

INTERIOR BOARD OF LAND APPEALS

Bookcliff Rattlers Motorcycle Club

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BOOKCLIFF RATTLERS MOTORCYCLE CLUB

IBLA 2004-151

Decided December 20, 2006

Appeal from a decision by the Moab (Utah) Field Office, Bureau of Land Management, denying a cost recovery fee waiver and providing cost recovery estimates for a competitive off-road motorcycle event. MFO-062-03-040R.

Affirmed as modified.

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

Anyone organizing an event that poses an appreciable risk of damage to public land or related water resource values must apply for and receive a special recreation permit from BLM. A not-for-profit motorcycle club promoting a competitive group event on public lands requiring a special recreation permit falls within the class of persons or groups subject to section 304(b) of FLPMA, 43 U.S.C. § 1734(b) (2000), and its implementing regulations at 43 CFR Subpart 2932, and is not entitled to a waiver of cost recovery fees pursuant to 43 CFR 2932.34.

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

The regulation at 43 CFR 2932.31(e)(2) authorizes BLM to recover the costs of issuing a special recreation permit which requires more than 50 hours of BLM staff time to process. The application of that regulation to a not-for-profit motorcycle club that has filed an application for a special recreation permit to hold a competitive motorcycle race on public lands is consistent with its statutory basis and is not unreasonable.

3. Administrative Practice--Public Lands: Special Use Permits--Special Use Permits

Where BLM makes use of computer spreadsheets or other documentation to accumulate data upon which a cost estimate for a special recreation permit is based, it must reveal underlying data sufficient for the applicant to ascertain the justification for BLM's conclusions; otherwise, an applicant has no basis upon which to understand and accept BLM's decision or, in the alternative, to appeal and dispute it.

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

Where the record as supplemented on appeal demonstrates that BLM's technical experts carefully documented the underlying rationale for their cost recovery estimates with respect to a special recreation permit and application for a competitive motorcycle race on public lands, and the appellant did not show by a preponderance of the evidence that the estimates calculated by BLM experts are based on an error in methodology, data, or analysis or are otherwise unreasonable, BLM's estimates of cost recovery are properly affirmed.

5. Federal Land Policy and Management Act of 1976: Applications: Generally

Section 304(b) of FLPMA, 43 U.S.C. § 1734(b) (2000), authorizes the Secretary to require a deposit that is intended to reimburse the United States for reasonable costs incurred by the Secretary in processing applications relating to the public lands. It does not require the Secretary to offset the Department's reasonable costs by expenses the applicant may have incurred in furtherance of its application, even if they in some measure benefit the general public interest or serve the public good.

6. Federal Land Policy and Management Act of 1976:  
Applications: Generally

BLM may not recover management overhead costs as reasonable costs associated with applications for special recreation permits on the public lands. 43 U.S.C. § 1734(b) (2000).

7. Administrative Authority: Estoppel--Estoppel

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by the acquiescence of its officers or their neglect of duty, failure to act, or delays in the performance of their duties or laches.

APPEARANCES: Paul A. Turcke, Esq., Boise, Idaho, for Bookcliff Rattlers Motorcycle Club; Paul W. Mortensen, Esq., for Utah Shared Access Alliance; James E. Karkut, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Bookcliff Rattlers Motorcycle Club (BRMC) appeals from a January 2, 2004, decision of the Moab (Utah) Field Office, Bureau of Land Management (BLM), denying its request for waiver and its protest<sup>1/</sup> of cost recovery fee estimates prepared on November 28, 2003, for processing an application for a special recreation permit (SRP) for BRMC's proposed off-road motorcycle race in the White Wash Sand Dune and Ten Mile Wash and Canyon areas, located in east central Utah, south of Interstate 70 and east of the Green River.<sup>2/</sup>

<sup>1/</sup> In its Dec. 17, 2003, letter to BLM, BRMC requested a waiver of fees, and listed nine points concerning why cost recovery fees should not be applied to its endeavor. To the extent BLM argues in its Answer to BRMC's Statement of Reasons (SOR) that BRMC's appeal is limited to the waiver question, we reject it. BRMC's Dec. 17, 2003, letter is properly construed as a protest to BLM's proposed cost recovery assessment as well. See 43 CFR 4.450-2.

<sup>2/</sup> The starting point of the race is expected to be 10 miles south of Exit 173 on Interstate 70. See flyer entitled "Dubinky Still Run 2001" attached to BRMC's Application for SRP received by BLM on Aug. 22, 2003; Map entitled "Bookcliff Rattlers 2003 Race Alternatives."

Section 304(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1734(b) (2000), provides as follows:

The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to [the public] lands. \* \* \* As used in this section “reasonable costs” include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities.

Departmental regulation 43 CFR 2932.31(e) provides that BLM may recover “costs to the agency of analysis and permit processing” for issuing an SRP, including “necessary environmental documentation, on-site monitoring, and permit enforcement,” if BLM needs more than 50 hours of staff time to process the permit. In its November 28, 2003, letter, BLM proposed three alternative cost recovery assessments, based upon which race course BRMC ultimately chose. BRMC generally contends that 43 CFR 2932.31(e) does not conform with section 304(b) of FLPMA and is therefore unreasonable; argues that BLM has arbitrarily applied the cost recovery regulation in this instance; and claims that BLM’s cost estimates are unjustified and unreasonable, as, among other things, BLM failed to properly document cost estimates and to take into account both its own Environmental Assessment (EA) prepared for a BRMC race held on the same course in 2001, as well as cultural surveys BRMC undertook at its own expense.

BRMC’s efforts to conduct desert motorcycle racing in the White Wash Sand Dune and Ten Mile Canyon areas began in August 1999, when it proposed a two-loop race to be held on March 25, 2000. (EA UT-062-01-015 at unnumbered 2; BRMC SRP Application for Mar. 25, 2000, motorcycle race.) The 2000 race would have traveled through the Ten Mile Wash south of Dripping Spring. (BRMC Map dated August 1999.) <sup>3/</sup> BLM informed BRMC in September 1999 that it would not route

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<sup>3/</sup> BRMC’s 1999 race proposal envisioned a smaller Loop One starting at the White Wash Sand Dunes, then heading southeast down the White Wash through Duma Point to Dripping Spring, then looping through a segment of Ten Mile Canyon, then heading north across Red Wash and back to the start. (EA UT-062-01-015 at unnumbered 5.) The larger loop of the race, Loop Two, headed north to Dee Pass, then east to Levi Well, then south and west to Dripping Spring via a route south of the Ten Mile Wash, where it proceeded to the finish point via a route north of Ten Mile Wash. See BRMC Map dated Aug. 1999. The course BLM approved in 2001 essentially tracked Loop Two, but it added an approach to Duma Point from the

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the course through Ten Mile Wash because it contains sensitive riparian areas. (Letter dated Sept. 23, 1999, from William Stringer, BLM, to Chris Barney, BRMC.) Additionally, BLM stated, a cultural resource inventory for the affected locale would be required prior to permit approval, but BLM archaeologists could not conduct one for at least a year, although BRMC could hire an approved private archaeological firm to do so. Id.

On August 29, 2000, BLM received a revised SRP application from BRMC and a letter reporting completion of a cultural inventory for the area encompassed by Loop Two. (Letter from John M. Potter to BLM dated Aug. 28, 2000.) That proposal abandoned plans to run the Ten Mile Wash south of Dripping Spring. Instead, it proposed a single loop course primarily following proposed Loop Two, but adding an approach looping around Duma Point from the south. But the revised course retained the 1¼-mile section of the Ten Mile Wash above Dripping Spring. At the end of the Ten Mile Wash run, riders would begin their approach to Duma Point. See n.3 supra; EA UT-062-01-015 at Map No. 1.

On March 7, 2001, subsequent to completion of the EA and a Finding of No Significant Impact (FONSI), BLM approved the SRP for the March 10, 2001, race. The permit approved a course that essentially followed Loop Two, but BLM rejected BRMC's proposal to route the race course through 1¼ miles of Ten Mile Wash. (EA UT-062-01-015 at unnumbered 3.) It rerouted the course to Dripping Spring along the Levi Well Road in order to protect sensitive riparian areas in Ten Mile Wash. (Stipulation 14 to SRP UT-062-01-015; see also EA UT-062-01-015 at unnumbered 4.) Stipulation 16 of the permit required BRMC to pay a competitive use permit fee of \$4 per participant, or 3 percent of gross receipts, whichever was greater.

The race was held as scheduled on March 10, 2001. It garnered 263 participants, and on April 11, 2001, BRMC remitted a permit fee based on \$4 per entrant less the \$75 application fee, for a total of \$977. See BRMC letter to BLM dated Apr. 9, 2001. Ten BLM employees were assigned to monitor the race and document pre- and post-race conditions. See Staff Reports dated Mar. 9, 10 (five reports), 16, 19, and 21, 2001.

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<sup>3/</sup> (...continued)

south (rather than from the north as BRMC had proposed) by heading north from the Levi Well Road at Dripping Spring on primarily single track trails eventually looping around Duma Point, then heading back towards the Red Wash on jeep trails. See, e.g., Monitoring Report by Katie Stevens and attached Map; EA UT-062-01-015 at Map Nos. 1 and 2.

Subsequently, BRMC and the Utah Trail Machine Association obtained a \$20,000 grant to conduct cultural resource inventories in the vicinity of the Ten Mile Wash. (Letter from Potter dated May 3, 2001.) A May 10, 2002, report prepared by Montgomery Archaeological Consultants (Montgomery) surveyed the Ten Mile Wash and Crystal Geysir Areas, including the portion of the 1999 proposed Loop One course traversing Ten Mile Canyon. (SOR, Ex. D at Figure 3 (page 7).)

On August 22, 2003, BRMC submitted the SRP application at issue in this appeal, which proposed a second competitive motorcycle race to be held in the White Wash/Ten Mile Wash area.<sup>4/</sup> The proposed course essentially combines the northern and eastern sections of the 2001 course with the southern and western segments of Loop One as proposed in 1999 (see n.3), and resurrects the proposal to include portions of the Ten Mile Wash both north and south of Dripping Spring. The application estimated that 150 competitors, 200 spectators, and 25-30 staff would be in attendance. (“Event Operating Plan” attached to 2003 SRP Application, at ¶ 1.)

BLM officials met with BRMC representatives in late September 2003 to discuss the application. See Sept. 29, 2003, letter from Potter to Russell von Koch, BLM. They advised BRMC that new BLM regulations require applicants to pay for staff time spent in excess of 50 hours for evaluating an SRP application, and proposed that BRMC amend the race course to route it around Ten Mile Wash in order to avoid expenditures of staff time that could result in a cost recovery assessment. Id. at 1-2. BRMC responded that it preferred to “keep the Ten Mile Wash section in” and requested that BLM “review our application accordingly.” Id. at 2.

On November 28, 2003, BLM issued a letter to BRMC stating that, under 43 CFR 2932.31(e)(2), cost recovery is appropriate because over 50 hours of staff time would be required to process an SRP for the race, and that it had developed alternative cost estimates for the 2004 race based on which race course BRMC ultimately chooses. (Nov. 28, 2003, BLM letter to BRMC at 1.) In addition to the course proposed by BRMC (the “proposed action”), BLM suggested two alternatives that would require less staff time on BLM’s part. Id. at 2. We will describe these alternatives in more detail infra. BLM included with the November 2003 letter a “Proposed Race Cost Estimate” in the form of a chart (or table) delineating costs for each of the three alternatives. In calculating costs, BLM multiplied the number of total number of staff hours estimated to be needed to administer each alternative by the “average hourly rate for Utah BLM employees as required by the BLM Director’s National Fee Schedule for recreation.” Id. at 2. BLM estimated that it would need between 196 and 414 hours to administer the race, depending on the alternative

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<sup>4/</sup> The application proposed that the race be held in March 2004. The application is still active, pending the outcome of this appeal.

chosen. Id. at 1. In addition to staff time, BLM included projected estimates for vehicle costs and map preparation work, and a “17.3 percent surcharge that BLM’s National Business Center assesses for setting up and maintaining contributed funds accounts.” Id. at 2. In sum, BLM estimated total cost recovery for the proposed alternative to be \$19,606; for Alternative One, \$10,482; and for Alternative Two, \$9,256. Id. at 2.

BRMC filed a protest and request for waiver of the fee on December 19, 2003. BLM denied the protest on January 2, 2004, stating that the SRP regulations permit a waiver of fees “on a case-by-case basis for accredited academic, scientific, and research institutions, or administrative uses.” (Decision at 1.) BLM stated that the BRMC competitive motorcycle race did not qualify for a waiver under “43 CFR 2933.32,”<sup>5/</sup> and rejected BRMC’s arguments that the cost recovery provision should not apply and that BLM’s estimates were arbitrary. Id. at 1-4.

BRMC and the Colorado Off-Highway Vehicle Coalition (COHVC) timely appealed. On July 7, 2004, BLM moved to dismiss COHVC as a party on the ground that it lacks standing to appeal. On July 13, 2004, the Board issued an order taking the motion to dismiss under advisement; we now address that motion. Under 43 CFR 4.410(a), in order to have standing to appeal a BLM decision, an appellant must be a party to the case and be adversely affected by the dismissal decision. To be a “party to a case” a person must have actively participated in the decisionmaking process regarding the subject matter of the appeal. 43 CFR 4.410(b); Southern Utah Wilderness Alliance, 164 IBLA 1, 4 (2004). There is no record of COHVC’s participation in this matter, as an applicant or otherwise, prior to its attempt to join in this appeal. See, e.g., Friends and Residents of Log Creek, 150 IBLA 44, 46-47 (1999). Accordingly, we dismiss COHVC’s appeal for lack of standing under 43 CFR 4.410.<sup>6/</sup>

On August 31, 2004, we received a motion for leave to file a Brief Amicus Curiae from the Utah Shared Access Alliance (USAA) in support of appellants. USAA represents itself as “Utah’s largest motorized access advocacy organization.” (Motion for leave to file Amicus Brief at 1.) It states that its members have visited the lands at issue here “for motorized recreation (including competitive racing), mountain biking,

<sup>5/</sup> This is a typographical error; the SRP regulation to which BLM refers is found at 43 CFR 2932.34.

<sup>6/</sup> Counsel for BLM correctly states that dismissal of COHVC as a party to this case for lack of standing “will not affect or limit the issues raised on appeal by the Motorcycle Club.” (Motion to Dismiss at 4.) Thus, our granting BLM’s motion is a mere formality, in that other than being named as an appellant, COHVC has not actually appeared before the Board in this proceeding.



sightseeing,” and various other recreational activities. Counsel for USAA represents that he has spoken with counsel for BLM, who does not object to USAA’s filing an Amicus brief. USAA’s motion is granted.

In its SOR, BRMC contends that 43 CFR 2932.31(e) is unreasonable on its face, as BRMC is not within the class of users who are properly assessed cost recovery fees under FLPMA (SOR at 7); the 50-hour threshold for triggering cost recovery is arbitrary, id. at 7-8; and the terms of the regulation do not comport with section 304(b) of FLPMA, id. at 6-7. BRMC argues that BLM’s January 2, 2004, decision fails to support BLM’s refusal to grant BRMC’s request for waiver of the fees; it is improperly based on the Office of Management and Budget’s (OMB) Circular A-25 and BLM’s Recreation Permit Administration Handbook, id. at 2, 3, 4-5, 6; it fails to provide adequate information concerning how the cost recovery assessment was calculated, id. at 8-9; and it fails to take into account environmental documentation completed for the 2001 race, id. at 4. The Amicus and BRMC assert that BLM’s decision fails to consider factors set forth in section 304(b) of FLPMA that would justify lowering the cost recovery assessment. (SOR at 6-7; Amicus Brief at 3-6.) They further argue that BLM arbitrarily singled out the 2003 BRMC race as a test case for application of the regulation, and that, consequently, BRMC has been treated differently from other similarly situated groups seeking special use permits. (SOR at 3; Amicus Brief at 6.)

SRPs are issued under the general authority of the Secretary of the Interior to administer use of the public lands, pursuant to section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000). BLM has considerable discretion under section 302(b) in approving and issuing SRPs. See 43 CFR 2932.26; Daniel T. Cooper, 150 IBLA 286, 291 (1999) (affirming a BLM decision denying off road motorcycle racing involving over 50 vehicles over existing unpaved roads within a wilderness area). An exercise of the Secretary’s discretionary authority to administer SRPs must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion. Larry Amos d/b/a Winterhawk Outfitters, Inc., 163 IBLA 181, 188 (2004). If a decision has any rational basis, it will not be held arbitrary and capricious. Obsidian Services, Inc., 155 IBLA 239, 248 (2001) (affirming a BLM decision denying an SRP due to the prior record of the applicant). An appellant appearing before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision is in error. Larry Amos, 163 IBLA at 190.

Section 304(a) of FLPMA, 43 U.S.C. § 1734(a) (2000), authorizes the Department to establish reasonable charges with respect to applications for use of the public lands. It authorizes the Secretary to “require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications \* \* \* relating to such lands.” It defines “reasonable costs” as including,

but not limited to, “the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance and termination of any authorized facility; or other special activities.” *Id.* Section 304(b) further provides:

In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

The regulations at 43 CFR Part 2930 were promulgated by the Department pursuant to section 304(b) of FLPMA, and became effective on October 31, 2002. 67 FR 61732 (Oct. 1, 2002). Departmental regulation 43 CFR 2932.31(e)(2) established a new cost recovery system for processing SRPs for competitive or organized group events. <sup>27</sup> If BLM anticipates that it will need more than 50 hours of staff time in any one year to process an SRP and “permit fees on the fee schedule for that year will be less than the costs of processing the permit,” it may assess charges for “BLM’s costs of issuing the permit, including necessary environmental documentation, on-site monitoring, and permit enforcement.” *See* 43 CFR 2932.31(e)(2) and (e)(3). Cost recovery charges for competitive or organized group events are in lieu of the SRP fee. 43 CFR 2931.32(e)(2).

With this legal framework in mind, we turn to the specific matters raised on appeal.

[1] We reject BRMC’s contentions that FLPMA mandates the exclusion of non-profit recreational users of the public lands from its cost recovery provisions, and its ancillary argument that BLM’s January 2, 2004, decision is in error because BLM did not grant its request for a waiver of cost recovery fees. Section 304(b) of FLPMA does not limit cost recovery by type of applicant, type of application, or type of

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<sup>27</sup> The regulations pertaining to SRPs were formerly found at 43 CFR Subpart 8372. Those regulations were recast in “plain English” and “update[d]” to reflect “changes over the last 15 years in recreational activities and large-scale events.” *See generally* 67 FR at 61740. The former regulation governing SRP fees, 43 CFR 8372.4(a)(1), provided a fee schedule. However, actual costs to the United States were to be charged in lieu of the fees in the SRP fee schedule “when the estimated cost of issuing and monitoring the permit (estimated at the time of application) exceeds \$5,000, except when the total estimated fees from the schedule over the term of the permit exceed the estimated actual cost.” 43 CFR 8372.4(a)(2).

activity. Regulation 43 CFR 2932.31(e) likewise is not limited to commercial uses of the public lands, but applies to both commercial uses (subsection (e)(1)), and also competitive use and “organized group/event use[s]” (subsection (e)(2)). It is this latter provision that applies here. “Competitive use” is defined as “[a]ny organized, sanctioned, or structured use, event, or activity in which 2 or more contestants compete” for which either “participants register, enter, or complete an application for the event” or “a predetermined course or area is designated,” or both. 43 CFR 2932.5.” An “organized group/event” that is not competitive is also subject to cost recovery. 43 CFR 2932.31(e)(2). “Organized group activity” means “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 CFR 2932.5. Thus, even if BRMC offered the opportunity to competitors to enter the race free of charge, or to run the course in a noncompetitive manner, it would still be subject to the cost recovery provisions of 43 CFR 2932.31(e).

BLM may, on a case-by-case basis, grant waivers of recreation permit fees for accredited academic, scientific, and research institutions, therapeutic, or administrative uses. 43 CFR 2932.34.<sup>8/</sup> This Board has held that a waiver of fees due for an SRP may not be obtained when the application for use of the public lands is primarily for recreational purposes. Camp Redcloud, Inc., 162 IBLA 84, 95 (2004).<sup>2/</sup> BRMC made no showing that it qualifies for a waiver of fees pursuant to 43 CFR 2932.34.

BRMC argues that BLM’s January 2, 2004, decision erroneously relies on OMB Circular A-25, which, it claims, is an unpublished memorandum that imposes requirements more restrictive than those set forth in section 304(b) of FLPMA (SOR at 2, 4-5) and, in any event, BRMC “stand[s] to derive no ‘special benefit’ from ‘Federal activities beyond those received by the general public’” (SOR at 4, quoting from OMB Circular A-25 (attached to the SOR as Ex. E) at ¶ 6.) This Circular specifies that it “is intended to be applied only to the extent permitted by law.” Id. at ¶ 4b. Section 304(b) of FLPMA provides that cost recovery may be reduced

<sup>8/</sup> Regulation 43 CFR 2932.12 authorizes BLM to waive the requirement to obtain a permit for competitive or organized group activities under circumstances not relevant here. Under that regulation, however, permits may not be waived when the use poses an “appreciable risk for damage to public land or related water resource values” and requires “specific management or monitoring,” both of which are the case here. See 43 CFR 2932.12(c)(4) and (c)(5).

<sup>2/</sup> While Camp Redcloud was decided under 43 CFR 8372.4(c)(2) and (c)(3), BLM took pains to point out in the Preamble to the new rule that the activity must qualify for the waiver, and that recreational outings may not obtain a waiver. 67 FR at 61735. See also n.7, supra.

by “that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant,” thus endorsing, albeit in the negative, the understanding that costs incurred for the special benefit of an applicant are “reasonable costs.”

We reject BRMC’s assertion that its application confers no special benefit to it with respect to these lands vis-a-vis other members of the public as disingenuous. BRMC is sponsoring a competitive motorcycle race. Anyone organizing a competitive event on the public lands that poses an appreciable risk of damage to public land or related water resource values must apply for an SRP and obtain approval from BLM. BRMC’s competitive motorcycle event poses such a risk. See EA UT-062-01-015 and the ten Monitoring Reports of the Dubinky Still Run issued by BLM staff in March 2001. By virtue of BLM’s commitment of resources to BRMC’s application, BRMC is receiving a special benefit from BLM that members of the public who do not apply for or participate in competitive motorcycle events held on public lands do not receive.

BLM correctly determined that BRMC is within the class of persons or groups properly subject to the cost recovery provisions of FLPMA and regulations enacted pursuant thereto, and is not entitled, pursuant to 43 CFR 2932.34, to a waiver of cost recovery fees.

[2] We now consider BRMC’s challenges to the cost recovery regulation. BRMC argues that the SRP cost recovery regulation is unreasonable because the regulation arbitrarily sets a 50-hour administrative threshold for triggering cost recovery, and it fails to incorporate the limiting factors in section 304(b).

It is well settled that the Secretary of the Interior is bound by his own regulations. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950). Likewise, this Board has no authority to declare a duly promulgated regulation invalid, and such regulations have the force and effect of law and are binding on it. Kathleen S. Rawlings, 137 IBLA 368, 372 (1997); Alamo Ranch Co., Inc., 135 IBLA 61, 69 (1996); Ruth Tausta-White, 127 IBLA 101, 103 (1993); Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990). Nonetheless, the Board is vested with the authority to determine in the context of deciding an appeal whether or not a regulation as applied to an appellant is consistent with its statutory basis. Alamo Ranch Co., Inc., 135 IBLA at 67, 69-71.

The Secretary’s authority to issue cost recovery regulations pursuant to section 304(b) of FLPMA was upheld in Alumet v. Andrus, 607 F.2d 911 (10th Cir. 1979), and Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983). As we have already noted, section 304(b) of FLPMA is not restricted by the type of application under consideration; thus, although both Nevada Power and Alumet arose within the right-of-way context, they are instructive in this context as well. Alumet held that

section 304(b) is “an express legislative mandate that all reasonable costs incurred by the Secretary in processing an application \* \* \* shall be chargeable against the applicant \* \* \* and further, that ‘reasonable costs’ include, among other things, costs associated with environmental impact statements.” Alumet v. Andrus, 607 F.2d at 916. The Court in Nevada Power held that the Secretary cannot disregard the “reasonableness factors” set forth in section 304(b) of FLPMA in determining the costs to be recovered. The Court made clear that “[w]e do not imply that Interior may never require an applicant to bear all of the costs of processing an application[;] [w]e emphasize that before assessing any costs, Interior must give thorough consideration to the 304(b) factors.” Id. at 925 n.6. The Court did not require BLM to “proceed by general rule” in determining how reasonable costs are to be assessed, but left to the Secretary’s discretion whether “the weighing mandated by section 304(b)” is accomplished “by rulemaking or adjudication,” noting that “[t]he touchstone of the Secretary’s determination is *reasonableness*, and the Secretary is thus vested with considerable discretion in performing the weighing mandated by section 304(b).” Id. at 927.<sup>10/</sup>

In light of these precepts, we turn to the regulation at 43 CFR 2932.31(e)(3), which contains the following limiting language:

(3) *Limitations on cost recovery.* Cost recovery charges will be limited to BLM’s costs of issuing the permit, including necessary environmental documentation, on-site monitoring, and permit enforcement. Programmatic or general land use plan NEPA [National Environmental Policy Act of 1969] documentation are not subject to cost recovery charges, except if the documentation work was done for or provides special benefits or services to an identifiable individual applicant.

This language includes those costs that are specifically encompassed by section 304(b), and excludes “management overhead” and the cost of environmental documentation to the extent that environmental studies are done for the benefit of the general public.<sup>11/</sup> The Court in Nevada Power emphasized that the Secretary may use discretion in “performing the weighing mandated by section 304(b).” Nevada Power Co. v. Watt, 711 F.2d at 927. We find that the limiting language in 43 CFR 2932.31(e)(3) is consistent with section 304(b), and that its inclusion in the SRP cost recovery regulation meets the “reasonableness” test set forth by the Court in

<sup>10/</sup> In reaching this holding, the Court in Nevada Power relied on the legislative history pertaining to section 304(b) of FLPMA. 711 F.2d at 921-25.

<sup>11/</sup> The “programmatic or general land use plan[ning]” referred to in this regulation includes broad land use planning requirements set forth in section 202 of FLPMA, 43 U.S.C. § 1712 (2000), and implementing rules at 43 CFR Part 1600.

Nevada Power Co. v. Watt, 711 F.2d at 927. We accordingly reject appellant's contention that the regulation is unreasonable and does not comport with section 304(b) of FLPMA.

We now turn our attention to BRMC's claim that the 50-hour threshold for charging cost recovery is unreasonable. In the Preamble to the final rule, BLM noted that during public comment on the proposed rules it received "several comments" suggesting that the 50-hour threshold for cost recovery is too low, and asking that the threshold be raised to 75-100 hours, or 200 hours. 67 FR at 61734-35. Among other things, BLM stated that "the practical effect of the rule as written, with its 50-hour threshold, is that permit renewals will not trigger cost recovery unless you propose a substantial change in your operation that would require additional environmental analysis." *Id.* at 61735. Thus, as was the case with respect to application of 43 CFR 8372.4(a)(2), *see n.7 supra*, BLM built into the new rule an opportunity, under favorable circumstances, for a renewing SRP applicant to avoid repeated cost recovery assessments for the same activity.

BRMC contends that BLM is incapable of completing any permit application in under 50 hours of staff time, and that 43 CFR 2932.31(e) is therefore unreasonable on its face. (SOR at 8-9.) Appellant assumes that, since BLM cannot complete its application within the 50-hour threshold, all applications must be similarly excluded. BRMC minimizes the effort required of BLM to properly administer its application. BRMC claims that over half of the 2004 proposed course is the same as the 2001 course and, on that basis, cost recovery should not be imposed. (Letter from Potter to Russell von Koch, Recreation Branch Chief, Moab Field Office, dated Sept. 29, 2003, at 2.) As our factual summary points out, the record supports a finding that the proposed event differs markedly from the 2001 course, as it includes substantial segments of Loop One that were not included in the 2001 EA. In a Declaration attached to BLM's Answer, von Koch avers that the proposed course "includes an additional 12 miles unanalyzed during the NEPA process for the 2001 motorcycle race." (Answer, Tab 1 (von Koch Declaration) at ¶ 7.) Moreover, BRMC rejected BLM's suggestion to eliminate the Ten Mile Wash from consideration in order to lower costs. (Sept. 29, 2003, letter at 2.) <sup>12/</sup>

While BRMC disagrees with the 50-hour threshold, it has not demonstrated that, as applied to the particular complexities of its 2003 motorcycle race proposal, it

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<sup>12/</sup> We note that even if the course were exactly like that of the 2001 event, BLM would nonetheless need to assess conditions contemporaneous with the proposal. Although limiting grazing above and below Dripping Spring (which is the perennial segment of the Ten Mile Wash) has resulted in riparian improvements, OHV uses continue to cause disturbance within the riparian system. ("Ten Mile Wash Proper Functioning Condition (PFC) Assessment Summary" at 1-2.)

is inconsistent with or results in an arbitrary construction of section 304(b). We accordingly reject BRMC's contention that the 50-hour threshold is per se unreasonable.

[3] In turning our attention to the specifics of BLM's cost recovery estimates, we emphasize at this juncture that an appeal on these issues would normally be considered premature, in that the decision as to costs is not final. The decision under review gives only an estimate, and any decision on final costs or refunds would be subject to further appeal. 43 CFR 2932.33 (refunds). We would consider challenges based on demonstrable evidence that BLM's actual costs were lower than projected. Obviously, this is information not available to BMRC at the present time. It is appropriate to consider the present challenge to the estimate, however, because the entire point of an estimate is to convey general cost information to an applicant so that it can decide whether to proceed. The decision thus has an impact, potentially adverse, that is more than hypothetical, and thus it is not premature for this Board to decide the matter. Nevada Outdoor Recreation Center, 158 IBLA 207, 209-10 (2003). If the Board upholds the estimates, BMRC may opt to move the race to other lands, or choose one of the alternatives. Further, a Board decision reversing the estimates entirely or in part may impact BMRC's decision as to whether or not to move forward.

BRMC argues that BLM's January 2, 2004, decision fails to support such estimates, as it does not properly document them, does not adjust costs or government efficiencies, or take into account any of the limiting factors in section 304(b) of FLPMA. The Amicus argues that BLM's decision is "improperly derived without considering or applying the cost recovery decision factors" set forth in section 304(b), resulting in an arbitrary "blanket exclusion" of motorized uses on lands open to those uses. (Amicus Brief at 2-3.) We first consider BRMC's contention that BLM failed to properly document the cost recovery estimates.

Referring to e-mail correspondence from Ann Marie Aubrey of the Moab Field Office, BRMC argues that BLM used "one summary piece of data related to BLM staff time estimates for a single BLM agent," <sup>13/</sup> and that, on the basis of broad estimates that are unsupported by factual detail, BLM concluded that the 50-hour threshold was met. (SOR at 8-9, Ex. H.) BLM responds that BRMC ignored BLM's November 28, 2003, letter to BRMC explaining how the cost estimates were calculated, and

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<sup>13/</sup> The Oct. 15, 2003, correspondence from Aubry to von Koch stated that Aubry had made the following estimates: EA, 25 hours; baseline, 30 hours; route delineation, 15 hours; day of event compliance, 0 hours; and post event activities (including monitoring and mitigation), 30 hours. (SOR, Ex. H.) This information is not documented on the cost estimator spreadsheets, suggesting that it was modified. See BLM Answer, Ex. D (cost estimator spreadsheets).

including a “detailed chart” based on the type of work required. (Answer at 14.) BLM supported the cost estimates provided in that letter with the Declaration signed by von Koch. (Answer, Tab 1.)

The November 28, 2003, letter to BRMC explains that the cost estimates were calculated based on three alternative courses of action: the proposed action, and Alternatives 1 and 2. Both alternatives would route racers around the portions of the Ten Mile Wash above and below Dripping Spring included in BRMC’s proposal, as well as around canyon areas between Dee Pass and Levi Well. (Map entitled “Bookcliff Rattlers 2003 Race Alternatives.”) Alternative One would otherwise use the route proposed by BRMC. (Nov. 28, 2003, letter from von Koch to BRMC at 2.) Alternative Two would “follow the route of the 2001 race,” except the loop to Duma Point would be routed primarily on an existing road west of the original single track route.<sup>14/</sup> *Id.* Additionally, BLM noted, the route chosen could be altered at several points to protect cultural resources. *Id.* The November 2003 letter states that the cost per hour of labor charged is equal to “the average hourly rate for Utah BLM employees as required by the BLM Director’s National Fee Schedule for recreation,” but it does not state what that figure is. (Nov. 28, 2003, letter at 2.) It notes that estimates for vehicle costs and map preparation work are included in the cost estimate chart. *Id.* It refers BRMC to the cost estimate chart for more specific information. *Id.* The chart incorporates nine expense items associated with processing BRMC’s permit application: application refinement; EA baseline data; EA development; public comment analysis, EA completion and decision record; route delineation; day of event monitoring; post event analysis and mitigation; support expenses; and the business center surcharge. It includes total estimates in each of those categories for the proposed action and the two alternative routes, but it does not include an analysis of how BLM reached the totals in each of the categories listed.

The cost estimate chart is a table that summarizes information not provided to BRMC. While BLM’s November 2003 letter discusses the general procedure BLM followed to reach its estimates, including modifications to the race course that would substantially reduce the costs of administering the race, and the cost estimate table provides BRMC with information concerning procedures BLM must follow in reviewing BRMC’s SRP application and estimate totals at each phase of the project,

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<sup>14/</sup> In describing the alternatives, von Koch stated:

“(a) the BRMC Proposed Action Using Tenmile Canyon and Crossing Red Wash, (b) Alternative One--Proposed Action With Riparian Protection Route Modification to Avoid Tenmile Canyon and Tenmile Wash Dust Reduction Modification, and (c) Alternative Two--Follow 2001 Race Route with Riparian Modifications Near Dripping Spring and Tenmile Wash Dust Reduction Modification.” (Von Koch Declaration at ¶ 6.)



neither the letter nor the table permits a detailed understanding of how BLM officials arrived at the totals listed. The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. El Paso Natural Gas Company, 156 IBLA 330, 340 (2002); Kitchens Productions, 152 IBLA 336, 345 (2000); Larry Brown & Associates, 133 IBLA 202, 205 (1995); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). In the context of a BLM decision adjudicating an application for desert land entry, we held in Roger K. Ogden, 77 IBLA at 8, 90 I.D. at 484, that where a computer model is used to support decisionmaking, BLM “may not simply report the results of its computer analysis; it must reveal the underlying facts used to obtain the result and the assumptions on which the computer program is based, and it must demonstrate why its facts and assumptions, and therefore its result, are more reasonable than the applicant’s \* \* \*.” The rationale for requiring disclosure of the underlying facts and assumptions BLM used to obtain the results reached is equally applicable here. Where BLM makes use of computer spreadsheets to accumulate data upon which a cost estimate for an SRP is based, it must reveal underlying data sufficient for the applicant being charged to ascertain the justification for its conclusions; otherwise, the applicant has no basis upon which to understand and accept the decision or, in the alternative, to appeal and dispute it. <sup>15/</sup>

[4] However, we do not automatically set aside and remand an agency’s decision when the record is incomplete if the record that has been provided allows review of the factual basis for the decision and supports the facts that are challenged on appeal. Silverado Nevada, Inc., 152 IBLA 313, 322 (2000); Great Western Onshore, Inc., 133 IBLA 386, 396-97 (1995); Shell Offshore, Inc., 116 IBLA 246, 249 (1990). We have also, as a matter of practice, permitted parties to supplement the record on appeal, including allowing BLM to submit data supporting the conclusions it reached in the decision appealed, emphasizing that it is our duty to have before us as complete a record as possible. See Wyoming Outdoor Council, 170 IBLA 130, 144-45 (2006), quoting Wyoming Outdoor Council, 160 IBLA 387, 398 (2004); see also B. K. Killion, 90 IBLA 378, 381 (1986), In Re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983). Accordingly, we will review the von Koch Declaration and supporting exhibits BLM submitted with its Answer to determine whether they adequately support BLM’s cost recovery determinations.

Von Koch stated in his Declaration that he developed the cost estimates set forth in the November 28, 2003, letter to BRMC by consulting with staff who had administered the 2001 race and by considering issues that must be addressed in the environmental analysis for the 2004 race. (Von Koch Declaration, ¶ 3.) As staff

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<sup>15/</sup> It goes without saying that all relevant data and documentation pertaining to a cost estimate for an SRP should be included in the administrative record.

provided him with “individual estimates of how long it would take to prepare the NEPA analysis and documentation and complete event monitoring by alternative,” he developed “a cost estimator spreadsheet” that enabled him to “enter the work hour estimates provided by each staff member for each of the seven parts of the project.” Id. After he recorded on the spreadsheet the hours each staff member projected for each segment of the project, he discussed the data entered with each individual to ensure that the data entered on the spreadsheet “was accurate and made sense.” Id. He discussed time estimates with all individuals who would likely be involved in environmental documentation, on-site monitoring, and permit enforcement, even if they submitted their time projections on paper or by e-mail. Id.

Von Koch multiplied the number of hours each staff member estimated by an hourly employee rate based on “the BLM average State work month cost,” which is the factor BLM applies to quantify personnel costs associated with processing an SRP permit. (Von Koch Declaration at ¶ 4, Ex. F.) He determined the average State work month costs by contacting Rulon Duncan, “BLM’s Utah State Office Budget Analyst,” who informed him that “the average work month cost for fiscal year 2004 was expected to be approximately \$6,747,” and that “this represented an average hourly rate of \$38.93 per staff member (including leave surcharge).” <sup>16/</sup> Id. He included vehicle and mapping costs on the cost estimator spreadsheet, as well as the 17.3% surcharge imposed by the Department’s National Business Center. Id. at ¶ 5; Ex. D.

Von Koch stated that he “designed the cost estimator spreadsheet to enable [him] to enter the number of hours each staff member expected to work on each relevant step of the permit.” (Von Koch Declaration at ¶ 6.) In the left hand column of the spreadsheet, he listed by job title each BLM staff specialist he anticipated would be needed to process the application and conduct monitoring and enforcement of the race. In the next columns, moving from left to right, he listed the work month cost, hourly rate, and the seven phases of the project: application refinement; EA baseline data; EA development; public comment analysis, EA completion and decision record; route delineation; day of event monitoring; and post event analysis and mitigation. He then recorded the number of hours each employee projected for phases of the project he or she would be involved in, and totaled both the amount of hours estimated by each staff member and the cost per employee at each phase of the project. He also calculated total labor costs anticipated at each stage of the process. This process was repeated for each of the three alternatives considered. Additionally,

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<sup>16/</sup> We do not here adopt BLM’s use of this average hourly rate or, more particularly, a leave surcharge. We would expect an applicant to contest such figures after a final assessment, and anticipate that the applicant could at that point attempt to show that the estimates exceeded actual charges and that the applicant is not responsible for a leave surcharge.

use of the spreadsheet allowed von Koch to “add in the vehicle and map production cost estimates, and the 17.3% National Business Center [c]harge and display the total cost estimate.” *Id.* The total labor costs per work item for each alternative plus the support expenses and Business Center surcharge allocated to each alternative formed the basis for the cost estimates that were provided to BRMC in the cost estimate chart (\$19,606, \$10,482, and \$9,256 for the Proposed Action and Alternatives One and Two, respectively).<sup>17/</sup>

Exhibit D to von Koch’s Declaration contains copies of the three spreadsheets, one each for BRMC’s proposal and the two alternatives developed by von Koch. Each spreadsheet is internally mathematically sound and contains information that is consistent with the chart attached to BLM’s November 28, 2003, letter to BRMC. The spreadsheets report that, according to BLM’s estimate, BRMC’s proposed race, which would require BLM field analysis and new environmental review of portions of the Ten Mile Canyon riparian area, would require two more employees and about twice as much staff time as Alternative One, which avoids the Ten Mile Canyon and Wash areas proposed by BRMC. This is consistent with von Koch’s Declaration, which states that BRMC’s proposal contains “an additional 12 miles of route unanalyzed during the NEPA process for the 2001 motorcycle race.” That segment “contains the largest area of riparian habitat northwest of Moab between the Colorado and Green Rivers, several cultural resource sites eligible for listing on the National Register of Historic Places, and active bighorn sheep use areas” which are “more environmentally sensitive than the generally dry upland areas approved for the 2001 race.” (Von Koch Declaration at ¶ 7.) Alternative Two, which most nearly resembles the 2001 race course, would require one less employee than Alternative One, and would result in an additional reduction of approximately 25 hours of staff time.

In light of von Koch’s Declaration and supporting exhibits, which provide the underlying rationale for BLM’s cost estimates, we find that BLM properly documented the basis for those estimates. We repeat that we do not affirm the costs themselves, but only affirm BLM’s process of providing reasonable estimates to the applicant so that it had a projection of expenses upon which it could make an informed decision to go forward.

BRMC and the Amicus argue that the cost estimates are unreasonable because BLM failed to adjust costs for government efficiencies. Specifically, BRMC argues that BLM failed to reduce the cost estimates to account for the work undertaken in its 2001 EA and the cultural surveys for which BRMC had previously paid. (SOR at 4, 6-7.) BLM states that it did not assess charges for cultural resource inventory work already completed, and argues that appellant’s allegations pertaining to inefficiencies

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<sup>17/</sup> Von Koch did not include any expenses attributed to developing the cost recovery estimates.

in the cost estimates are conclusory and therefore insufficient to meet its burden of showing error. (Answer at 18-19.)

There is no evidence in the record supporting a conclusion that BLM included costs for cultural surveys already paid for by BRMC in the estimates. BLM's letter to BRMC states: "Wherever possible, we are trying to utilize the contract cultural resource inventory funded by the Bookcliff Rattlers to reduce route alignment costs." (Nov. 28, 2003, letter at 3.) Notwithstanding those surveys, BLM determined that it would be necessary to realign routes in places to avoid cultural resource sites. BLM did not, however, assess charges for cultural surveys in its cost estimates. Id. at 2; see also Ex. D to von Koch Declaration (the cost estimator spreadsheets).

In support of its argument that BLM did not properly account for efficiencies in the processing of its application, BRMC maintains that its application requires "no 'special studies' nor an environmental impact statement" and that the EA produced for the 2001 race, combined with the cultural resource study provided by appellants "for the one minor divergence in the route of the race," should "meet the demands of NEPA without any further study." (SOR at 7.)

The total amount of staff time estimated for EA development for the Proposed Action is 121 hours; for Alternative A, 62 hours; for Alternative B, 59 hours. The cost estimator spreadsheets indicate that the bulk of time allocated to EA development, 80 hours, is assigned to the lead recreation staff specialist. Cf. Cost Estimator Spreadsheets for the Proposed Action and Alternatives One and Two. The remaining 41 hours allocated to EA development for the Proposed Action is divided among seven other staff specialists having various areas of expertise, including, among others, experts in soils, wildlife, and riparian ecology. Thus, the cost estimate for EA development includes an average of approximately three-quarters of a workday per individual for staff members other than the lead recreation specialist. Given that the Proposed Action adds about 12 miles of additional track to the 2001 race and includes travel along an important regional riparian system that is already compromised by grazing and OHV use,<sup>18/</sup> BRMC has not demonstrated that the amount of time estimated for EA development of the Proposed Action is based on an error in methodology, data, or analysis, or is otherwise unreasonable. The argument that the 2001 EA should lower the cost of processing the 2003 application is most compelling when considering Alternative B, the alternative that most nearly resembles the earlier race. But there is no indication in the record that individual employees failed to take into account the efficiencies obtained from having prepared or perused the prior EA when submitting their time estimates to von Koch. The reduction for BLM's having previously prepared an EA for this alternative is reflected

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<sup>18/</sup> See "Ten Mile Wash Proper Functioning Condition (PFC) Assessment Summary" at 1-2.

in BLM's estimate requiring less than half the time of BMRC's proposal. In any event, the fact that an EA was done for a similar race course in 2001 does not obviate the need to perform an environmental review contemporaneous with the current proposal, particularly since the Ten Mile Canyon area is designated open to OHV use and grazing, and affected areas are subject on a continuing basis to impacts from both.

We must emphasize that our conclusion that appellant has not shown BLM's cost recovery estimates to be unreasonable does not mean that the actual fees charged by BLM may not differ in amount. Being estimates, BLM's calculations are subject to change, and actual fees charged by BLM for processing BRMC's application may be greater or less than the estimates. However, the regulations make clear that the estimated charges must be paid before BLM will process or continue processing BRMC's SRP application. See 43 CFR 2932.32. Should the estimates paid by BRMC exceed the actual fees charged by BLM, the regulations provide, with regard to the overpayments: "For multi-year commercial permits, if your actual fees due are less than the estimated fees you paid in advance, BLM will credit overpayments to the following year or season. For other permits, BLM will give you the option whether to receive refunds or credit overpayments to future permits, less processing costs." 43 CFR 2932.33. Any eventual decision setting actual fees for processing BRMC's SRP would be subject to appeal to this Board in accordance with 43 CFR 2931.8.

[5] The Amicus contends that the cost recovery estimates should be offset by the cost of the cultural resource survey and volunteer monitoring services BRMC has contributed or will contribute to the race. It contends that the cultural surveys provide a benefit to the general public interest and the monitoring provides a public service; therefore, under section 304(b) of FLPMA, the appellant should be credited for their value. (Amicus Brief at 5.) Section 304(b) of FLPMA authorizes the Secretary to require a deposit intended to reimburse the United States for reasonable costs incurred by the Secretary in processing applications relating to the public lands. That section generally defines reasonable costs, then provides, in pertinent part, the following limiting language: "In determining whether costs are reasonable, the Secretary may take into consideration \* \* \* that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, [and] the public service provided \* \* \*." Id. Section 304(b) does not require the Secretary to consider whether costs incurred by the applicant benefit the general public interest, but only whether any portion of the government's costs do so in order to determine which of the government's costs may be charged to the appellant. Neither section 304(b) nor BLM's regulation at 43 CFR 2931.32(e)(3), which we have found is consistent with section 304(b), requires the Secretary to place a value upon the commitment of resources by an applicant, or to offset his reasonable costs by expenditures an applicant may have incurred in furtherance of its

application, even if they in some measure benefit the general public interest or serve the public good.

[6] Section 304(b) requires that expenses BLM may take into consideration for purposes of recovering reasonable costs with respect to applications and other documents relating to the public lands must be “exclusive of management overhead.” 43 U.S.C. § 1734(b) (2000). BLM has applied a “17.3% administrative charge” to the total cost estimate for each alternative. (Von Koch Declaration at ¶ 5.) According to von Koch, this charge is “required by BLM’s National Business Center for cost recovery accounts to cover costs for setting up accounts and disbursing funds.” *Id.* Von Koch does not specify whether this administrative charge by the National Business Center is exclusive of management overhead. Without more information, we cannot determine that the charge would not be used by the National Business Center for management overhead. To the extent, if any, that the National Business Center uses the surcharge for management overhead, BLM must reduce the cost recovery estimates to reflect only that portion of the surcharge that is not used for management overhead.

[7] BRMC contends that BLM admits in interoffice memoranda that it failed to apply the cost recovery regulation to a previous application and that, therefore, BLM treated BRMC differently from similarly situated applicants, rendering its estimate of costs to be recovered arbitrary and capricious. (SOR at 3.) BRMC is essentially arguing that BLM should be estopped from applying the cost recovery regulation to BRMC because it previously failed to apply it to a different applicant. “The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by the acquiescence of its officers or their laches, neglect of duty, failure to act, or delays in the performance of their duties.” 43 CFR 1810.3(a); United States v. California, 332 U.S. 19, 40 (1947); Ametex Corp., 121 IBLA 291, 294 (1991); Joseph A. Barnes, 78 IBLA 46, 60, 90 I.D. 550, 558 (1983), *aff’d*, Barnes v. Hodel, 819 F.2d 250 (9th Cir. 1980), *cert. denied*, 484 U.S. 1005 (1988). Nor is this a proper case for estoppel, as there was no affirmative misconduct by BLM, the essential predicate to invoking that equitable doctrine. *See* Schweiker v. Hansen, 450 U.S. 785, 788-89 (1981); United States v. River Coal Co., 748 F.2d 1103, 1108 (6th Cir. 1984); McNabb Coal Co. v. OSM, 105 IBLA 29, 37 (1988). As we have repeatedly held, to invoke estoppel, a party must show detrimental reliance on a written decision issued by an authorized officer, Jesse Hutchings, 147 IBLA 357, 360 (1999); Steve E. Cate, 97 IBLA 27, 32 (1987), or a crucial misrepresentation and/or concealment of material facts, United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978); Salmon Creek Association, 151 IBLA 369, 373 (2000); D.F. Colson, 63 IBLA 221, 224 (1982); Arpee Jones, 61 IBLA 149, 151 (1982).

All other arguments advanced but not specifically addressed herein have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision denying BMRC's request for a cost recovery fee waiver and setting cost recovery estimates is affirmed as modified.

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James F. Roberts  
Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge