regulation at 43 C.F.R. § 2932.41 is not, and never was intended to be, a rule allowing the imposition of fees for the Government's actual direct or indirect costs. Such costs were to be covered by fees, on either a cost recovery or set minimum fee basis. The rule now in place at 43 C.F.R. § 2932.31 covers SRP fees, as did its predecessor at 43 C.F.R. § 8372.4 (2001). The stipulation rule cannot be construed to allow BLM to transfer to a permit holder Government costs that are also covered by fees. Rather, in promulgating the fee rules, the Department anticipated that the United States' actual direct or indirect costs for group event permits would be recovered with the fees charged under the fee regulations, and that the fee schedule would be adequate to cover such costs. In the case where the Government's actual direct and indirect costs were not covered (and BLM required more than 50 hours to process the permit), BLM could alternatively choose a cost recovery fee. Thus, while BLM most certainly may impose stipulations on the approval of an SRP, this rule does not go so far as to permit BLM to impose a fee that it could not impose under the SRP fee rule at 43 C.F.R. § 2932.31.

[10] It is worth pointing out that the *BLM Manual* as revised on Aug. 7, 2006, states that "[f]ees are charged on a per person bas[is] ($4.00/person/day in 2005). Permittees will pay the minimum fee plus any fees due in excess of the minimum fee. State Directors may establish a higher fee when warranted" based on enumerated factors. H-2930-1, Aug. 7, 2006, Chap. 1, III.G.2.d, at 26. As terms of the *BLM Manual* may not amend existing regulations, we do not construe the full sentence quoted to change the terms of 43 C.F.R. § 2932.31, as promulgated, and presume that the "fees in excess of the minimum fee" refer to higher fees established by the State Director, as addressed in the next sentence of the *Manual* and 43 C.F.R. § 2932.31(d).

What has not yet been answered by our discussion is whether stipulation 16 imposes a fee or not within the meaning of 43 C.F.R. Subpart 2932. On the face of it, the transfer of money is not mentioned in the stipulation. Rather, the stipulation directs BRC to ensure State and local law enforcement on the public lands during the festival.[11] Our analysis thus arrives at the following question: When an SRP holder is paying the fixed minimum fee addressed at 43 C.F.R. § 2932.31(c), does 43 C.F.R. § 2932.41 authorize BLM to add a stipulation requiring the permittee to contract for and pay the costs of providing State and local law enforcement on the public lands that previously were treated by BLM as part of the Government's direct or indirect costs recovered by fees collected as established in the minimum fee schedule? Answering the question requires advertence to FLPMA.

II. FLPMA

BLM's position on whether FLPMA provides authority for stipulation 16 is not entirely clear. In response to BRC's challenge that FLPMA is not a source of authority for the stipulation, BLM cites FLPMA section 303, 43 U.S.C. § 1733 (2000). Answer at 12-13. Whether BLM believes that this statutory provision gives it direct authority for the stipulation is never clearly articulated. In any event, the relevance of this provision of FLPMA is that, given the responsibility of the Secretary of the Interior for law enforcement on the public lands administered by the Department, section 303 ensures that the Secretary has authority to negotiate with local agencies for their assistance in enforcing Federal laws, and also to enter into cooperative, contractual arrangements with them to enforce State and local laws on the public lands of the United States. "The Secretary is authorized to cooperate" and "[s]uch cooperation may include reimbursement" to the local agency for expenditures incurred by it . . . ." FLPMA section 303 states [12]:

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[11] BLM goes to some lengths to explain that it has authority and discretion to determine the level of law enforcement necessary on the public lands. Answer at 14-16, citing, *inter alia*, 43 C.F.R. § 1733 (2000), and *Reed v. U.S. Department of the Interior,* 231 F.3d at 505-06. We do not question this authority. BLM fails to explain how it can, by stipulation, bestow that discretion on a required private agreement between the County and the permit holder. In the current *BLM Manual*, the provision addressing stipulations states that "BLM shall not additionally stipulate or otherwise regulate matters that are the responsibility of other Federal, State, or local agencies." H-2930-1, Aug. 7, 2006, Chap. 1, III.L.2, at 42 (special stipulations). As this version of the *Manual* did not apply in this case, we need not decipher the meaning of this provision as it might apply to stipulation 16.

[12] Subsection (g) is regularly cited as the authority for the Secretary to hold persons in trespass on the public lands. *See* 43 C.F.R. Part 2920. Subsection (a) is the

(continued...)

> **(c) Contracts for enforcement of Federal laws and regulations by local law enforcement officials; procedure applicable; contract requirements and implementation**
>
> (1) When the Secretary determines that assistance is necessary in enforcing Federal laws and regulations relating to the public lands or their resources *he shall offer a contract to appropriate local officials* having law enforcement authority within their respective jurisdictions with the view of achieving maximum feasible reliance upon local law enforcement officials in enforcing such laws and regulations. The Secretary shall negotiate on reasonable terms with such officials who have authority to enter into such contracts to enforce such Federal laws and regulations. . . .
>
> (2) The Secretary may authorize Federal personnel or appropriate local officials to carry out his law enforcement responsibilities with respect to the public lands and their resources. . . .
>
> **(d) Cooperation with regulatory and law enforcement officials of any State or political subdivision in enforcement of laws or ordinances**
>
> In connection with the administration and regulation of the use and occupancy of the public lands, *the Secretary is authorized to cooperate with the regulatory and law enforcement officials of any State or political subdivision thereof* in the enforcement of the laws or ordinances of such State or subdivision. *Such cooperation may include reimbursement to a State or its subdivision* for expenditures incurred by it in connection with activities which assist in the administration and regulation of use and occupancy of the public lands.

43 U.S.C. § 1733 (2000) (emphasis added). Subsection (c) "authorizes the Secretary to contract with local officials for law enforcement services where the Secretary considers that assistance is necessary to enforce federal laws and regulations on public lands." Smyth, Paul "Federal Law Enforcement Authority on Public Lands: Reality or Mirage?" 21 *Arizona Law Review* at 494. Subsection (d) is a relief provision; Congress expected the Secretary to construe it broadly to provide financial

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[12] (...continued)
provision granting the Secretary the authority to enforce Federal law on the public lands, and subsection (b) provides authority to impose penalties for violations of law there. *See generally* Smyth, Paul, "Federal Law Enforcement Authority on Public Lands: Reality or Mirage?" 21 *Arizona Law Review* 485, 490-93 (1979).

assistance where "the existence of large areas of public lands deprives the governmental entity of adequate enforcement . . . ." *Id.* at 496, citing H.R. Rep. No. 1163, 94th Cong., 2d Sess. 15 (1976).

This provision of FLPMA does not address BLM's authority to impose stipulations on SRP holders, impose fees for SRPs, or shift to private parties the Secretary's authority to "cooperate" with local agencies. Nor does it address BLM's authority to require SRP holders to reimburse State or local agencies for law enforcement expenditures incurred for their events. The language of section 303 makes clear that it is the Secretary's obligation to ensure Federal law enforcement on public lands and the Secretary's authority to cooperate with local agencies for the enforcement of State and local laws there, and that "such cooperation," defined to include "reimbursement" for local agencies' costs, is an obligation of the Secretary. Thus, FLPMA establishes that law enforcement, whether undertaken by BLM or by local agencies by virtue of cooperative arrangements between the Department and such agencies, is an actual cost of the United States. This is reinforced by the FLREA at 16 U.S.C. § 6805(a)(3) and (b) (Supp. V 2005), which sections, like their FLPMA counterparts, permit the Secretary to enter into agreements with State and local agencies for law enforcement and for reimbursements to those agencies for their expenditures.[13] BLM effectively concedes this point in discussing the necessary burden that monitoring the Burning Man event imposes on it. Answer at 14-16. But the authority for BLM to recover those costs from a permittee is found in the fee authority of the FLREA, and nowhere else.

Therefore, we agree with BRC that BLM did not have authority in 43 C.F.R. § 2932.41 (the stipulation rule) to add a stipulation, the effect of which was to take direct or indirect costs of the Federal Government, compensated and covered by the fee schedule rate for an SRP, and impose them on the permittee. This was not the purpose of that rule. In promulgating the 2002 rules, the Department revealed its intention, for group permits such as BRC's, to ensure that BLM charges either a fee based on the minimum fee schedule (or as adjusted by the State Director), or a cost recovery fee, but not both. BLM has effectively charged both here. We recognize BLM's argument that it is not charging a cost recovery fee, Answer at 11-13, and that it is requiring BRC to contract with the County for services. While this is true, the above analysis of FLPMA, the FLREA, and even BLM's past practices confirm that the central aspect of the stipulation is to transfer a cost recovery element supplemental to the SRP fee charged to BRC. This BLM cannot do.

[13] It is also reinforced by the policy established in the 2006 *BLM Manual,* which states that, when BLM collects an SRP fee based on cost recovery, "[l]aw enforcement directly related to the activity or event" is an appropriate cost. H-2930-1, Aug. 7, 2006, at III.H.1.a.2, at 29.

Nothing in this holding should be read as prohibiting BLM's exercise of discretion to set stipulations, the effect of which may require a permit holder to undertake actions which impose financial burdens. Where the line is drawn between our holding here and such permissible stipulations depends on expenses for which the Government is responsible. Under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), BLM is obligated to condition any authorized use of the public lands on prevention, whether by a miner or an SRP holder, of unnecessary and undue degradation. If payment is required for clean up necessary to accomplish that purpose, so be it. By contrast, section 303 of FLPMA, 43 U.S.C. § 1733 (2000), and section 806 of the FLREA, 16 U.S.C. § 6805 (Supp. V 2005), both address the Secretary's authority to enter into cooperative agreements and contracts with State, County, and local agencies for law enforcement "in connection with administration and regulation of the use and occupancy of the public lands." 43 U.S.C. § 1733 (2000). Both laws authorize the Secretary to reimburse the local agencies for their expenses. This reimbursement is plainly a cost of the Federal Government. It is thus both a "direct or indirect cost" considered in establishing the fee schedule for SRP fees, 43 C.F.R. § 2932.31(b), and also an actual expense collected from a permittee when fees are charged on a cost recovery basis, 43 C.F.R. § 2932.31(e).[14] That BLM agreed with this point of view is reflected by the fact that it routinely paid the County for its local law enforcement expenses for some years, and collected sufficient fees from BRC to cover those costs, with proceeds left over. When BLM seeks to compel by stipulation a permittee to pay the Government's actual expenses which are recouped in SRP fees charged under the fee schedule, it is engaging in the double charging it explicitly repudiated in the 2002 rulemaking.

To the extent BLM chooses in a particular case to charge SRP fees based on cost recovery under 43 C.F.R. § 2932.31(e)(2), instead of the fee schedule under subsection (c), we need not decide whether a permittee may agree to a stipulation requiring it to make direct payment of those costs to the County. To the extent the fee holder agreed, as BRC indicated here that it would agree, to make such payments directly to a third party, however, the authority for such a condition would include the fee rule at 43 C.F.R. § 2932.31(e).

[14] As noted, the current *BLM Manual* identifies costs of "law enforcement directly related to the activity or event" as "an appropriate cost" under cost recovery procedures. H-2930-1, Aug. 7, 2006, Chap. 1, III.H.1.a.(2). It does not list it under "other fees associated with SRPs," such as application, assigned site, exclusive use, and grazing fees. *Id.* at Chap. 1, III.G.2.f.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, that part of BLM's decision to award the SRP to BRC subject to stipulation 16 is reversed, and stipulation 16 is declared void.

/s/
Lisa Hemmer
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge