

INTERIOR BOARD OF LAND APPEALS

Obsidian Services, Inc.

155 IBLA 239 (July 19, 2001)

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OBSIDIAN SERVICES, INC.

IBLA 2001-128 and 2001-276

Decided July 19, 2001

Consolidated appeals from decisions by the Lakeview (Oregon) Resource Area Office, Bureau of Land Management, revoking commercial special recreation permit OR-015-00-02 and denying request for recalculation of fees with respect to that permit.

Appeals consolidated; requests for hearing denied; appeal dismissed; decision affirmed.

1. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Hearings--Federal Land Policy and Management Act of 1976: Permits--Rules of Practice: Hearings--Special Use Permits

Departmental regulations do not guarantee every recipient of an adverse BLM decision the right to a hearing. The language of 43 U.S.C. § 1732(c) (1994), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not require a formal hearing before an administrative law judge; a special recreation permittee's hearing rights under that section are satisfied when the permittee is given notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals. Although a hearing may be ordered when a question of fact is presented that cannot be resolved on the basis of a written case record, as supplemented by documents or affidavits submitted on appeal, the burden of proof lies with the party requesting the hearing to show adequate evidence or offer of proof to raise adequate doubt that a hearing should be ordered.

2. Special Use Permits

BLM properly revokes a special recreation permit being held on a "probationary" basis where the record shows that the public health and safety have been endangered by the permittee's activities twice within a 10-month period in that one person has died and two more have been subjected to deadly

force; that the permittee committed violations of SRP terms; that the permittee failed to pay permit fees; and that the permittee's liability insurance carrier notified BLM that its coverage was canceled and no notice of replacement coverage was provided by the permittee. BLM properly examines the entirety of the probationary permittee's past performance in determining whether to revoke the SRP.

APPEARANCES: David C. Crosby, Esq., Juneau, Alaska, for appellant; Bradley Grenham, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Obsidian Services, Inc. (OSI), d/b/a Obsidian Trails, has appealed the December 18, 2001, decision of the Lakeview (Oregon) Resource Area Office, Bureau of Land Management (BLM), revoking the commercial special recreation permit (SRP) OR-015-00-02. That appeal has been docketed as IBLA 2001-128. OSI has also appealed from BLM's decision dated March 28, 2001, denying its request for recalculation of fees with respect to that permit. That appeal has been docketed as IBLA 2001-276. As the appeals present related issues of law and fact, they are hereby consolidated.

The SRP was issued to OSI for an "[o]utdoor school (wilderness therapy) for troubled youths, ages 13-17." (Case Record (CR) 35.) As discussed in more detail below, revocation of the SRP followed the death of Eddie Lee, a participant in OSI's program, in September 2000.

OSI was incorporated in Oregon on June 16, 1998. (CR 152 at 1.) BLM first issued an SRP to OSI on September 15, 1998, for an "outdoor school." (CR 167 at 2.) The permit was issued "for a probationary period from the date of issuance to 6/29/99 (insurance expiration date)." (CR 167 at 4.)<sup>1/</sup>

On October 31, 1998, OSI reported "two juvenile runaways" to BLM. According to the record, the "[t]he two were found unharmed at about 1:15 am the next morning not far from the camp." (CR 164.) On November 29, 1998, OSI reported a "female juvenile runaway," who was missing from about 9:30 pm until about 10:30 pm. It was reported that "[t]his was the second time this juvenile had run away." (CR 162.)

In April 1999, BLM notified OSI and three other "wilderness therapy schools" that their use of the public lands in Lake County, Oregon, had raised concerns among "the visiting public, local residents and ranchers, and other agency personnel." (CR 160 at 1.) BLM listed numerous substantive

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<sup>1/</sup> It appears to be standard procedure for BLM to issue a first-year SRP on a probationary basis. (Answer at 5.)

issues, including notifying authorities when runaways occur and the safety of local residents. Id. at 1-2. BLM convened a meeting on April 28, 1999, with representatives of the four schools to consider these issues. (CR 159.)

In June 1999, BLM phoned OSI to discuss reports of illegal artifact collecting/promoting by "one of the wilderness group field directors." (CR 153.) During the course of that call, OSI reported that "a female group member" had "reported a medical condition"; that she was taken to a clinic for medical treatment; that she claimed that she was raped by an instructor while in the field; that the claims of a medical condition and of rape were proved false; and that charges of false reporting had been filed by Lake County against the "girl." Id.

On June 26, 1999, BLM notified OSI that it was issuing BLM Violation Notice No. L006733 for violation of the terms of SRP OR-015-98. Although that violation notice is unaccountably missing from the case record, BLM's cover letter indicates that it was issued because a BLM enforcement ranger found "a large amount of debris scattered about on the ground" including "a number of items with an identification to Obsidian Trails." (CR 150.)

On June 30, 1999, BLM issued SRP No. OR-015-99-03, which was essentially a renewal of the previous year's permit. (CR 148.) On July 8, 1999, BLM sent OSI its SRP annual evaluation form and notified OSI that it had received a "probationary" rating for its 1998 permit. (CR 145 at 1-3.) BLM enclosed the standards governing probationary permits (CR 145 at 4) and explained this rating to OSI as follows:

Your organization has been given a "Probationary" rating [for its 1998-99 permit], which means that your performance was less than acceptable for significant considerations applicable to the permitted activity. Specifically, these include: various complaints from the local public, a Violation Notice for violating the terms of a permit (Stipulation 9), suspected artifact collecting, and failing to file your post-use report until the last minute. Because of your observed willingness to work with our staff and correct these deficiencies, this office will renew your permit for another year. If you continue to operate at the probationary level, your permit can be terminated, or future permits denied.

(CR 145 at 1.) No appeal was taken from BLM's action.

On November 12, 1999, OSI reported a student that ran away at approximately 10 am. The student was reported found that same afternoon. (CR 124.) On November 21, 1999, BLM was visited by a representative of the local sheriff's office, who indicated that there had been confusion surrounding OSI's "search and rescue" call. He indicated that, although "search and rescue" for Lake County would be happy to respond to calls, they needed maps of locations of campsites. (CR 123.)

At about 9 am on December 17, 1999, BLM was contacted by a private citizen who reported that two neighbors had told his wife that they had "been held at knifepoint and had their [car] and cell phone stolen by [Obsidian] runaways." BLM advised the citizen that its ranger was aware of the runaways. (CR 121.)<sup>2/</sup> At about 9:45 am that morning, a representative of OSI contacted BLM to confirm that there had been two runaways the night of December 16, 1999, and that there had apparently been "an assault of some sort." (CR 120.) The case record contains a BLM significant activity report that sets out the following synopsis of the incident:

At about 8:00 a.m., on December 17, 1999, two male juvenile runaways from a wilderness therapy organization camp, robbed two local ranchers in their home at knifepoint. After threatening to kidnap one of them, the two juveniles fled in the ranchers' vehicle, taking their phones. The runaways were apprehended the same morning by the Oregon State Police near Burns, Oregon. They were turned over to the Lake County Sheriff's Office and indicted on December 20, 1999, on charges of First Degree Robbery. They are currently awaiting trial in the Lake County Jail. The wilderness therapy organization was operating, under a permit issued by the BLM, on the public lands near the victim[s] residence.

(CR 114.)

On December 20, 1999, BLM called OSI to discuss the fact that OSI had groups camping in a closed area, apparently an area closed to use because it is a sage grouse seasonal area. (CR 116.) The case record documents three OSI camps in closed areas that were used. (CR 115.)

By decision dated January 5, 2000, citing 43 CFR 8372.5(a)(1), BLM suspended SRP OR-015-99-03. (CR 91.) Citing the synopsis of the runaway incident quoted above, BLM stated that "[t]he basis for this suspension relates to the public's health and safety which have been put at risk by [OSI's] operations." (CR 91 at 1.) BLM noted further that, out of nine runaway incidents from among the four outfitters engaged in wilderness schools, six had been connected with OSI's operations, concluding that "[c]umulatively, this is unacceptable" and that "[t]he safety of the public is paramount." *Id.* The suspension was indefinite, and was to terminate when it was "mutually agreed that changes to [its] Plan of Operations will be adequate to ensure that similar incidents do not occur in the future." (CR 91 at 2.) BLM specifically required, at a minimum, "an updated Plan of Operations which includes all of the proposed changes you will implement to increase the level of safety within your program." *Id.* OSI did not appeal the suspension.

The record indicates that, following the suspension, OSI and BLM worked together to improve OSI's supervision of students while in the

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<sup>2/</sup> It appears that Obsidian had notified BLM of the runaways at about 8:50 am. *See* CR 120.

field, including its policy toward runaways. BLM also reviewed OSI's practice of allowing its students access to knives and other tools. See CR 85. OSI filed an amended plan of operations addressing safety concerns. (CR 78.) Those changes included increasing screening procedures for participants; increasing staffing in the field; requiring direct supervision of students using knives and restricting students' possession of knives at other times; and moving campsites farther away from occupied ranches/residences. (CR 68.)

On January 31, 2000, BLM notified OSI that it had lifted the suspension effective that date. BLM reminded OSI that it was still "operating under a probationary rating" until after next the annual evaluation. See CR 69 at 2-4.

On April 21, 2000, the U.S. Forest Service (USFS) advised BLM that OSI had not made full payment on a Bill for Collection for fees relating to activities conducted in the Deschutes National Forest, and that complete payment was 60 days past due. (CR 48 at 2.) On May 5, 2000, BLM reminded OSI that holders of SRP's issued by BLM must abide by all Federal regulations and requested that OSI fulfill its obligation to pay USFS. (CR 48 at 1.)

On May 12, 2000, BLM contacted OSI regarding the process necessary for renewing its SRP. (CR 46.) BLM notified OSI that the term of its (and other permittees') new SRP(s) would expire on December 31, 2000, for administrative purposes. BLM noted that OSI must submit an updated certificate of insurance and State outfitter/guide registration. BLM also notified OSI that deductions it had taken in prior years from gross income for certain expenses were not allowable for the purpose of fee calculations. Id.

BLM also addressed the question of payment of fees in its May 12, 2000, letter. It noted that OSI had previously paid in advance one-third of the estimated fees for the 1999-2000 season, 3/ a figure that had been set at \$1,777.01. This left a substantial balance for the 1999-2000 season that had not been paid. BLM notified OSI that it would have to pay that balance and also pay in advance one third of the estimated fees for the 2000 season. 4/ BLM authorized OSI to pay that amount (the 1999-2000 balance plus the 2000 advance estimate) in three equal payments. (CR 46 at 2.) 5/ The record contains nothing showing that OSI objected to this letter.

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3/ The 1999-2000 season covered the period from June 29, 1999, through June 29, 2000. As discussed below, it was subsequently extended by BLM through July 24, 2000.

4/ The 2000 season was from July 24, 2000, through Dec. 31, 2000.

5/ BLM also indicated how the actual fees for the 2000 season would be paid off in 2001. Id. Upon revocation of OSI's SRP, that payment plan was abandoned.

On June 21, 2000, BLM sent OSI bills for collection for fees calculated for actual use for the 1999-2000 season of operation. (CR 43.) Based on OSI's reported adjusted gross income of \$867,750 and applying the formula set out in the BLM fee schedule, BLM determined that OSI owed \$26,035 in fees for the 1999-2000 season of operation. Id. at 8. BLM credited the advance payment of \$1,777 made in 1998 against this amount. It then added \$8,678 representing one-third of the estimated fees for the 2000 season of operation. It divided the sum (\$31,432) into three equal payments of \$10,477. Id. Three bills for collection were sent to OSI on June 21, each for \$10,477. Id. at 2-4. No payment date was set for the first (No. A422834), but it was required to be paid before the 2000 SRP could be issued. (CR 43 at 2; CR 41.) Payment dates of September 1, 2000, and November 1, 2000, were set for the second (No. A422820) and third (No. A22826) bills for collection, respectively. (CR 43 at 3-4, 9.)

On June 22, 2000, a BLM employee had a phone conversation with an OSI representative that alluded to several matters concerning whether OSI was in compliance with the SRP terms. (CR 42.) BLM informed OSI that it had been informed by USFS that its fee arrearage had not be paid. When OSI informed BLM that its students had built a lean-to structure, BLM reminded OSI that such activities must be approved in advance. BLM advised OSI that its reports reflected that the maximum group size limits had been exceeded; OSI explained that its reports failed to reflect that some of the students were not actually on BLM lands. BLM reminded OSI that it was required to report all pertinent information, to avoid such problems. Id.

On June 30, 2000, BLM extended the term of the SRP until July 24, 2000. (CR 41.) The latter date coincided with the due date for the first payment under BLM's revised payment schedule. BLM also specified which campsites OSI was allowed to use and directed it to move any groups using unauthorized campsites. Id.

On July 5, 2000, BLM issued a receipt to OSI for a payment of \$10,477. (CR 38.) That payment was evidently made in response to the first bill for collection (No. A422834) sent by BLM on June 21, 2000. (CR 43.) On July 7, 2000, BLM received by fax a copy of a certificate of liability insurance. (CR 37.) On July 24, 2000, BLM approved OSI's application for SRP OR-015-00-02. (CR 35.)

On July 25, 2000, BLM approved its annual evaluation of OSI's permit, as follows: "Based on the runaway situation which occurred on 12/17/99 (and subsequent permit suspension) and camping in a seasonal closure area [on 12/20/99, OSI] will be placed on a probationary status for the term of their next SRP." (CR 32.) Notification of that rating and the rating documents were sent to OSI on July 25, 2000. (CR 31.) No appeal was filed.

On July 26, 2000, BLM received an amended certificate of liability insurance naming BLM as an "additional insured." (CR 30 at 1.)

On September 18, 2000, Eddie Lee (a participant in OSI's program) died. The case record contains the following description of the event by the Lake County District Attorney in a press release:

On September 18th a call was placed to local emergency services personnel. It was reported that a counselor at the Obsidian Trails Camp had restrained a child attending the camp. While the child was being restrained, it was discovered that the child had stopped breathing. Camp staff members called 911 to get assistance in performing CPR. Air Life was dispatched and picked up the child.

Sheriff's Deputies and Oregon State Police Officers began responding to the camp after the initial call. The child was later pronounced dead at St. Charles Medical Center in Bend, Oregon. \* \* \*

(CR 22.)

BLM suspended OSI's permit at 8:30 am on September 19, 2000, providing OSI 48 hours to remove all remaining students, staff, equipment, etc. from public lands. (CR 25.) BLM provided written notice of the suspension on September 21, 2000. The suspension was indefinite and was issued under the authority of 43 CFR 8372.5(a)(1). (CR 15.) No appeal was taken from the suspension decision.

On October 4, 2000, BLM notified OSI that payment had not been received on Bill for Collection No. A422820 (issued on June 16, 2000, in the amount of \$10,477 for 1999-2000 SRP fees) and that the bill had become delinquent. That was the second bill for collection that was issued in June 2000; payment of it was due on or before September 1, 2000. BLM provided 15 days to settle this debt. (CR 11.)

On October 30, 2000, BLM received a notice of cancellation of OSI's insurance. The cited reason for cancellation was "company request -- increase in hazards." The cancellation was effective on December 1, 2000. (CR 6.)

On November 28, 2000, BLM contacted OSI concerning the SRP fees that were due for the 2000 season. (CR 4.) BLM noted that, "[b]ecause of the suspension of [OSI's] current permit, it is necessary to determine the amount of fees [OSI] owes based on actual use for the period 5/30/00 through 9/18/00." BLM requested post-use reports within 10 days so that the actual use could be calculated. BLM advised that, after the amount of fees owed for the 2000 season had been determined, they would be added to the remaining fees owed by OSI for the 1999-2000 season. Id.

On December 11, 2000, BLM renewed its demand for payment of Bill for Collection No. A422820 in the amount \$10,477, the amount originally found to be owed, plus interest, penalty, and administrative charges. (CR 3.) On December 13, 2000, BLM determined that OSI had paid USFS \$1,141, which



was "short of the full amount owed." BLM determined that the USFS ranger district had written off the balance. (CR 2.)

On December 18, 2000, BLM issued its decision revoking OSI's SRP. (CR 1.) The stated reason for the revocation was the "recurrence of public health and safety issues relating to [OSI's] operations on public lands and persistent non-compliance with the terms and conditions of the [SRP]." (CR 1 at 1.) BLM specifically cited "the death of a student," Eddie Lee, "that was under the supervision of [OSI] on September 18, 2000." (CR 1 at 1, 2.) In support of its decision to revoke the SRP, BLM cited (among other things) Condition #1 of the SRP, which states: "This permit is issued for the period specified herein. It is revocable for any breach of conditions hereof or at the discretion of authorized officer of the [BLM], at any time upon notice." (Id., citing language appearing at CR 35 at 2.) BLM also cited its policy that "overall objectives of the [SRP] Program are to satisfy recreational demand within allowable use levels 'in an equitable, safe and enjoyable manner, while minimizing adverse recourse impacts and user conflicts,'" citing BLM Manual 8372.06B. (CR 1 at 1.) BLM's decision noted that, prior to revocation, OSI had received two consecutive "probationary" performance ratings, in July 1999 and July 2000. Id. at 2.

BLM presented "a chronology of the documented public health and safety issues and instances of non-compliance with the terms and conditions of [OSI's] SRP's," including the following:

On January 5, 2000, [OSI's] SRP was suspended for an indefinite period of time. The basis for this suspension related to public health and safety that had been put at risk through [OSI's] operations. Over a one-year period there were six separate reports of students running away from [OSI's] field camps. On December 17, 1999, during one of these runaway incidents, two male juvenile students ran away from an [OSI] camp and robbed an elderly couple residing on a ranch at knife point. The victims were threatened with kidnaping before the juveniles took the ranch couple's phones and a vehicle and then fled from the scene. These students were apprehended later the same day, and were eventually indicted on charges of First Degree Robbery. The suspension of [OSI's] permit was lifted on January 31, 2000, after [OSI] updated their Plan of Operation, with a focus on increasing the safety of their operation.

(CR 1 at 2.) BLM listed additional "incidences of non-compliance with the terms and conditions of the SRP." Id. at 2-7. It specifically noted non-compliance with Permit Stipulation #28(F), requiring permit fees to be paid on or before established billing dates:

On June 21, 2000, the Lakeview Resource Area Office sent [OSI] three Bills for Collection which covered fees for actual use for the 1999/2000 season of operation \* \* \* and one-third

of the estimated fees for the 2000 season of operation \* \* \* . The total fees due were split into three equal payments (Bill for Collection forms) of \$10,477.00. \* \* \* Payment number two was due on or before September 1, 2000, and payment number three was due on or before November 1, 2000. \* \* \* [OSI] has failed to make payments number two and three.

(CR 1 at 4-5.) BLM also cited OSI's failure to make timely payments of a separate "monetary obligation" to the USFS, Department of Agriculture. Id. at 5.

OSI, through counsel, filed a timely notice of appeal of BLM's decision, accompanied by a request that the case be assigned to an administrative law judge under 43 CFR 4.415. Its statement of reasons (SOR) was timely filed on February 23, 2001. BLM filed its answer on March 19, 2001. On April 9, 2001, OSI renewed its request for assignment of the case to an administrative law judge. BLM filed an opposition to this request on April 16, 2001, and OSI responded on April 30, 2001.

In a letter dated March 6, 2001, OSI asked BLM to recalculate the fees charged to it for the SRP "to reflect the fair market value of its use of public lands," and to "refund the excess to" OSI. (SOR in IBLA 2001-276, Att. A at 2.) On March 28, 2001, BLM denied the request. (BLM Answer in IBLA 2001-276, Ex. 1.) OSI appealed BLM's decision (IBLA 2001-276) and filed its SOR on May 24, 2001. BLM filed its answer and motion to consolidate on June 25, 2001.

Special recreation permits are issued under the authority granted to the Secretary of the Interior by the Land and Water Conservation Fund Act, 16 U.S.C. § 4601-6a(c) (1994), which provides: "Special recreation permits for uses such as group activities, recreation events, motorized recreation vehicles, and other specialized recreation uses may be issued in accordance with procedures and at fees established by the agency involved." See also 43 CFR 8372.0-3 and Special Recreation Permit Policy Statement (Policy Statement), 49 FR 5300 (Feb. 10, 1984). SRP's issued by the Department of the Interior are also governed by the provisions of sec. 302(c) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1732(c) (1994). Id.; Dvorak Expeditions, 127 IBLA 145, 148-50 (1993).

[1] We have received two requests from OSI to refer this matter to the Hearings Division for a fact-finding hearing under 43 CFR 4.415. Departmental regulations do not guarantee every recipient of an adverse BLM decision the right to a hearing. Alfred G. Hoyl, 127 IBLA 297, 303 (1993); see Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976). Specifically, the Board has established that the language of 43 U.S.C. § 1732(c) (1994), allowing for revocation or suspension of a special recreation use permit after "notice and hearing," does not require a formal hearing before an administrative law judge and that a special recreation permittee's hearing rights under that section are satisfied when the permittee is given

notice of BLM's adverse decision and afforded the right to appeal to the Interior Board of Land Appeals. Dvorak Expeditions, 127 IBLA at 150-51. <sup>6/</sup>

Nevertheless, hearings may be ordered when a question of fact is presented that cannot be resolved on the basis of a written case record, as supplemented by documents or affidavits submitted on appeal. 43 CFR 4.415; Lazy VD Land and Livestock Co., 108 IBLA 224, 228 (1989). However, the burden of proof lies with OSI, as the party requesting the hearing, to show evidence or offer of proof to raise adequate doubt that a hearing should be ordered. Alfred G. Hoyl, 127 IBLA at 303. It has not done so.

We recognize that OSI might have believed itself entitled to a hearing and may accordingly not have understood its obligation to make such an offer of proof. Nevertheless, we deem it appropriate to decide its appeal on the basis of the present record. The material that is in the record fully supports BLM's finding that Eddie Lee died while under the supervision of OSI's employees. OSI admits as much. <sup>7/</sup> There is also no dispute as to the circumstances surrounding the earlier runaway incidents. Nor has OSI alleged that it, in fact, paid its SRP fees timely or notified BLM of the reestablishment of its insurance coverage. As noted below, assuming no more, BLM's decision to revoke OSI's SRP is amply supported by facts of record. No hearing is necessary here.

[2] BLM has considerable discretion in approving and issuing SRPs. 43 CFR 8372.3; Daniel T. Cooper, 150 IBLA 286, 291 (1999). Further, decisions imposing sanctions for violation of SRP terms (including revocation) will be upheld, unless it is shown that the decision was arbitrary, capricious, or based upon a mistake of fact or law. Judy K. Stewart, 153 IBLA 245, 251 (2000); Dvorak Expeditions, 127 IBLA at 151. If a decision has any rational basis, it will not be held arbitrary and capricious. Id. at 151 (citing Robert E. Miller, Jr. v. BLM, 118 IBLA 354, 357 (1991)).

Four factors presented in this case support the exercise of BLM's discretion to cancel OSI's permit. First, OSI's permit OR-015-00-02 was issued on a probationary basis. The rating system put in place by BLM left no room to doubt that continued "less than acceptable" performance would lead to revocation of the SRP. A "probationary" rating is appropriate where the permittee's "[p]erformance is less than acceptable for

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<sup>6/</sup> Appellant complains that it was not afforded an opportunity to protest prior to its permit cancellation, per BLM Handbook, H-8372.1. (SOR at 8.) Appellant's right to administrative review is governed by the provisions of 43 CFR Part 4, not the BLM Handbook. Appellant's due process rights are protected by review by this Board, which provides objective, independent review of BLM's decision. See 43 U.S.C. § 1701(a)(5) (1994).

<sup>7/</sup> OSI states that Lee's "death apparently occurred while [he] was being restrained following a confrontation with counselors in which the student became aggressive and violent." (Errata to SOR at 1.)

significant considerations applicable to the permitted activity. Performance does not pose an immediate threat to the safety of guests or others, is not in violation of law[,] and does not pose a threat of significant resource damage." See, e.g., CR 145 at 4. This clearly means that, even where the permittee's performance does not pose an immediate threat to the safety of guests or others, it may nevertheless be "less than acceptable."

OSI's performance did pose an immediate and continuing threat to the safety of guests and the general public as well. The robbery committed by two of OSI's charges demonstrates that OSI did not ensure that they would not leave its custody and threaten parties near its operation. This is supported by the unchallenged fact that, over a 1-year period, there were six separate reports of students running away from OSI's field camps. See CR 1 at 2. The death of another person while in OSI's control demonstrates that it was unable to ensure the safety of its guests. Such performance was plainly "less than acceptable."

OSI was provided with information along with each annual performance appraisal that fully explained its status and the consequences if it, as a probationary permittee, continued to maintain "less than acceptable" performance:

[Corrective] action by the permittee is mandatory and continuous operation at this level of performance would be unacceptable. \* \* \* A permittee who is given a summary performance rating of probationary will qualify for a permit period not to exceed one year[,] and permits with remaining periods of more than one year will be so amended. If a holder continues to operate at the probationary level, the authorized officer shall terminate the permit and/or deny future permit applications.

(CR 32 at 2 (emphasis supplied).) The record contains ample unchallenged evidence that OSI's performance had been and continued to be "less than acceptable." OSI had been expressly warned that termination of the permit was appropriate in those circumstances.

Second, regardless of the consequences resulting from OSI's special status as a probationary permittee, we hold that BLM also properly exercised its discretion here in view of its inherent obligation to consider public health and safety in managing the public lands. <sup>8/</sup> OSI asserts that it is entitled to show at a hearing that it was not at fault in Lee's death. (OSI's Reply to BLM Opposition to Hearing Request at 2.) Accepting only that Lee died while being restrained by OSI's employees (a

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<sup>8/</sup> Departmental regulation 43 CFR 8372.5(a)(1) authorizes BLM to suspend an SRP "if necessary to protect public health [or] public safety," and specifies that the term of the permit continues to run during such suspension. This provides adequate authority for the suspension and termination of, and failure to reauthorize, an SRP where the public health or public safety is threatened.

fact well supported by the record and admitted by OSI), sufficient grounds exist to revoke OSI's SRP on the grounds that its continuing operations were inconsistent with the public health and public safety, particularly in view of the incident only 10 months earlier where OSI students admittedly forcibly robbed private citizens. In the present case, BLM could not ignore that OSI's activities had, in a 10-month period, caused (whether or not as a result of its negligence) two persons to be threatened with deadly force and a third to die. There was clearly a continuing, serious threat to the public health and public safety, and BLM's action to suspend and later revoke OSI's permit was singularly appropriate here.

We expressly reject OSI's suggestion that BLM may not reach back to previous permit periods to determine whether a probationary permit may be revoked. Plainly, BLM is entitled to review a permittee's entire history to inform that determination. See Red Rock Hounds, 123 IBLA 314, 319 (1996). In some cases, doing so may help a permittee; in OSI's case, it does not.

Third, cancellation of OSI's permit was fully in accord with Departmental regulations. Regulation 43 CFR 8372.0-7(a)(2) provides that a permittee is "prohibited to \* \* \* violate stipulations or conditions of" an SRP. BLM expressly warned OSI in its permit form that the permit was "revocable for any breach of conditions hereof." The Department may revoke an SRP upon a final administrative finding of a violation of any term or condition of the SRP. See 43 U.S.C. § 1732(c) (1994). Finally, the terms of the SRP state that it "is revocable for any breach of conditions" of the SRP "or at the discretion of the authorized officer of [BLM], at any time upon notice." (CR 35 at 2.)

To the extent that BLM has used them as a basis for maintaining its SRP on a "probationary" basis, OSI has in the past been informally charged with numerous violations of SRP terms.<sup>9/</sup> By not appealing those previous adverse decisions, OSI has effectively admitted those violations. Further, it has not made an effective offer of proof disputing the facts underlying them.

In any event, OSI's failure to pay permit fees provides, by itself, adequate independent justification for revocation of its probationary SRP. Upon issuance of SRP OR 015-00-02, OSI agreed to pay fees in accordance with BLM's fee schedule, as published in the Federal Register. See 43 CFR 8372.4(a)(1). The fee schedule is well known, having been in effect since 1984. See 49 FR 5302 (Feb. 10, 1984). BLM followed it here. OSI could have appealed the fee arrangement to this Board, while accepting the other terms of the SRP. See, e.g., Crawford Mesa Water Association, 150 IBLA 14, 15 (1999). It did not do so. As the requirement to pay fees for the 1999-2000 season according to the BLM fee schedule was not timely challenged, it

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<sup>9/</sup> OSI disputes alleged violations discovered by a BLM volunteer on August 10 and September 12, 2000. (SOR at 6-7.) Even if those alleged violations are completely discounted, the case record documents adequate grounds for the revocation of OSI's SRP.

became administratively final, and OSI was required to comply with it, on pain of sanctions, expressly including revocation.

Fourth and finally, OSI's loss of insurance coverage (although not cited by BLM) also by itself justifies the revocation of its probationary SRP. Although OSI apparently told BLM verbally that it had found replacement insurance (CR 5), nothing in the record evidences replacement insurance. Its failure to maintain insurance is in violation of 43 CFR 8372.5(d) and the terms of the SRP itself. (CR 35 at 2 Par. C.) A permittee's obligation to notify BLM that it has secured replacement coverage where its insurance has been canceled (and that BLM has been named as a co-insured) is properly viewed as ancillary to the requirement that it maintain coverage. In these litigious times, BLM plainly may not allow a permit to continue where there is any uncertainty as to liability coverage.

OSI's appeal from BLM's March 28, 2001, decision denying its request for recalculation of permit fees with respect to the SRP in question here for the 1999-2000 season amounts to an untimely challenge to BLM's June 30, 1999, decision to issue the 1999-2000 SRP subject to the BLM fee schedule. As the appeal was filed long after the 30-day period allowed for bringing an appeal by 43 CFR 4.410(a), it must be dismissed. 43 CFR 4.411. This result is fair, where OSI enjoyed the benefit of the 1999-2000 SRP without ever objecting to the terms under which it was issued. Having failed to object timely, it was bound by the terms of the SRP to pay the specified rental on pain of revocation of its SRP.

To the extent not expressly addressed herein, OSI's arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are consolidated, the requests for hearing are denied, the appeal docketed as IBLA 2001-276 is dismissed as untimely, and BLM's decision revoking SRP OR-015-00-02 is affirmed.

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David L. Hughes  
Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge