

TIMBER RIVER RAFTING, INC.

IBLA 85-360

Decided December 29, 1986

Appeal from a decision of the Area Manager, Kremmling Resource Area, Colorado, Bureau of Land Management, requiring payment of commercial use fee under special recreation use permit. CO-018-SRP-21.

Reversed and remanded.

1. Accounts: Fees and Commissions -- Federal Land Policy and Management Act of 1976: Permits -- Fees -- Public Lands: Special Use Permits -- Special Use Permits

BLM may properly require the holder of a special recreation use permit to pay an annual-use fee for commercial use of public lands in connection with a river rafting operation and limit deduction of off-site transportation expenses in the fee computation to those cases involving transportation of customers more than 200 miles one way.

2. Accounts: Fees and Commissions -- Administrative Practice -- Federal Land Policy and Management Act of 1976: Permits -- Fees -- Public Lands: Special Use Permits -- Special Use Permits

Where BLM has established a policy of allowing a deduction for all off-site transportation expenses in the computation of the annual use fee for commercial use of public lands in connection with a river rafting operation, it will not be permitted to retroactively amend that policy to restrict the deduction.

APPEARANCES: Doug Freeman, Pine, Colorado, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Timber River Rafting, Inc., has appealed from a decision of the Area Manager, Kremmling Resource Area, Colorado, Bureau of Land Management (BLM), dated January 18, 1985, requiring payment of an additional amount as fee for

use of public land for commercial rafting operations on the upper Colorado River during the 1984 operating season under special recreation use permit (SRUP) CO-018-SRP-21.

The decision also stated that failure to pay by February 4, 1985, would result in the "automatic revocation" of appellant's SRUP.

On April 14, 1982, the Area Manager issued a SRUP for appellant's commercial use of public land while rafting on the upper Colorado River "between the Pumphouse and Dotsero." The stated term was from May 1, 1982, to October 30, 1986. An annual operating license for the period from May 22 to October 31, 1984, was issued to appellant on May 24, 1984. On September 28, 1984, appellant submitted a check in the amount of \$ 1,753.50, daily trip logs, and a post-use report for the 1984 season.

By letter dated October 23, 1984, the Area Manager notified appellant that, as a result of a policy decision issued by the BLM Colorado State Director, when computing the commercial-use fee, "[d]eductions from actual daily charges for long-distance travel will be allowed only for travel with customers that is in excess of 200 miles, one way." (Emphasis omitted.)

In his October 1984 letter, the Area Manager also required appellant to submit revised forms for daily trip logs and a post-use report for the 1984 operating season, "no later than Monday, November 5, 1984," and stated "[e]ach type of trip (i.e. half day, full day, camping) will require an individual data sheet to justify and claim deductions."

Having received no revised forms by November 5, 1984, the Area Manager sent a November 28, 1984, "final notice for requesting all trip logs, supplemental data forms to claim deductions, and post-use reports." The Area Manager stated that if the revised forms were not received by December 7, 1984, "we will compute your deductions." A "Bill for Collection" (bill No. A 322690) was sent to appellant with the January 1985 decision of the Area Manager. This bill was for the "balance" of the use fee for the 1984 season, computed to be \$ 313.20, on the basis of 4,017 user days. Payment was required by Feb. 17, 1985 (i.e., "within 30 days of the date of this bill"), in order to avoid the assessment of interest. This balance was the result of deducting the \$ 1,753.50 paid by appellant on Sept. 28, 1984, from \$ 2,066.70, the total use fee.

In its statement of reasons for appeal, appellant contends it should be allowed to deduct the cost of transporting customers to and from its rafting operations outside the BLM permitted area (i.e., off-site transportation expenses) when computing the annual commercial-use fee, and the balance of the commercial use fee for the 1984 operating season in the amount of \$ 313.20 resulted from a disallowed deduction. 1/

1/ Appellant explains that it had originally computed the commercial use fee for the 1984 operating season at \$ 1,753.50, "with a deduction for transportation." We note, however, that appellant computed the fee based on 4,040 user days, rather than the 4,017 user days used by BLM. Thus, the difference between BLM's and appellant's computations of the use fee may not be entirely due to BLM's disallowance of the off-site transportation expense

deduction.

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Appellant states it transports customers to and from surrounding resort communities (e.g., Vail, Steamboat Springs, and Estes Park) but that no trip is more than 200 miles one way. Appellant argues that when the BLM Colorado State Director set the 200-mile one-way limit for off-site transportation expenses, he effectively disallowed the deduction despite the fact the expenses were not incurred while using public land or BLM facilities and that "elimination of the mileage deduction in Colorado certainly was not the intent of those who drafted the new fee system." ^{2/} Appellant argues that, when setting its retail prices for rafting trips during the 1984 operating season, it relied on assurances by BLM that it would be entitled to deduct off-site transportation expenses, and that it was "sometime in late August 1984" before it was informed of the 200-mile one-way limit for the deduction of off-site transportation expenses.

[1] Section 304(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1734(a) (1982), provides that the Secretary may establish "reasonable charges" for "applications and other documents" relating to use and enjoyment of the public lands. In addition, section 4(c) of the Land and Water Conservation Fund Act of 1965 (LWCFA), as amended, 16 U.S.C. § 4601-6a(c) (1982), provides that a Federal agency may issue "[s]pecial recreation permits for * * * specialized recreation uses * * * at fees established by the agency involved." See Rogue River Outfitters Association, 63 IBLA 373, 382-83 (1982). The applicable regulation, 43 CFR 8372.4(a)(1), provides that the Director, BLM, shall establish fees for recreation use permits to be set forth in a fee schedule published in the Federal Register and such fees "may be adjusted from time to time to reflect changes in costs" incurred by the United States in issuing and monitoring the permits.

Effective February 10, 1984, BLM issued a commercial-use fee schedule for SRUP's which set forth the fees to be paid BLM for each user day based upon the adjusted daily charge collected by the permittee. This fee schedule was published in the Federal Register on February 10, 1984 (49 FR 5302). ^{3/} BLM stated that, in determining the adjusted daily charge, BLM "will recognize * * * that certain associated customer charges may be deducted from the daily amount charged participants" (49 FR 5302 (Feb. 10, 1984)). However, BLM provided that "[d]eductions may be limited to long distance, off-site transportation and lodging expenses [incurred] either before or after the associated permitted use, or fees paid to others for services off public lands." Id.

^{2/} Appellant points out that in the case of transporting customers to and from Winter Park, a 140-mile roundtrip, it incurs a cost of \$ 7.53 per person out of \$ 38 charge to the customer.

^{3/} BLM stated that the fee schedule

"is thought to represent a fair and equitable charge which will allow the BLM to recover a greater portion of the costs of issuing and monitoring special recreation permits and in some instances will provide a return for the privilege of using Federal resources for commercial purposes." 49 FR 5302 (Feb. 10, 1984).

Following the publication of the policy statement, the Colorado State Office, BLM, indicated an off-site transportation expense deduction would be allowed, but did not place any limitation on the extent of any allowable deduction. On April 26, 1984, the Acting State Director, Colorado, issued IM No. CO-84-185, Change 2, with various enclosures, which basically notified district managers of the "final FY '84 policy and procedures for BLM Colorado" with respect to special recreation use permits. IM No. CO-84-185, Change 3, at 1. Enclosure 2, entitled Supplemental Special Recreation Permit Application Data Sheet, was a worksheet for the computation of the adjusted daily charge per participant and the resulting use fee per user-day derived from data supplied by the permit applicant. The form includes spaces for the applicant to indicate the advertised daily rate per participant, as well as various expenses incurred off-site proposed for deduction, including long-distance transportation costs. In the instructions for the form (enclosure 2-2), long distance off-site transportation costs are defined as "costs of travel with customers from base of operation or pick-up point (office, airport, etc.) to starting point of permitted use where public lands are entered (launch site, base camp, trailhead, BLM road -- county roads excluded, etc.) and back to drop-off point." (Emphasis in original.) A reasonable reading of the instructions is that all off-site transportation expenses constitute an allowable deduction.

According to the State Director, after issuance of IM No. Co-84-185, change 2, it was the opinion of "at least one field office," that "deductions from advertised daily rates for all travel expenses, no matter how small they may be," were to be allowed. In IM No. CO-84-185, Change 3, at 1, the State Director stated that the "intent of regulations is clearly to allow permittees the option of separating from fees charged those expenses which have nothing directly to do with use of the public lands, and * * * we have already informed affected outfitters that such deductions would be made." In addition, Change 3 defined the term "long distance, off-site transportation * * * expenses" which could be deducted from the charge to customers in computing the commercial-use fee. The allowable deduction was, as stated above, limited to transportation expenses incurred for transporting customers in excess of 200 miles one way.

In a memorandum to the Regional Solicitor dated March 13, 1985, and submitted by BLM on appeal, the State Director explained the rationale for the 200-mile one-way limit. The State Director stated the limit arose from a need to adopt a uniform standard in Colorado and to avoid a costly and time-consuming review of "'nickel and dime' deductions." Moreover, the State Director explained that the drafters of the February 1984 Federal Register policy statement "were thinking of long distance in terms of any trip that would involve an overnight stay" and that 200 miles is the one-way limit for a day trip "that would not necessarily involve an overnight stay."

The fee for a SRUP is quite clearly a fee for the commercial recreational use of public lands. See 43 CFR 8372.0-2. The fee is calculated as a percentage of the daily charge by a private operator to members of the public taking advantage of a SRUP by engaging in a recreational use of public lands. In essence, the Federal Government is compensated for the operator's use of public lands. Thus, it is not contemplated that the Federal government would be compensated if the operator does not use public lands. For example, if

some portion of the daily charge by an operator is to reimburse it for expenses not derived from a use of public lands or BLM facilities, the operator should be allowed to deduct these expenses from the total daily charges before computing the commercial use fee paid to BLM. Indeed, in designing the fee schedule set forth in the February 1984 Federal Register, BLM specifically provided that an operator may deduct certain customer charges from the daily charge, including off-site transportation and lodging expenses. However, the drafters did not specify the extent of any deduction. Nonetheless, to focus only on the use of private versus public lands ignores several of the purposes for a commercial-use fee.

Section 304(c) of FLPMA, 43 U.S.C. § 1734(c) (1982), states that, in determining reasonable charges with respect to "applications and other documents," the Secretary may take into account

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.

Likewise, section 4(d) of the LWCFA, as amended, 16 U.S.C. § 4601-6a(d) (1982), provides that fees for special recreation permits

shall be fair and equitable, taking into consideration the direct and indirect cost to the Government, the benefits to the recipient, the public policy or interest served, the comparable recreation fees charged by non-Federal public agencies, the economic and administrative feasibility of fee collection and other pertinent factors.

It is evident that commercial use fees are intended to represent more than the Federal share of daily charges by a private operator to members of the public engaging in the recreational use of public lands under a SRUP. Rather, use fees are intended in part to reimburse BLM for administrative costs incurred by the Government in issuing and monitoring a SRUP as well as to constitute a reasonable charge for the privilege extended to the private operator to use public lands. See Rogue River Outfitters Association, 83 IBLA 151, 153-54 (1984). The fee schedule, regardless of how it is configured, will be judged solely by whether it accomplishes these statutory purposes. See Payment of Interest on the Capital Cost of the National Fisheries Center and Aquarium, Solicitor's Opinion, 70 I.D. 514 (1963).

In the present case, BLM promulgated a commercial-use fee schedule intended primarily to recover administrative costs and, in some instances, provide a fair return to the Federal Government. 49 FR 5302 (Feb. 10, 1984). Incorporated in the schedule was an indication that a deduction would be allowed for long distance off-site transportation expenses. Obviously, BLM's conclusion was that, even with the deduction, the fee schedule should be sufficient to recover administrative costs and, in some instances, provide a fair

return to the Federal Government. In the case of Colorado,

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the BLM State Office decided to allow a deduction but to limit the deduction to off-site transportation expenses incurred by a private operator in transporting customers more than 200 miles one way. By making the limitation the Colorado State Office struck a balance between the policy of allowing deductions for "long distance transportation costs" and the policy that the fees should reimburse the administrative costs, which include the cost of auditing the deductions. Appellant argues that the State Office has effectively disallowed any deduction for a permit holder's off-site transportation expenses. Even if this is true, it does not violate the original policy directive set forth in the February 1984 Federal Register, which made allowance of a deduction of long distance transportation costs discretionary. Moreover, we find no evidence that the resulting use fee does not comport with its statutory purposes.

In addition, both section 304(c) of FLPMA and section 4(d) of the LWCFA recognize that, in setting use fees, the Department may take into account the administrative efficiency involved in the fee-collection system. According to the March 1985 memorandum submitted on appeal, the BLM Colorado State Director based his decision to limit the off-site transportation expense deduction to 200 miles one way in large part on the costly and time-consuming review which would otherwise be entailed if the deduction were set at a lower limit, *i.e.*, "'nickel and dime' deductions." We conclude, based on the evidence before us, that the limit set is a reasonable effort to make administrative operation of the fee-collection system more efficient. ^{4/}

Appellant also argues it is entitled to a deduction for offsite transportation expenses because otherwise those operators incurring such expenses pay more in use fees than operators not incurring such expenses, where the "amount of use of BLM lands and facilities is the same." (Emphasis omitted.) However, the use fee is not based upon expenses, but customer charges. These charges may be only in small part attributable to the expenses incurred. Moreover, an important consideration in determining use fees is the "monetary" value of the privilege or the benefit extended to the private operator. 43 U.S.C. § 1734(c) (1982); see also 16 U.S.C. § 4601-6a(d) (1982). In the case of an operator with higher customer charges, the "monetary" value of its SRUP is greater. Accordingly, the operator's corresponding use fee should be higher.

[2] Nevertheless, we find disallowance of a deduction for off-site transportation expenses involving the transportation of customers less than 200 miles one way to be objectionable in the present case, as it has

^{4/} We note that, in promulgating amended rules with respect to special recreation permits under 43 CFR Subpart 8372, effective Sept. 28, 1984, BLM set forth a revised fee schedule which provided for a deduction "limited to off-site transportation and lodging expenses." 49 FR 34334 (Aug. 29, 1984). The words "long distance," included in the February 1984 Federal Register policy declaration on use fees, have been omitted. However, there is no discussion on this point and we attribute no significance to the omission.

been applied retroactively. Appellant argues it relied on assurances by BLM that it would be allowed an off-site transportation expense deduction in setting its 1984 retail prices. Neither the April 1982 SRUP nor the operating license for the 1984 operating season set forth a limitation on the allowable deduction for off-site transportation expenses based on length of travel. Although no deduction for off-site transportation expenses was taken in the computation of the commercial use fee for the 1983 operating season, the February 1984 Federal Register policy statement recognizes the allowance of deductions of "long distance, off-site transportation * * * expenses." 49 FR 5302 (Feb. 10, 1984). The application of IM No. CO-84-185, Change 2, "in the area of allowable deductions, specifically for long distance travel," gave rise to IM No. CO-84-185, Change 3, which essentially defined the term "long distance." Nevertheless, we cannot overlook the fact that, prior to the issuance of IM No. CO-84-185, Change 3, in July 1984, the Statewide policy in Colorado seemed to allow all off-site transportation expenses as a deduction in computing use fees. Documents in the file indicate the dissemination of this policy statement to permit holders and appear to be the source of appellant's belief that it would be allowed to deduct its off-site transportation expenses. It is reasonable to believe appellant entered the 1984 operating season relying on the policy that deduction of all off-site transportation expenses would be allowed, and set its retail prices and incurred expenses based upon this belief. The record also lends support to the conclusion that appellant continued in this belief through the entire period of its 1984 operating season.

It is manifestly unfair to permit BLM to now disallow deduction of appellant's off-site transportation expenses because late in the 1984 operating season BLM changed its stated policy by issuance of IM No. CO-84-185, Change 3, limiting the allowable deduction. We conclude that permitting BLM to in effect retroactively negate its prior policy would produce an inordinately harsh result which is not outweighed by precluding BLM from disallowing the deduction for the 1984 operating season. Cf. Safarik v. Udall, 304 F.2d 944, 949 (D.C. Cir.), cert. denied, 371 U.S. 901 (1962) (citing Franco Western Oil Co., 65 I.D. 427 (1958)); Elbert O. Jensen, 39 IBLA 62, 66 (1979); Eve Reese, 25 IBLA 244 (1976). The definition of what off-site transportation expenses are deductible when computing use fees is not governed by statute or regulation, but is a matter of discretion with BLM. To quote our decision in Wilderness River Outfitters, 30 IBLA 148, 152 (1977), the policy regarding the deduction of off-site transportation expenses is "relatively recent and the operators have not had time to appreciate fully its nuances." Accordingly, BLM will not be permitted to stringently enforce a policy determination until that determination has been clearly stated and disseminated.

As previously noted, BLM is at liberty to apply the amended policy. BLM is simply restricted from retroactively applying that policy to appellant's 1984 operating season.

The facts in this case distinguish it from Score International, 78 IBLA 142 (1983), which involved disallowance of a deduction for the portion of an entry fee charged by the permittee under a SRUP for an off-road vehicle race, for purposes of the computation of 5 percent of the "gross receipts" use fee under 43 CFR 8372.4(b)(2) (1982). In upholding disallowance of the deduction

by BLM, we relied on the fact that "[t]here is nothing in the record which would indicate that it had been BLM's policy to allow a deduction of the prize purse prior to the calculation of the 5 percent use fee in previous use permit calculations. Without this showing there is no basis for the conclusion that the calculation is in variance with BLM's past practice." Score International, supra at 148. By contrast, in the present case, disallowance of a deduction for appellant's off-site transportation expenses in computing the use fee is clearly at variance with BLM's Statewide policy at the time appellant entered into the 1984 operating season.

Thus, we hold appellant will be accorded the benefit of BLM's established policy which it relied upon during the 1984 operating season, and will be permitted to deduct its off-site transportation expenses in accordance with that policy. To the extent this deduction accounts for the balance of the commercial-use fee which BLM required appellant to pay in its January 1985 decision, that decision is hereby reversed. However, the case is remanded to BLM in order that it may determine what amount is owing because of the difference in the number of user days in appellant's calculation of the use fee and BLM's. See note 1.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded.

R. W. Mullen
Administrative Judge

We concur:
Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge

