WALT'S RACING ASSOCIATION

IBLA 75-90 Decided January 30, 1975

Appeal from letter decision of the Las Vegas District Office, Bureau of Land Management, denying appellant's protest against the imposition of a revised fee assessment for Special Land Use Permit N5-74-35.

Remanded.

1. Administrative Authority: Generally -- Fees -- Public Lands: Administration -- Special Use Permits

   The Bureau of Land Management, in the exercise of its discretionary power to issue special land use permits, may establish special fee assessments for off-road vehicle (ORV) events.

2. Applications and Entries: Vested Rights -- Fees -- Special Use Permits

   The filing of an application for a special land use permit does not vest in the applicant any rights which preclude the Bureau of Land Management from requiring compliance with fee assessments adopted after the date of such filing but before issuance of the permit. In the absence of a provision that pending applications are to be exempted from the effects of the change in fee requirements, the applicant must comply with the fee assessment in effect at the time of the issuance of the special land use permit.

3. Applications and Entries: Vested Rights -- Fees -- Special Use Permits

   An applicant's special land use permit application does not fall within the

> "firm commitment" exception of a Bureau of Land Management instruction memorandum requiring revised fee assessments for off-road vehicle (ORV) permits where, subsequent to issuance and notice of the memorandum, the application is still in the preliminary processing stage requiring additional pre-event meetings, the applicant's acceptance of special stipulations, and further staff investigation and review before approval; however, the case will be remanded for further consideration where the District Office decision does not determine whether the application falls within the memorandum exception which permits the honoring of "negotiations which have progressed too far to negate * * *."

APPEARANCES: Joseph W. Brown, Esq., of Jones, Jones, Bell, LeBaron, Close, Bilbray & Kaufman, Las Vegas, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Walt Lott and Peter Simon, representatives of Walt's Racing Association, have appealed on behalf of the Association from a decision of the Las Vegas District Office, Bureau of Land Management (BLM), dated May 20, 1974, denying a protest against imposition of a revised fee assessment required by BLM Instruction Memorandum No. 74-60, subsection .72, which imposes a five percent payment on the gross receipts for special land use permits issued for organized off-road vehicle (ORV) events.

On February 11, 1974, appellant submitted a special land use permit application to the District Office requesting permission to hold an off-road vehicle race, the "Bonnie & Clyde 350," on national resource lands located in Clark County, Nevada, for a period covering April 26 through April 28, 1974. Appellant's permit (N5-74-35) was issued on April 25, 1974. On February 21, 1974, the Director, Bureau of Land Management, issued Instruction Memorandum No. 74-60 to all Washington, D.C. and field officials on the subject of "Special Land Use Permits and Fees for Recreational Uses of the National Resource Lands." Subsection .72 states, in part, the following:

> FEES A non-refundable $10 filing fee is required at the time the application is filed. The fees to be collected for all ORV events are: Five percent of

> gross receipts of the event, or $1 per rider event whichever is greater. (Emphasis in original.)

The memorandum had the following prefatory statement:

> These instructions are effective immediately. Firm commitments and negotiations which have progressed too far to negate will be honored. * * *

On April 25, 1974, appellant protested against application of the new fee assessment to its racing event, charging that the fee structure was both inequitable and unconstitutional, and adding that, under the circumstances, the prefatory exception was applicable. The District Office denied the protest and, on appeal, appellant reasserts the arguments stated above.

The processing of appellant's application proceeded as follows. Upon receipt of the application, the District Office solicited comments from grazing and powerline right-of-way permittees as portions of the proposed racecourse covered two grazing allotments and a powerline right-of-way road. On March 18, 1974, the District Office received a letter from one of the grazing permittees objecting to the race on the grounds that it could cause damage to his cattle operation. On April 23, 1974, an additional objection was received from the Southern California Edison Company, holder of the powerline right-of-way. Comments were also received from the Nevada Fish and Game Department which objected to the race on the grounds that it would interfere with the bighorn sheep lambing season in the area. In addition, the Clark County Air Pollution Board stated its intention to monitor the proposed event for particulate matter concentration levels to determine the pollution effect on the surrounding airshed.

On April 12, 1974, David B. Mensing, Recreation Technician, completed a comprehensive environmental analysis record on the event. The report recommended issuance of the permit with 22 special stipulations to be attached. Recommended stipulation #11 reads as follows:

> Rental fee will be determined as follows:
>
> | | |
> |---|---|
> | Value of entry fee | = $ 360 |
> | Number of entrants | = |
> | Gross receipts | = |
> | 5% | = |
> | % of course on National Resource lands | = 98% |

TOTAL RENTAL FEE [1/]

On April 24, 1974, the Resource Area Manager concurred with the recommendations proposed in the environmental report. On April 25, 1974, an antiquities site inventory report for the racecourse was submitted offering no objection to the proposed race. On that same day, the Environmental Coordinator and the Chief, Division of Resource Management, concurred with the recommendations proposed in the environmental report. The District Manager also concurred, but no date is indicated. When Special Land Use Permit N5-74-35 was issued on April 25, 1974, 20 special stipulations were attached. Stipulation #10 was a restatement of recommendation #11 in the environmental report with the additional requirement that "[t]otal fees must be received within 15 days after the event is held."

In its protest and appeal, appellant specifically charges that the newly-enacted fee schedule is inequitable and unconstitutional as it discriminates against ORV events by charging disproportionately exorbitant fees for use of the public domain in relation to other recreational and commercial users of such land. With regard to the argument that its special land use permit falls within the memorandum's prefatory exception, appellant alleges the following facts: a) appellant has been planning the event since September 1973; b) appellant held several meetings between September 1973 and January 1974 with a BLM Recreation Planner who gave appellant a verbal commitment that "a race course would be approved;" c) appellant received notice of the new rate structure for ORV events on or about March 6, 1974; d) prior to receipt of notice, appellant expended a substantial amount of time, money and effort promoting the event in reliance upon the existing rate structure; e) prior to receipt of notice, appellant already had several meetings with BLM representatives and all investigations for the environmental analysis record had been completed and needed only staff review in order to be perfected; f) prior to receipt of notice, the only remaining investigation requiring completion and submittal was the archeological [antiquities] report; and g) appellant promptly complied with all pre-issuance requirements and should not

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1/ In an undated memorandum signed by David B. Mensing, the following fee assessment is presented:

244 entries	87,840.00
$ 360 per entry	.05 BLM Fee
$ 87,840.00	4,392.00
	.98 % of course on BLM Land
	4,304.16

4,304.16 Total Fee
3,750.00 Amount paid in advance

554.16 Balance on fee due

be penalized due to the BLM's delay in finalizing and approving the application. Appellant requests an opportunity for oral argument before the Board in order to further detail the activities which transpired prior to its receipt of notice of the existence of the revised fee structure.

In its decision denying appellant's protest, the District Office responded to appellant's arguments as follows:

> [C]riteria for determining whether a firm commitment had been met were established as follows in Nevada:
>
> 1. The application must be recorded.
>
> 2. All pre-event meetings with the applicant must have been held.
>
> 3. The EAR (environmental analysis record) for the proposed SLUP [special land use permit] has had staff review and is ready for the District Manager's signature.
>
> 4. The only action remaining with the applicant is a meeting to receive the permit. [2/]
>
> In reviewing the status of the above identified permit, it is found that the first item had been completed prior to the initiation of the new fee schedule. However, the environmental analysis record had not had staff review (completed around April 20) and other actions with the applicant, outside of receiving the permit, were required including additional pre-event meetings. [3/]

* * * * * * *

2/ These criteria are set out in BLM Instruction Memorandum No. NSO 74-33, issued March 12, 1974, by the State Director, Nevada, to all District Managers.

3/ Following appellant's appeal to the Board, the District Manager, Las Vegas, submitted a Status Report to the BLM State Director, Nevada. The report is dated July 24, 1974, and includes in part, the following information:

"[M]any of the necessary items to complete the granting of the application were not accomplished until after the date I.M. 74-60 was placed into effect. * * * [T]he initial route of the course was changed prior to granting the permit and after issuance of I.M.

74-60 because of a conflict with livestock grazing."

> In regard to whether the fees are equitable * * * the fee structure has been established by the Director of BLM based on authority prescribed in 43 CFR 18.10 [1973], which states: "Notwithstanding other sections of this part, 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 fees established by the bureau involved."

[1] The issuance of special land use permits is not authorized by any statutory provision. However, under the general authority of the Secretary of the Interior to administer the public lands, a permit may be issued for purposes not specifically provided for by existing law. 43 CFR 2920.0-2(a); Wilderness Society v. Morton, 479 F.2d 842, 875 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973); Wyoming Highway Department, 14 IBLA 258, 260 (1974); Allen M. Boyden, 2 IBLA 128, 131 (1971). Furthermore, issuance of special land use permits is discretionary, and the BLM may reject an application for such permit if the Bureau's studies of the area indicate that the use for which the application is made is inconsistent with the Bureau's objectives and programs for public use of the land. 43 CFR 2924.3(a); Wyoming Highway Department, supra; Desert Outdoor Advertising, Inc., 2 IBLA 344, 349 (1971); Allen M. Boyden, supra. As noted in the District Office decision, in exercising his discretionary power, the Director, BLM, is authorized to establish special fee assessments for ORV events. 43 CFR 18.10 (1974). 4/ The February 21, 1974, instruction memorandum incorporated a revised ORV fee assessment which represented the Director's determination of the fair market value for the privileges granted, and was promulgated in accordance with the Department's proprietary obligation to assure that the public interest is served by exacting a fair return from persons engaged in exploiting national resource lands. 43 CFR 2920.4(a); see Hannifin v. Morton, 444 F.2d 200, 202 (10th Cir. 1971). Accordingly, we find that imposition of a special assessment for ORV events is neither arbitrary nor capricious, and reject appellant's argument that the new fee is inequitable and unconstitutionally discriminatory.

[2] Our conclusion is not altered by the fact that the memorandum was issued subsequent to the filing of appellant's application. In analogous situations, the Department has consistently held that the filing of an application for the sale, lease or permit for public lands does not vest in the applicant any

4/ The regulation was revised in 1974, but is generally to the same effect.

rights which preclude the Department from requiring compliance with revised payment structures, adopted after the date of such filing, in order for the applicant to qualify for the interest in public lands. See Joseph C. Sampson, 52 I.D. 637 (1939) (oil and gas prospecting permit); Roy W. Swenson, 67 I.D. 448 (1960) (potassium prospecting permit); Harold Ladd Pierce, 69 I.D. 14 (1962), aff'd sub nom. Miller v. Udall, 317 F.2d 573 (D.C. Cir. 1963) (oil and gas lease); Clarence E. Felix, A-30197 (January 7, 1965) (coal prospecting permit); Billy Stewart, NM 4200 (April 8, 1969), approved by the Secretary of the Interior (May 2, 1969), aff'd sub nom. Hannifin v. Morton, supra, (sulphur prospecting permit); Eugene G. Roguszka, 15 IBLA 1 (1974) (small tract sale); David M. Miller, 15 IBLA 270 (1974) (soldium prospecting permit).

The Department's position was upheld in Miller v. Udall, supra. Although that case involved a statutory change in the requirements for issuance of a lease, and the present case concerns the BLM Director's change in the criteria for assessing special land use permit fees, the principle is the same. Before an interest in public lands will be granted, an applicant will be required to comply with the requirements in effect at the time the interest is to be issued even though the requirements have been changed during the pendency of his application, in the absence of a provision that pending applications are to be exempted from the effects of a change in payment requirements.

Thus, the remaining issue to be settled is whether appellant's permit application should be exempted from the effects of the change in fee criteria in accordance with the memorandum's prefatory exception. 5/

5/ As for appellant's argument that it relied upon the verbal commitment of a BLM Recreation Planner that "a race course would be approved," we note that appellant's permit was in fact approved, subject to compliance with proper BLM requirements which included the revised fee assessment. Implicit in appellant's argument is the assumption that the verbal commitment contemplated the issuance of a permit subject to the fee schedule existing at the time the application was filed. Appellant's reliance upon this assumption was unreasonable as the Recreation Planner was not authorized to issue a permit, and, thus, any implicit verbal commitment on his part could not bind the Government to vary the terms of the special land use permit as finally issued. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); Grady C. Price, Jr., 17 IBLA 98 (1974); Atlantic Richfield Co., 16 IBLA 329, 81 I.D. 457 (1974); Medford Corp., 16 IBLA 321 (1974).

[3] The comprehensive discretionary authority of the Department over national resource lands includes the power to prescribe the times, conditions and modes of transfer thereof. Cf. Southwestern Petroleum Corp. v. Udall, 361 F.2d 650, 654 (10th Cir. 1966). Accordingly, it was proper for the State Director, Nevada, to establish, and measure appellant's application against, the "firm commitment" criteria set forth in Instruction Memorandum 74-33. See 43 CFR 18.10. The facts clearly indicate that subsequent to the issuance of the revised fee assessment, and subsequent to appellant's notice of the new fee, the application was still in the preliminary processing stage. Additional pre-event meetings were required as in the instance where the route of the course had to be changed in order to protect the interests of a grazing permittee. In addition, staff review of the environmental analysis record was still required in order to determine whether an environmental impact statement would be necessary pursuant to the National Environmental Policy Act, 42 U.S.C. ° 4321 et seq. (1970). Furthermore, the antiquities investigation had not as yet been completed. 6/ Had the staff concluded that the proposed ORV event would have significant adverse effects upon the environment or upon archeological conditions in the area, the permit application could have been denied. 43 CFR 2924.3(a). Instead, the permit was approved subject to 20 special stipulations which still required appellant's acceptance. 43 CFR 2920.3(b). Under these circumstances, it was proper for the District Office to conclude that appellant's application did not fall within the instruction memorandum's "firm commitment" exception. 7/ However, we note that the prefatory language of the memorandum includes two exceptions from the effects of the change in fee assessment: "Firm commitments and negotiations which have progressed too far to negate will be honored." (Emphasis added). The two exceptions are separate and distinct, and, in its decision denying appellant's protest, the District Office neither set out criteria for nor measured appellant's application against the latter exception. Accordingly, the case is remanded to the BLM for further consideration of this point. Appellant will be given 30 days from receipt of this decision to submit evidence to the BLM concerning the progress of the negotiations. Thereafter, the District Office will issue a decision on the matter subject to appellant's right to appeal.

6/ The Historic Sites, Buildings and Antiquities Act, 16 U.S.C. ° 461 et seq. (1970), directs the Secretary of the Interior to preserve for public use historic sites, buildings and objects of national significance for the benefit of the public. See also 43 CFR 18.10(2).

7/ We also reject appellant's argument that it is being penalized due to the BLM's failure to process the application prior to the issuance and notice of the new fee assessment. An applicant for public land cannot acquire any right in the land by virtue of administrative delay. See Eugene G. Roguszka, supra at 8, and cases cited therein.

With respect to the issues adjudicated in this decision, we do not believe that a hearing before the Board is justified. 43 CFR 4.415. Accordingly, appellant's request for a hearing is denied.

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 remanded for further consideration.

Martin Ritvo
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Douglas E. Henriques
Administrative Judge