



SHOOTERS-EDGE, INC.

178 IBLA 366

Decided February 22, 2010



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

SHOOTERS-EDGE, INC.

IBLA 2009-156

Decided February 22, 2010

Appeal from a decision of the Ridgecrest (California) Field Office, Bureau of Land Management, denying an application for a Special Recreation Permit. CACA 48780.

Affirmed.

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

When BLM exercises its discretionary authority to reject an application for a land use authorization, it must provide a rational basis for its decision. To successfully challenge a discretionary decision, an appellant must demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. Where the basis for the decision is clear from the record, the Board will not substitute its judgment for that of the BLM decisionmaker.

2. Administrative Procedure: Administrative Review--Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

Where the record supports BLM's conclusions that the public safety is a significant issue, that appellant's safety protocols do not guarantee the public safety, that the proposed activity conflicts with other uses of the public lands, and that the public interest is better served by avoiding the potential for accidental death or injury,

BLM's decision denying an application properly applied the criteria set forth in 43 C.F.R. § 2932.26 and will be affirmed.

3. Administrative Procedure: Administrative Review--Federal Land Policy and Management Act of 1976: Permits--Hearings--Public Lands: Special Use Permits

No due process hearing is required before an application for a Special Recreation Permit can be denied, because no protected property interest arises from the filing thereof, and no provision in the Federal Land Policy and Management Act of 1976 otherwise requires a hearing in such circumstances.

APPEARANCES: Bruce Krell, President, Shooters-Edge, Inc., Los Angeles, California, for appellant; Erica L.B. Niebauer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Shooters-Edge, Inc. (Shooters), through Bruce Krell, its president, has appealed from the February 23, 2009, decision of the Field Manager, Ridgecrest (California) Field Office, Bureau of Land Management (BLM), denying its Special Recreation Permit (SRP) application to conduct and provide instruction in long range precision rifle shooting in open areas of public lands known as the Hollands Camp and Hillside/Jeep Trail in sec. 32, T. 28 S., R. 39 E., Mt. Diablo Meridian, Kern County, California.

Shooters filed its application in December 2008,¹ seeking authorization for 12 to 16 shooters to use the Hollands Camp and Hillside/Jeep Trail areas 12 to 14 days each year, on weekdays and on weekends. Dec. 18, 2009, Letter from Krell to Craig

¹ Shooters had previously submitted a Land Use Application and Permit, Form 2920-1 (February 2005), signed by Krell and dated Feb. 1, 2007. BLM did not act on that application. Answer at 1. Instead, Shooters was directed to file a Special Recreation Application and Permit, Form 2930-1 (August 2007, formerly 8370-1), which was signed by Krell and dated Dec. 15, 2008. See Administrative Record (AR), Section II.

Beck, Recreation and Wilderness Branch Chief, BLM, at 1, AR, Section II.² The record shows that the parties had discussed Shooters' request and BLM's concerns a number of times before BLM issued its decision, including BLM's conclusion that the permit should be denied, and BLM's proposed alternative of conducting the activity in a different location. *See generally* AR, Section III; *see also* internal BLM e-mail message dated Feb. 6, 2009, from Hector Villalobos to Jack Hamby and Janet Bedrosian, AR, Section III.

BLM denied the application, invoking its discretionary authority under 43 C.F.R. § 2932.26 to issue or deny SRPs and stating:

The primary reason for the denial of your permit request is our inability to ensure public safety for the casual visitor to the public lands in the area of your proposed operations. In addition, the Holland Camp area receives many casual users visiting the area participating in such activities as hiking, rock hounding, off-highway vehicle use, and horseback riding. With your proposed shooting range operations covering a distance of 960 yards there is no way to prevent a member of the public from wandering into a live fire zone and potentially being in harm[']s way. Your proposed use of this particular area is in conflict with these other uses.

We have proposed an alternative location which you have refused that could safely handle your proposed activity. The Boral Pit is an old sand and gravel pit which is currently set up as a shooting range. This location features berms and gated access so that live fire "red flag" closures can be implemented to warn and protect the public.

² The application described the requested use as follows: "in the Hollands Camp Area: Long Range Precision Rifle Training Classes: Typically 12 participants, 1 day in length, sometimes 2 days in length. Hillside/Jeep Trail: Long Range Precision Rifle Training Classes: Typically 12 participants, 1 day in length, sometimes 2 days in length[;] Limited Camping For 2 Day Events." SRP Application, Item 13. Attachment A to Shooters' Notice of Appeal (NA) explains that Shooters is a small company of veterans that trains military, law enforcement, and civilian personnel, and that it seeks terrain resembling that found in Afghanistan for its training programs. AR, Section I. Its objective is to train personnel who may be deployed to Afghanistan, and to provide jobs for veterans. The "General Guidelines for the Course" contains the suggestion that the objective is to train individuals as snipers. AR, Section II; Statement of Reasons (SOR) Ex. 21.

This range offers standard target ranges of up to 400 yards and through the use of half-size targets one could simulate a range of 800 yards.

Decision at 1, AR, Section II. Shooters timely appealed on March 9, 2009.³

In its summary of its position on appeal, Shooters asserts there are other areas of the public lands that are more heavily used, and these “very popular areas are between 17 miles and 50 miles away from the Holland Camp area.” In contrast, Holland Camp is “fairly remote, and almost never used.” Cover letter to SOR at 1. It contends that “[n]either hunters nor casual long distance shooters are subject to any safety controls” (emphasis omitted), and that no permit is required for the casual shooter. *Id.* Shooters notes that its operations will be governed by “[s]afety processes and procedures,” and that these measures were addressed in the SRP application. *Id.* at 2. Shooters enumerates a lengthy list of perceived violations to support its request that we order BLM to issue a 10-year permit subject to certain criteria and enjoin BLM from applying what it characterizes as the “high degree” criteria” used to deny the application. *Id.* at 2-3.

Discussion

Shooters appears to argue that BLM violated the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2006), in that the decision establishes criteria that, according to Shooter, requires rulemaking, an obligation for which there is no lawful exception. SOR at 1-3. This line of argument is misplaced. The regulations governing SRPs are codified in 43 C.F.R. Part 2930, which implements sections 302(b) and 303 of the Federal Land Policy and Management Act of 1976 (FLPMA). 43 C.F.R. § 2930.3(a). Sections 302(b) and 303 contain authority to promulgate such rules and regulations as may be necessary “to implement the provisions of this Act with respect to the management, use, and protection of the public lands,” and “to carry out the purposes of this Act.” 43 U.S.C. §§ 1732(b) and 1733 (2006).⁴ Those regulations were lawfully promulgated in the manner required by the APA, and include 43 C.F.R. § 2932.26 (“How will BLM decide whether to issue a Special Recreation Permit?”), which acknowledges BLM’s broad discretionary authority to issue or deny an SRP,

³ Shooters also requested a stay, which BLM opposed. That request was denied by order dated May 15, 2009. After an extension of time to allow BLM to respond to a request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (2006), Shooters filed its SOR on Oct. 23, 2009. BLM filed its Answer on Nov. 24, 2009.

⁴ In addition, section 310 of FLPMA directs the Secretary to promulgate rules and regulations “to carry out the purposes of this Act and of other laws applicable to the public lands.” 43 U.S.C. § 1740 (2006).

and establishes the following factors to be considered in exercising that discretion:

- (a) Conformance with laws and land use plans[,]
- (b) Public safety,
- (c) Conflicts with other uses,
- (d) Resource protection,
- (e) The public interest served,
- (f) Whether in the past you complied with the terms of your permit or other authorization from BLM and other agencies, and
- (g) Such other information that BLM finds appropriate.

[1] When BLM exercises its discretionary authority to reject an application for a land use authorization, or to impose a condition upon such use, it must provide a rational basis for its decision. *Mark Patrick Heath*, 175 IBLA 167, 176 (2008); *Wiley F. & L'Marie Beaux*, 171 IBLA 58, 66 (2007); *Fallini v. BLM*, 162 IBLA 10, 34 (2004); *James M. Chudnow*, 70 IBLA 225, 226 (1983); *James E. Sullivan*, 54 IBLA 1, 2 (1981). As this Board has often stated, to successfully challenge a discretionary decision,

[t]he burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

International Sand & Gravel Corp., 153 IBLA 293, 299 (2000); *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999).

Wiley F. & L'Marie Beaux, 171 IBLA at 66. Therefore, the question before us is whether Shooters has, by a preponderance of the evidence, shown error in BLM's analysis, or the lack of a rational connection between the facts, applicable regulatory criteria, and the choice made. Where the basis for the decision is clear from the record, this Board will not substitute its judgment for that of the BLM official exercising his or her discretion. *Judy K. Stewart d.b.a. Western Wilderness Outdoor Adventure*, 153 IBLA 245, 252 (2000), and cases cited.

Shooters states: "On the first day of hunting season, several hundred shooters may be in the area. Neither hunters nor casual long distance shooters are subject to any safety controls. A permit is not required for casual long distance shooting." SOR at 1. In contrast, Shooters' application addressed safety issues. The record includes documents containing safety practices, rules, and measures titled "Safety Concepts for Firearms Training" (SOR Ex. 18), "Advanced Precision Rifle Safety Rules" (SOR

Ex. 20), “Operations Guidelines” (SOR Ex. 21), “General Guidelines for the Course” (SOR Ex. 22), and “Sample Shooting Syllabus and Round Count” (SOR Ex. 23). It claims those safety protocols “derived by Shooters’ certified and very experienced instructional [sic] are more than reasonable when compared to the standard for the area - NO safety requirements at all.” SOR at 10. Thus, Shooters reasons that “BLM claims lack of safety requirements against hunters is because they do NOT have any control over hunters. If inability to enforce strict safety limitations upon hundreds of simultaneous shooters is reasonable, then the same level of safety reasonableness should be applied to Shooters-Edge, Inc.” *Id.* at 11. BLM did not respond to these allegations in its Answer.

FLPMA expressly provides

[t]hat nothing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law.

43 U.S.C. § 1732(b) (2006).

The regulation at 43 C.F.R. § 2932.14 (“Do I need a Special Recreation Permit to hunt, trap, or fish?”) implements this statutory directive as follows:

(a) If you hold a valid State license, you do not need a Special Recreation Permit to hunt, trap, or fish. You must comply with State license requirements for these activities. BLM Special Recreation Permits do not alone authorize you to hunt, trap, or fish. However, you must have a Special Recreation Permit if BLM requires one for recreational use of a special area where you wish to hunt, trap, or fish.

(b) Outfitters and guides providing services to hunters, trappers, or anglers must obtain Special Recreation Permits from BLM. Competitive event operators and organized groups may also need a Special Recreation Permit for these activities.

Notwithstanding Shooters’ arguments regarding the lack of safety restrictions on hunting and casual shooting, the issue before us is whether BLM erred in its weighing of factors when it considered Shooters’ request for an SRP to allow it to

train long-range precision shooters on open public lands. Although Shooters plainly disagrees with BLM's assessment and conclusions, its arguments do not establish error in BLM's analysis, or demonstrate the absence of a rational connection between the facts, applicable regulatory criteria, and BLM's choosing not to add to the risk of a shooting death or injury on the public lands.

Shooters argues that BLM ignored "binding precedent" in denying the application. SOR at 13. More specifically, Shooters states that it was issued a permit for long-range firearms training in open areas of the Los Padres National Forest in July 2001 by the Forest Service (FS), U.S. Department of Agriculture. Stating that the same safety protocols now before us were determined to be acceptable by FS, Shooters contends that FS' action in granting a permit "should be binding on other Federal government agencies." This argument is without merit. The actions of one executive agency to implement the statutes and regulations applicable to its mission and activities do not constitute precedent that binds the actions of another executive agency under the statutes and regulations applicable to its mission and activities.

Shooters next asserts that BLM failed to "substantially justify" its decision, arguing that Shooters' safety measures are more than adequate to protect other users of the public lands, and that BLM's estimated use of the Holland Camp area is unsupported. *Id.* at 10-13.⁵ Shooters reviewed 48 permit applications processed by the Ridgecrest Field Office and other information, observed activity in the Hollands Camp area, looked at proposed and upcoming SRPs, and visitor estimates, and concluded that BLM's assessment of the extent and nature of the use of the public lands in Holland Camp cannot be relied upon, reasoning that BLM failed to employ "a statistical sampling methodology," so that the "validity of the data is highly questionable and not to be trusted." *Id.* at 13. Shooters notably does not state what that methodology should be, what the results of such a methodology would likely show, or how, specifically, BLM errs in stating that non-shooting members of the public also use the lands sought in the SRP application. Instead, Krell adverts to occasions he has been in the area and observed others "shooting out to very long distances without enforcing any of the safety or rigorous firing discipline that we go to great lengths to enforce," and that he has seen "hardly . . . anyone" when

⁵ Shooters cites *Heirs of David F. Berry*, 156 IBLA 341 (2002), in support of its assertion that BLM is required to "substantially justify" its reasons for denying the SRP application. That case is not relevant. It concerned a Native allotment and the statutory standard relating to an application for an award of attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (2006). Shooters' argument nonetheless raises the question of whether BLM properly analyzed the facts that furnished the basis for the decision made, and we consider it in that context.

“offroading” in the area. SOR Ex. 19 at 2. We think this line of argument misses the point.

BLM’s concern is the potential for an accident: long-range precision shooting at distances of half a mile or more in open areas and over varying topography may result in unsuspecting visitors entering the impact area, undetected by Shooters. There are trails and mining claims in the area, and though Shooters purports to challenge the method of determining actual visitor numbers, there is no serious dispute that the area is open to a variety of recreational and other pursuits or that it is used for those purposes by members of the public. Shooters states that it will control the number of persons discharging weapons at any given time. It clearly believes that with “numerous spotters and observers,” “elevated shooting lines,” and the placement of targets “in very large open areas,” its participants will “have a clear view of an extensive surrounding area to insure that we can foresee any potential safety situations.” SOR Ex. 19 at 1. From BLM’s perspective, however, the increased risk of a shooting mishap neither favors public safety nor serves the public interest. While Shooters may deem the risk acceptable or negligible, no error in the decision is shown because BLM takes a more cautious view.

[2] Where it is undisputed that an area receives visitors engaged in a variety of activities, it seems to us that the question of public safety in such circumstances is less a matter of statistical analysis concerning the numbers and types of visitors to the area than it is a matter of whether, given all the missteps that could occur in any number of ways, BLM reasonably chose not to expose the public to the added risks presented by long distance shooting in open areas. Thus, the fundamental question is whether the facts and circumstances of the proposed activity, which include Shooters’ safety protocols and Krell’s qualifications to offer training in precision shooting, are rationally connected to the criteria set forth in 43 C.F.R. § 2932.26 and the decision to deny the SRP.

BLM determined that members of the non-shooting public visit the Hollands Camp area, that their safety is a significant issue,⁶ that Shooters’ safety protocols do

⁶ Shooters’ submissions in support of its application confirm that BLM’s concern for safety is neither unfounded nor wholly unreasonable. For example, the “General Guidelines for the Course” contain the following admonishment:

I need your complete attention and focus for the whole class.

- We are in an open area without any protections to non-shooters.
- We will be shooting a large number of rounds in awkward positions.
- Lots of technical information and data — absorb quickly,

(continued...)

not guarantee public safety, that the proposed activity conflicts with other permitted uses of the public lands, and that the public interest is better served by avoiding the added risk for accidental death or injury posed by long-range precision shooting in open areas of the public lands. Shooters plainly disagrees, but we perceive no material error in BLM's analysis of the facts. The record adequately shows that BLM considered the relevant facts, weighed the pros and cons of the proposal, and acted on the basis of a rational connection between those facts and relevant regulatory criteria before exercising its discretion to deny the application.

While BLM denied the December 2008 SRP application, it suggested an alternative location. As the decision explained, the Boral Pit offers features that would directly address BLM's concerns for the public safety. Shooters rejected this alternative on the ground that conditions in the Boral Pit are not comparable to the "extreme field conditions that prevail in the Hollands Camp and surrounding terrain," and states that participants will not receive training in elevation and wind corrections, or in the varying field conditions necessary to duplicate the conditions that confront military snipers. SOR at 15-16. To the extent that Shooters suggests reversible error because BLM failed to provide a reasonable substitute, *id.* at 15, it is mistaken. BLM offered the best alternative it could offer in Holland Camp, consistent with its view of the weight and importance of the factors enumerated in 43 C.F.R. § 2932.26. Shooters' contrary view provides no basis for reversing BLM's decision.

Shooters' remaining challenges can be grouped into two main arguments: denial of due process, and interference with commerce inhibiting competition for commercial opportunities to provide training. With respect to the former, Shooters alleges a right to know applicable rules and policies, to timely process, to present and receive evidence, to examine evidence, to impartial fact-finding, to a hearing, to a decision that articulates the reasons for the decision made, and to the right to receive the same treatment afforded in similar cases. SOR at 16-17. It further claims BLM attempted to "fraudulently deny due process" by requesting the filing of an SRP application instead of acting on the earlier Land Use Application and Permit, Form 2920-1. *Id.* at 18. In its Answer, BLM failed to respond to these contentions. We must conclude, however, that they are not well-founded.

⁶ (...continued)

apply correctly[.]

If you mess up the application of the scientific information, you can cause a shot to go wild and someone can get hurt.

AR, Section II; SOR Ex. 22.

First, members of the public are deemed to know the content of relevant statutes and duly promulgated regulations. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Copper Valley Electric Association, Inc.*, 177 IBLA 389, 310 (2009), and cases cited.

[3] Second, Shooters is not entitled to a hearing. Due process requires a hearing before a compensable property interest can be extinguished. The denial of an application for an SRP does not require a due process hearing because no protected property interest arises from the filing of the application and no provision in FLPMA otherwise requires a hearing in such circumstances. *Dirt, Inc.*, 162 IBLA 55, 60 n.5 (2004). To the extent Shooters means to suggest that this Board is required to order a hearing to adjudicate the appeal, Shooters again errs. This Board has discretionary authority to order a hearing before an Administrative Law Judge pursuant to 43 C.F.R. § 4.415 where there is a material issue of fact that cannot be resolved without the introduction of testimony and other evidence. *Peter J. Mehringer*, 177 IBLA 152, 169 (2009). Shooters has not identified an issue of material fact that cannot be resolved by the record, and our review of the record discloses none. Accordingly, no hearing is required to decide this appeal.

Third, Shooters has not been denied procedural due process. It received BLM's written decision, which presented a reasoned explanation of the decision rationale and the factual and legal bases therefor, supported by the administrative record. Shooters was thus provided an adequate basis for understanding and accepting the decision, or disputing and appealing it. See *Jerry D. Grover d.b.a. Kingston Rust Development*, 163 IBLA 310, 318 (2004), and cases cited. Shooters exercised its right to appeal the denial of the SRP to this Board. It requested and received from BLM all the documents it deemed important to prosecute the appeal. Before us, as before BLM, Shooters has presented all the evidence and argument it wished to offer in support of its application, and we have independently and objectively reviewed the decision BLM issued. Shooters has thus received all the process it is due in the circumstances of this case. *Obsidian Services, Inc.*, 155 IBLA 239, 248 n.6 (2001).

Fourth, Shooters' allegations of improper motive and lack of impartiality are unfounded. The record contains absolutely no evidence of any such motivation or bias; to the contrary, it shows that BLM's decision was predicated on the facts and issues raised by the application, and that these issues were considered and weighed in light of applicable statutory and regulatory requirements.

Shooters' final claims are that BLM has unlawfully interfered with commerce and inhibited opportunities to provide training, charges that arise under the U.S. Constitution. We perceive no factual or legal basis for these allegations. However, the Department of the Interior, as an agency of the executive branch of Government, is not the proper forum to consider constitutional challenges. *Carey Horowitz*,

138 IBLA 330, 345 (1997); *Laguna Gatuna, Inc.*, 131 IBLA 169, 173 (1994). Such claims must be pursued in a judicial forum.

The decision denying the SRP is affirmed. To the extent not expressly considered herein, appellant's arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge