

WILDERNESS/CHALLENGE, INC.

IBLA 81-788

Decided May 6, 1982

Appeal from decision of District Manager, Moab District, Bureau of Land Management, rejecting special recreation use permit application.

Affirmed as modified.

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

An applicant for a special recreation use permit for river rafting will be considered as seeking a "commercial use" of the river, within the meaning of 43 CFR 8372.0-5(a), where the applicant or the applicant's employee makes a salary from or for services rendered to customers or participants in the permitted activity.

APPEARANCES: Craig G. Spillman, Director, Wilderness/Challenge, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Wilderness/Challenge, Inc., has appealed from a decision of the District Manager, Moab District, Bureau of Land Management (BLM), dated April 23, 1981, rejecting its special recreation use permit application for the purpose of conducting private educational river rafting trips on the San Juan River from Sand Island to Clay Hills Crossing from May to July 1981. 1/

In its April 1981 decision BLM stated the following reasons for rejecting appellant's application:

1/ While the time period for which appellant sought a permit has passed, we will decide the appeal because of the nature of the issue presented.

1. Your organization falls in the commercial category and because no commercial permits are available, we cannot approve your application. In order for your group to be noncommercial, the following criteria must be met:

A. All participants, including trip leaders, must share equally all costs and expenses. This means that no fee is charged or collected by trip leaders or sponsors of the trip in excess of actual costs of each trip.

B. No participants, leader, or sponsor of a trip may receive a salary, gratuity, or increase his/her net worth as a direct result of the river trip. This means that if a trip leader is employed by the trip sponsor, no portion of his salary may come from fees charged trip participants.

C. Members of the organization and its sponsor(s) or leader(s) may not engage in paid advertising for the trip.

D. No one may amortize equipment costs on a noncommercial river trip.

2. From the information you provided with your application it appears that student costs for the San Juan River trip are in excess of \$45 per day per student. This is clearly in the range charged by commercial outfitters and not an equal sharing of actual costs and expenses.

3. Your boat persons are paid a salary from fees charged trip participants. This being the case, we feel that your organization cannot meet the above criteria and should be considered in the commercial category. [Emphasis in original.]

Thus, BLM concluded that appellant could not be a noncommercial user because there was not "an equal sharing of actual costs and expenses" and because "[y]our boat persons are paid a salary from fees charged trip participants."

In its statement of reasons for appeal, appellant states that it is a nonprofit, educational corporation licensed by the State of Arizona and granted tax-exempt status as an educational corporation by the Internal Revenue Service (IRS). It contracts with "school agencies" to develop and run "full school year-long programs," which are "funded in their entirety by outside sources, usually Federal or private." These programs are not confined to river rafting trips but "include a broad range of outdoor education training, teacher training, and student outings." The curriculum includes backpacking, flora and fauna identification, leadership training, first-aid and evacuation, as well as white and flat water rafting. Appellant employs a full-time

staff, which in part participates in all outings. Its programs are designed to include teacher training so that each school can assume full responsibility for its respective program.

In response to the BLM decision, appellant contends that all costs of its river rafting trips are shared equally because participants are not charged; rather, the contracted school agencies are billed for the entire, school yearlong program. Furthermore, these costs reflect "actual" costs of the program. Appellant also challenges the BLM figure of "\$45 per day per student" as an inaccurate estimate of the "direct costs for river trips." 2/ Appellant states that the figure, instead, is "approximately \$11 to \$15," after discounting the costs of transportation and overhead, which are not included in the prices charged by commercial outfitters.

Appellant also argues that staff salaries are not a direct result of the river trip but rather of the entire, school yearlong program. Appellant reiterates that these salaries are not paid from fees charged participants. 3/

[1] The question in this appeal is whether appellant's proposed use of the San Juan River for its rafting trips qualifies as a "commercial use." The applicable regulation, 43 CFR 8372.0-5(a), defines "commercial use" as follows:

"Commercial use" is recreational use of the public lands for business or financial gain. When any permittee, employee or agent of a permittee, operator, or participant makes or attempts to make a profit, salary, increase his business or financial standing, or supports, in any part, other programs or activities from amounts received from or for services rendered to customers or participants in the permitted activity, as a result of having the special recreation permit, the use will be considered commercial. * * * The collection by a permittee or his agent of any fee, charge, or other compensation which is not strictly a sharing of, or is in excess of, actual expenses incurred for the purposes of the activity or use shall make the

2/ The figure of \$45 appears from the record to have been calculated based on a cost breakdown supplied by appellant for one of its "typical river programs." Letter from Craig G. Spillman to Brad Groesbeck, District River Management Specialist, BLM, dated Dec. 16, 1980. This cost breakdown included not only amounts allocated for staff and supplies but also travel and overhead.

3/ Appellant also states that it does not engage in paid advertising of river rafting trips and that it amortizes equipment costs "as a regular procedure expected of any organization owning equipment." BLM, however, does not appear to have categorized appellant as "commercial" on the basis of either criteria. They will not be considered herein.

activity or use commercial. Use by educational and therapeutic institutions is considered commercial when the above criteria are met. * * * Nonprofit status of any group or organization under the Internal Revenue or Postal Laws or regulations does not in itself determine whether an event or activity arranged by such a group or organization is noncommercial. [4/]

On appeal appellant seeks to establish that its proposed use is not "commercial use" by showing how it meets the criteria set forth by BLM, as quoted in its decision, for a noncommercial use. While much of what appellant argues is persuasive, we are constrained to find that appellant's proposed use is a "commercial use," as that term is defined in the regulations. We arrive at this conclusion not on the basis of the grounds set forth by BLM for rejection, but on our own analysis of the language of the regulation, as it relates to appellant's situation.

As a basis for rejection, BLM stated that "[y]our boat persons are paid a salary from fees charged trip participants." As appellant correctly points out, its teachers are not paid salaries from fees charged trip participants, because its participants do not pay "any fee of any kind for participation in the river program." Nevertheless, appellant's teachers do, in fact, receive salaries and are on salary when they participate in rafting activities.

In the definition of commercial use in 43 CFR 8372.0-5(a), it is stated: "When any permittee, employee or agent of a permittee, operator, or participant makes or attempts to make a * * * salary * * * from or for services rendered to customers or participants in the permitted activity, as a result of having the special recreation permit, the use will be considered commercial." In this case appellant contracts with various schools to provide wilderness programs for its students. The students are the participants but pay no individual fees to take part in the activities. However, appellant provides "services" for the schools ("customers"), and therefore, must be considered as being involved in a commercial use.

Despite the fact that the regulation, 43 CFR 8372.0-5(e), provides for educational use which would be noncommercial, given the all inclusive scope of 43 CFR 8372.0-5(a), it is difficult to conjure up a situation in which an educational institution would qualify as a noncommercial user.

^{4/} This regulation was originally proposed in 1977 (42 FR 5294 (Jan. 27, 1977)), and published in final form in 1978 as 43 CFR 6263.0-5(a) (43 FR 7868 (Feb. 24, 1978)). The regulation was redesignated in 1978 as 43 CFR 8372.0-5(a) (43 FR 40738 (Sept. 12, 1978)). Neither the preamble to the proposed regulation nor the preamble to the final regulation provide any relevant information to help in our interpretation of this definition.

The "educational use" definition requires a teacher-pupil relationship, yet 43 CFR 8372.0-5(a) provides that use by educational and therapeutic institutions is considered commercial when the criteria set forth in that subsection are met. One of those criteria is salary. Assuming a teacher is on salary with an educational institution, it would appear that a permit sought by that institution for rafting would have to be considered "commercial use" under the definition. In that case, an employee of the permittee (educational institution) would be making a salary for services rendered (supervision/teaching) to participants (students) in the permitted activity.

Appellant alleges that "the application of the criteria for private status as it refers to educational organizations has neither in the past nor is it currently administered consistently," and that "educational organizations have regularly used the San Juan River for river trips in which paid professors or teacher boatmen are involved." If these allegations are true, then those institutions should be denied noncommercial status just as appellant has been. While the breadth of the regulatory definition dictates the result in this case, it should be pointed out that if appellant can secure the use of property other than public lands for all of its onshore activities, BLM may not foreclose appellant's use of the San Juan River. See Whitewater Expeditions & Tours, 52 IBLA 80, 82 (1981). ^{5/}

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 as modified.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge

^{5/} In Rogue River Outfitters Association, 63 IBLA 373 (1982), we held that BLM could charge a special recreational permit fee for commercial raft trips on the Rogue River, even when those trips involved overnight stays in private lodges. Our conclusion in that case was predicated on the fact that the Rogue River had been designated a wild and scenic river pursuant to the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1976), and use of the river itself was therefore subject to regulation. The San Juan River is not a component of the wild and scenic river system.

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

The difficulty here is occasioned by the unrealistic and unimaginative language of that regulation, 43 CFR 8372.0-5. As noted by the majority, although that regulation and others in Subpart 8372 piously provide for issuance of "no fee" permits to educational, scientific, or therapeutic institutions, the definition of "commercial use" would foreclose the waiver of fees to any such institution except where the students or other participants pay no tuition or incidental fee and the staff donate their services without remuneration. Such institutions are exceedingly rare -- if not nonexistent. Even Boy Scouts are charged a fee to attend camp, where the staff is paid.

The temptation is to bend such absurd regulations as this into something sensible, useful, and equitable. But, where, as in this instance, the regulation is clearly expressed and without ambiguity, this Board would be obliged to inflict great violence upon it to force its plainly worded definition into conformity with our impression of what it ought to say. The legal community has long been served in this regard by the legend of Procrustes, a giant highwayman of ancient Attica, who kidnapped travelers and tied them in an iron bed, then either stretched his victims or cut off their legs to adjust them to the length of the bed. Such Procrustean adaptations are not the function of this Board, or of any judicial or quasi-judicial tribunal. Instead, it is occasionally our unhappy obligation to apply an unreasonable statute or regulation, as we have no authority either to rewrite it or to ignore it.

While some language is so composed as to afford a legitimate range of diverse interpretations and/or applications according to circumstance, 43 CFR 8372.0-5 is not.

Therefore, I reluctantly concur in the majority opinion.

Edward W. Stuebing
Administrative Judge

