

PACIFIC CREST OUTWARD BOUND SCHOOL

IBLA 89-114

Decided January 23, 1991

Appeal from a decision of the Area Manager, Prineville District, Prineville, Oregon, Bureau of Land Management, setting forth requirements for a fee waiver for a special recreation permit. OR-050-RP8-35.

Set aside 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

A party seeking a waiver of fees due for a special recreation permit is not barred from receiving the waiver simply because it is engaged in "commercial use" as that term is defined in the regulations. Rather, the party may receive the waiver if it meets the criteria set out in 43 CFR 8372.4(c)(1) and (2).

APPEARANCES: David McNeil, Director of Community Programs, Pacific Crest Outward Bound School, Portland, Oregon.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Pacific Crest Outward Bound School (the School) appeals from a decision letter of the Area Manager, Prineville District, Prineville, Oregon, Bureau of Land Management (BLM), dated October 19, 1988, setting forth criteria for a fee waiver for special recreation permit (SRP) OR-050-RP8-35 pursuant to 43 CFR 8372.4(c).

The School describes its activities as follows:

Pacific Crest Outward Bound is a non-profit educational institution based in Portland, Oregon. It is one of five Outward Bound schools in the United States operating under charter from the national office of Outward Bound, Inc., in Greenwich, Connecticut. It is a member in good standing of the Pacific Northwest Association of Independent Schools. * * * [O]utward Bound has, throughout its nearly 50-year history, provided educational programs for young people in various wilderness settings.

(Statement of Reasons (SOR) at 1).

Quoting from "the Outward Bound Mission," the School adds:

Outward Bound's purpose is to develop respect for self, care for others, responsibility to the community, and sensitivity to the environment. The Outward Bound process assumes that learning and understanding take place when people engage in and reflect upon experiences in challenging environments in which they must make choices, take responsible action, acquire new skills, and work with others. Outward Bound implements its educational and social purposes by providing leadership in experience-based programs, offering courses in its schools, conducting demonstration projects, and helping others to apply Outward Bound principles.

Id. at 2.

On June 14, 1985, BLM approved the School's application for an SRP for its activity on the Deschutes River between Warm Springs and the confluence at the Columbia River. In 1986 BLM recognized the School as eligible for an "educational fee waiver" under its SRP and continued to recognize the School as "exempt from payment of user fees" when it renewed the SRP in 1988.

On October 19, 1988, BLM issued its decision letter to various SRP holders, including the School. In this letter, BLM explained that the State Office had reviewed the Prineville District's SRP program regarding "educational fee waivers" and found that it was not in compliance with the intent of the regulations. BLM indicated in the letter that "educational fee waivers" for the 1989 season would be granted only to those organizations who meet the following criteria in their use of public land and/or related waters:

1. The use is an academic activity sponsored by an accredited institution of learning established for such purposes.
2. The tours or outings are only for educational or scientific purposes related to the resources of the area visited.
3. The tours or outings are not primarily for recreational purposes.
4. Fees charged for the river trip portion of the course are strictly a sharing of actual expenses incurred for the purposes of the activity or use.

The fourth criteria, which is directly at issue here, is based on 43 CFR 8372.0-5(a), the definition of "commercial use." BLM went on to explain that, if the permittee met the definition of "commercial (sic)" it would be required "to pay a user fee of 3 percent of gross receipts or \$50 per year, whichever [was] greater, for the 1989 season." That is, BLM effectively held that the School would not be eligible for an educational fee waiver if it was found to be a commercial concern.

BLM concluded by informing the School that, if it wished to continue to be considered for an "educational fee waiver," it would be necessary, in addition to showing status as an educational institution, to provide a breakdown of fees collected showing that moneys received did not exceed actual expenses:

If you wish to continue to be considered for an educational fee waiver, you will need to provide us with a course syllabus, proof of official recognition as an educational institution by Federal, State or local government bodies and a breakdown of fees collected showing that the requirement for actual expenses is met.

(BLM Decision at 2). In closing, BLM advised the School that it could appeal the decision, and the School did so.

At the outset, we address a procedural issue. BLM's letter of October 19, 1988, is not a final determination that the School is not entitled to a fee waiver. BLM's decision did not specifically require the School to pay a fee, but BLM simply stated what would be required if the School wished to be considered for a fee waiver. Although it had not been adversely affected, because it had not been required to actually pay a fee, the School filed an "appeal" setting forth its objections to BLM's criteria for fee waiver. ^{1/} There has been no formal consideration by BLM of the School's objections to those criteria.

In the absence of a decision that adversely affects a party, an appeal is technically premature. Robert C. LeFaivre, 95 IBLA 26 (1986); Julie Adams, 45 IBLA 252 (1980). However, where a notice of appeal is filed before BLM has issued its final decision and the matter is forwarded to the Board, the Board has discretion whether to remand the case to BLM to be treated as a protest under 43 CFR 4.450-2 or, instead, to adjudicate the merits of the matter. Robert C. LeFaivre, *supra*. If the Board finds that no useful purpose would be served by remanding the case to BLM, the Board will adjudicate the case on its merits. Beard Oil Co., 97 IBLA 66 (1987); Robert C. LeFaivre, *supra*.

Under the circumstances, we find that remanding the case to BLM to consider the School's objections to the criteria imposed by BLM's decision would not serve a useful purpose. The interests of efficient adjudication are served by our reviewing the legality of these criteria now. There is no indication that BLM wishes to change its position based on the arguments raised by the School in this appeal.

[1] In its SOR, the School argues that the question of whether the amount it charges participants amounts to no more than a sharing of

^{1/} In its letter of Oct. 31, 1988, appellant states that it received notice from BLM that BLM had reviewed its exempt status and decided to charge it commercial use fees for the 1989 season. Apparently appellant is referring to BLM's decision of Oct. 19, 1988, as the file contains no other decision.

actual expenses pertains to the definition of "commercial use" and not to the standards established in the regulations for the granting of an educational fee waiver. The School contends that the definition of actual expenses serves to clarify the definition of "commercial use" and that, together, these regulations establish who is a commercial user of BLM lands and waters for the purpose of determining whether a special recreation permit is required under 43 CFR 8372.1-1. We agree.

"Commercial use" is defined under 43 CFR 8372.0-5(a) as "recreational use of the public lands for business or financial gain." As BLM held, this provision expressly provides that use by educational institutions is properly considered "commercial use" when the permittee collects 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. However, under the regulations, the issue of whether use is "commercial use" is relevant only to whether a special recreation permit must be secured for the use. See 43 CFR 8372.1-1(a). 2/

The School does not deny that it is a "commercial user" and that it must therefore have a special recreation permit (SOR at 3). It argues instead that, under 43 CFR 8372.4, even though use by an educational institution may be "commercial," the institution may nevertheless be exempt from the requirement of paying fees. To this extent, we agree with the School.

However, the School also suggests that it is an "educational institution" and that its activities, although commercial, are "not related to recreation." The School points to 43 CFR 8372.4(c)(2), providing that "fees * * * shall not be charged * * * for commercial * * * activities not related to recreation," asserting that "the intent [of this provision] is clearly that use by an educational institution, even though it may be commercial by virtue of charging more than 'actual expenses,' is to be exempted from the requirement of paying fees" (SOR at 3). We reject the suggestion that educational use is automatically exempted from fees as non- recreational.

The regulations governing fee exemptions state as follows:

§ 8372.4 Fees.

(c) Exceptions, exclusions, and exemptions.

* * * * *

2/ This provision states, "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 [various statutes] require their issuance." 43 CFR 8372.1-1. Limited exceptions to the permitting requirement are provided at 43 CFR 8372.1-2 and -3.

(2) Fees under provisions of this part shall not be charged and permits shall not be required for commercial or other activities not related to recreation. Permits may be required but fees shall not be charged for uses including, but not limited to, organized tours or outings conducted for educational or scientific purposes related to the resources of the area visited by bona fide institutions established for these purposes.

(3) Applicants for waiver of fees on this basis may be required to provide documentation of their official recognition as educational or scientific institutions by Federal, State or local government bodies or any other documentation necessary to demonstrate educational use as defined in § 8372.0-5(e) of this title. The use of recreational resources for which a waiver on this basis is requested shall relate directly to scientific or educational purposes and shall not be primarily for recreational purposes. [3/]

The first sentence of 43 CFR 8372.4(c)(2), relied on by the School, merely repeats that only recreational uses are being regulated by BLM under its SRP procedures. It is clear from the balance of 43 CFR Subpart 8372 that the term "recreational uses" is very broad, so that it is possible for an entity to engage in "recreational use" that is nevertheless "educational" in purpose. Indeed, it appears that the School is doing exactly that. Use by an educational institution is subject to regulation. See 43 CFR 8372.4(c)(2). Therefore, the fact that there is an educational purpose involved does not by itself render the use "non-recreational" and beyond regulation or fee. 4/

3/ In the preamble to these regulations, BLM stated that "the rulemaking was intended to parallel the Departmental regulations at 36 CFR Part 71, which allows waivers only for scientific and educational uses and does not provide for temporary use permits for such uses." 49 FR 34336 (Aug. 29, 1984). The relevant provision, 36 CFR 71.13(d), governing recreation fees collected by the National Park Service (NPS), provides:

"No Federal recreation fee shall be charged for commercial or other activities not related to recreation, including, but not limited to, organized tours or outings organized for educational or scientific purposes related to the resources of the area visited by bona fide institutions established for these purposes. Applicants for waiver of fees on this basis will be required to provide documentation of the official recognition as educational or scientific institutions by Federal, State or local government bodies and will also be required to provide a statement as to the purposes of the visit proposed. The use of any recreation facilities for which a fee waiver is requested must relate directly to scientific or educational purposes of the visit and may not be primarily for recreational purposes."

4/ Against this background, we perceive that Criterion 3 in BLM's decision presents a problem. This criterion is directly based on 43 CFR 8372.4(c)(3), which provides that, in order to be entitled to a fee waiver,

The regulations provide for exemption of fees for commercial recreational uses, including "organized tours or outings conducted for educational or scientific purposes," but only if certain conditions are met.

It is clearly stated in 43 CFR 8372.4(c)(3) that no waiver of fees shall be granted unless the use of the resources relates directly to scientific or educational purposes. Further, when read in pari materia with 43 CFR 8372.0-5(e), it is clear that waiver of fees "may be denied" by BLM where the permittee fails to provide documentation of its official governmental recognition as an educational or scientific institution, or any other documentation demonstrating that it is engaged in an "academic activity sponsored by an accredited institution of learning."

Thus, the regulations provide for waivers of use fees only for officially recognized or accredited institutions of learning. Fees may be collected unless the permittee meets the burden of establishing that it is officially recognized or accredited. Further, the outings must be conducted for "educational or scientific purposes related to the resources of the area."

Insofar as it sought to base the School's entitlement to a fee waiver on its status as a commercial concern, BLM erred, and its decision must be set aside. We are unable to determine from the record whether the School meets the conditions imposed by the regulations for a fee waiver. BLM should consider this question on remand.

fn. 4 (continued)

a permittee must show that the use "shall not be primarily for recreational purposes."

As we read the regulations, BLM must decide whether a party is engaged in "recreational use" in order to determine whether he must secure an SRP. 43 CFR 8372.0-5(a) and 8372.1-1. As held above, "recreational use" is a broad term including some educational uses. Presuming that the party is engaged in recreational use, BLM then must decide whether his use is or is not "primarily for recreational purposes" (among other things) in order to determine whether he is entitled to an educational fee waiver.

It seems unlikely that there will be many uses which constitute "recreational use" that do not also constitute use "primarily for recreational purposes." Thus, if this provision is strictly enforced, very few fee waivers would be granted, and the entire educational fee waiver provision might be rendered nugatory.

It is possible that 43 CFR 8372.4(c)(3) was included in the regulations without appreciating that it would have this effect. It appears that BLM was attempting to establish a system comparable to NPS' fee system. However, NPS' system is different, in that no permits are required. The issue in the NPS system is simply whether the use is recreational use. If so, a fee is due; if not, no fee is due. However, BLM's system contemplates a third possibility, viz., where no fee is due, but a permit is required. 43 CFR 8372.4(c)(2). In our view, requiring the permittee to show that his use is "not primarily for recreational purposes" (43 CFR 8372.4(c)(3)) may effectively foreclose that possibility. BLM may wish to re-examine the effect of this provision.

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 set aside and the case remanded to BLM for further consideration.

David L. Hughes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge