

UPPER ROGUE RIVER OUTFITTERS ASSOCIATION

IBLA 85-484

Decided July 23, 1986

Appeal from a decision of the State Director, Oregon State Office, Bureau of Land Management, affirming the intent to initiate a requirement that commercial users of the recreation segment of the Rogue River (Applegate River to Grave Creek) obtain permits and pay user fees.

Affirmed.

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

It is proper for the Bureau of Land Management to require outfitters to obtain permits and pay user fees for commercial use of the recreation segment of the Rogue River (Applegate River to Grave Creek), even though noncommercial users are not required to pay such fees for use of the same area. Commercial use fees are imposed to recover at least a portion of the cost of issuing and administering the permit and for the privilege to use and opportunity to make a profit on public lands and related waters.

APPEARANCES: David Jensen, Esq., Eugene, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Solicitor, United States Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

By letter dated December 3, 1984, the Medford District Office, Bureau of Land Management (BLM), notified outfitters of its intent, beginning January 1, 1985, to require outfitters/guides conducting commercial operations on the recreation segment of the Rogue River (Applegate River to Grave Creek) to obtain commercial use permits and pay appropriate user fees. Outfitters and guides who wished to operate within that area were advised to contact the Rogue River Program, Medford District Office, prior to the 1985 use season for information on permit applications.

In a letter dated January 3, 1985, David Jensen, on behalf of Upper Rogue River Outfitters Association, inquired of BLM whether there would be a

similar fee for noncommercial users. Jensen asserted that the imposition of a noncommercial user fee was mandated by the Board's decision in Rogue River Outfitters Association (Rogue River), 63 IBLA 373 (1982).

In a January 11, 1985, letter BLM responded that noncommercial users would not be charged a fee. It explained that Rogue River, supra, referred to a specific area with limited access, equally divided into commercial and noncommercial use, while the section of the river being put under commercial permit was not an area of limited access. Subsequently, Jensen wrote to the Oregon State Director for assurance that "the user fee for the upper Rogue River will not be visited only upon the commercial users." Jensen indicated that if the State Director did not extend the user fee to noncommercial users, "we intend to appeal your decision to the Interior Board of Land Appeals."

In his decision dated March 13, 1985, the State Director presented the following rationale in support of BLM's intent to initiate a Special Recreation Permit requirement under 43 CFR 8372.1-1(a) for commercial use of the Rogue River (Applegate River to Grave Creek), effective April 1, 1985, but not to initiate a noncommercial permit requirement at that time:

The BLM Special Recreation Permit Policy, which was published in the Federal Register on February 10, 1984, indicates in paragraph 4 that "special recreation permits are issued for specific recreational uses of the public lands and related waters." Implementing regulations at 43 CFR 8372.1-1 state that "Special recreation permits are required for (a) commercial use, . . . , and (d) special area use where the authorized officer determines the criteria of the . . . Wild and Scenic River Act . . . require their issuance."

Based upon this policy and the regulations found in 43 CFR 8372.1-1(a), the BLM in Oregon currently requires outfitters and guides operating commercially on the Deschutes River, the Owyhee River, the John Day River, and the Klamath River to obtain Special Recreation Permits and pay appropriate commercial use fees. Additionally, a commercial permit requirement on the upper Rogue National Wild and Scenic River (recreation segment) is scheduled to become effective April 1, 1985. [1/]

In addition, because the BLM has determined that the criteria of the Wild and Scenic Rivers Act requires the protection and enhancement of the values which caused the wild segment of the Rogue River component of the National Wild and Scenic Rivers system to be set aside, the BLM implemented a permit system for the commercial and noncommercial use of this segment. This action was consistent with the requirements of 43 CFR 8372.1-1(d). The implementation of a similar permit system which would limit the commercial and noncommercial use of the recreation section of the Rogue is not considered necessary or contemplated at this

1/ The record shows BLM implemented this requirement in April 1985.

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time. We interpret the Rogue River Outfitters Association decision to mean that the BLM is not required to declare the recreation segment of the Rogue Wild and Scenic River to be a special use area nor to issue permits and collect fees from both commercial and noncommercial users until it becomes necessary to regulate the number of commercial and noncommercial users and the manner of their use in order to protect the values which cause this segment of the river to be set aside by Congress. 2/

In its statement of reasons, appellant asserts that BLM seeks to impose upon the commercial users the entire burden of paying for policing of the upper Rogue River by BLM. Appellant points out that in Rogue River, supra, the Board rejected a similar BLM decision to impose the entire policing costs for the wild and scenic section of the Rogue River on commercial users. Appellant contends that requiring commercial users to pay a user fee and not requiring a user fee of noncommercial users is unconstitutional.

In response BLM states that appellant displays a misunderstanding of BLM's program in its allegation that BLM seeks to impose upon the commercial user the entire burden of paying for policing of the upper Rogue River by BLM. BLM asserts that it is not charging the commercial user for the cost of policing the river, but rather for the privilege of using Federal resources for commercial purposes.

BLM contends that Rogue River, supra, is not applicable to the present situation because Rogue River applies only to special areas which require special management. BLM states that the recreation section of the upper Rogue River has not been designated a "special area" in which special recreation permits should be required for noncommercial use.

[1] Special use permits are issued under the general authority of the Secretary of the Interior to regulate the use of the public lands and related waters. 43 U.S.C. § 1732(b) (1982). Special recreation use permit requirements are set forth in 43 CFR Subpart 8372. 43 CFR 8372.1-1 provides that special recreation permits are required in the following situations:

2/ The part of the river in question is variously referred to in the case file and pleadings as the upper Rogue River, the upper Rogue National Wild and Scenic River (recreation segment), the upper Rogue River (Applegate River to Grave Creek), and the upper Rogue River section of the Rogue National Wild and Scenic River (Applegate River to Grave Creek).

Although Upper Rogue River Outfitters Association represents in its Statement of Reasons at 1, n.1 that "[t]his section is above the Wild and Scenic River section," this is clearly not the case. Section 3 of the Wild and Scenic Rivers Act, 16 U.S.C. § 1274(a)(5) (1982), designates that section of the Rogue River "extending from the mouth of the Applegate River downstream to the Lobster Creek Bridge" as a component of the national wild and scenic rivers system. The issue in this case relates to the difference in policy regarding permitting and use fees for two separate segments of the national wild and scenic section of the Rogue River -- the "wild" portion (involved Rogue River, supra) and the

"recreation" portion (involved herein).

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° 8372.1-1 Public lands, general.

Special recreation permits are required for (a) commercial use, (b) competitive use, (c) off-road vehicle events involving 50 or more vehicles, and (d) special area use where the authorized officer determines the criteria of the Land and Water Conservation Fund Act, as amended, the Sikes Act, the Wild and Scenic Rivers Act, Federal Land Policy and Management Act, the Taylor Grazing Act, or National Trails Act require their issuance.

Appellant contends that it is discriminatory to charge commercial users a user fee while not charging noncommercial users such a fee. We find that imposition of a user fee for commercial users, but not for noncommercial users, is proper in this case. The special recreation permit is required for commercial use under 43 CFR 8372.1-1(a). This requirement is no different than requirements for any other commercial use of the public lands which might include rights-of-way, timber contracts, grazing leases, and oil and gas leases. For the privilege to use and opportunity to make a profit on Federal lands and related waters, the United States must receive fair market value as provided in section 102(a)(9) of FLPMA, 43 U.S.C. ° 1701 (1982). Regulatory authority for requiring fees for special recreation permits is found at 43 CFR 8372.4 which provides as follows:

° 8372.4 Fees.

(a) Fees. (1) Fees for Special Recreation Permits shall be established and maintained by the Director, Bureau of Land Management, and may be adjusted from time to time to reflect changes in costs. The fee schedule shall be incorporated in the Manual of the Bureau of Land Management, published periodically in the Federal Register and otherwise made generally available to the public.

In accordance with this regulation, a fee schedule was set forth at 49 FR 34334 (Aug. 29, 1984), including fees for commercial uses.

Appellant refers to Rogue River, supra, to support its contention that noncommercial, as well as commercial users, should be charged a use fee. That appeal, however, involved the wild portion of the Rogue River. 43 CFR 8372.1-1(d) requires a special recreation permit for special area use where BLM determines that the Wild and Scenic Rivers Act, 16 U.S.C. ° 1271-1278 (1982), requires such issuance. BLM has classified the wild portion of the Rogue River as a "special area," and therefore, individuals, or individual immediate families are not excepted by regulation from the requirement of having a special recreation permit. See 43 CFR 8372.1-2. Fees for special use areas are set forth at 49 FR 34334 (Aug. 29, 1984), which provides as follows:

(3) Other uses -- \$ 1.50 per user day for uses other than commercial or competitive events, uses involving more than 50 vehicles including those of participants and spectators, or

uses taking place in special areas for which permits are required. ^{3/}
[Emphasis added.]

Since permits are required for use in the "special area" of the Rogue River, under 43 CFR 8372.1-1(d), noncommercial users must pay a fee as provided at 49 FR 34334, in the section designated "(3) Other uses."

In Rogue River, *supra* at 386-387, the Board explained the reasons why both commercial and noncommercial users should be required to pay a fee to use the wild portion of the Rogue River:

As we previously pointed out, since 1976 noncommercial parties have been required to obtain a permit in order to raft on the Rogue River. Thus, a system for collecting such fee is already in place. Presumably BLM incurs similar costs for processing these permits as it does for commercial permits. Furthermore, since 1978, use of the Rogue River has been equally divided between commercial and noncommercial users. Thus, presumably the BLM activities required to monitor the river in order to protect the quality of the recreational experience, apply equally to commercial and noncommercial users. Similarly, we find that half the need for the maintenance of toilet facilities and of trash collection is likely to result from noncommercial users.

We can find no distinction between the specialized use of the commercial users and the specialized use of noncommercialized users which would permit noncommercial users to have free use of the Rogue River for rafting.

None of these reasons is applicable to the upper Rogue River between Applegate River and Grave Creek. BLM has not designated this portion of the river as a "special area" in which special recreation permits would be required for noncommercial use. Therefore, there is no permit system in place for noncommercial users. Use of this section of the river is not restricted and the number of commercial and noncommercial trips is not limited. There is no division between the number of commercial and noncommercial trips. Also, the reason for requiring permits in the wild portion of the Rogue River (to limit the number of users and preserve the wild experience) does not exist in the section of the Rogue in issue.

In comparing the appeal in issue with Rogue River, *supra*, two distinct permit and fee systems are obvious: one requiring that commercial operators obtain a permit and pay appropriate fees for the privilege of conducting commercial operations on public lands and related waters (43 CFR 8372.1-1(a))

^{3/} At the time the Rogue River appeal was decided, the applicable regulation was found at 43 CFR 8372.4(b)(3) (1981) which reads as follows:

"(3) Special area use -- fees may be required for special area uses by other than commercial, competitive, and offroad vehicle users where the authorized officer determines that such charges are consistent with the Land and Water Conservation Fund

Act. A minimum fee of \$ 1 shall be charged for each permit for such use."

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and 43 CFR 8372.4), and another providing the authorized officer with discretion to determine if and when commercial and noncommercial permits are necessary (43 CFR 8372.1-1(d) and 43 CFR 8372.4). We find that BLM's determination to initiate a permit and fee system for commercial use, but not to initiate a permit and fee system for noncommercial use on the segment of the river in question, is proper. The provision of 43 CFR 8372.4 requiring payment of commercial user fees is a duly promulgated Departmental regulation which must be applied by the Board while the rule remains in effect, Rogue River Outfitters Association, 83 IBLA 151, 154 (1984), and appellant is therefore required to pay this fee. We find that BLM's permit and fee system is based on the applicable statutes and regulations and does not discriminate against appellant.

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 affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Anita Vogt
Administrative Judge
Alternate Member

James L. Burski
Administrative Judge.

