PRONTO PICS, INC.

IBLA 2002-371 Decided March 15, 2005

Appeal from a decision of the Deschutes (Oregon) Resource Area Office, Bureau of Land Management, approving in part and rejecting in part a special recreation use permit for commercial photography. OR-056-02-008.

Affirmed.

1. Administrative Procedure: Administrative Review--Public Lands: Special Use Permits--Special Use Permits

Officials of BLM exercise their discretionary authority when adjudicating applications for special recreation permits. When a rational basis for the decision is established in the record, the Board will not ordinarily substitute its judgment for that of the BLM officials delegated the authority to exercise that discretion, and the decision is ordinarily affirmed.

APPEARANCES: Jason Brummond, President, for appellant; Robert B. Towne, Field Manager, Deschutes Resource Area, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by Pronto Pics, Inc., from a May 1, 2002, decision of the Deschutes (Oregon) Resource Area Office, Bureau of Land Management, approving in part and denying in part appellant's application for a special recreation permit (SRP) for commercial photography on the Lower Deschutes River. Pronto's application for an SRP (056-1-615P) was filed with BLM on April 19, 2002. Pronto applied for a commercial photography permit for the period commencing May 1, 2002, and expiring May 1, 2003, to photograph boaters on the river at four sites: Wapinitia Rapids, Boxcar Rapids, Devil's Hole Rapids, and Oak Springs Rapids. [1/] The BLM decision approved the application for a photography

[1/] The record discloses that appellant applied for an SRP for commercial photography on three of the same sites (Box Car, Wapinitia, and Oak Springs Rapids) (continued...)

permit for two sites, Wapinitia Rapids and Box Car Rapids. The application was rejected for the other two sites, Devil's Hole and Oak Springs.

In rejecting the permit application for the Devil's Hole site, BLM noted that photography has not previously been permitted at this location and explained that "[t]he one hole (sharp drop-off and recirculating water) that would justify a photo opportunity is particularly dangerous and has caused injuries to boaters." (BLM decision at 1-2.) Noting that these rapids require skills beyond the capability of many of the boaters on the river, BLM rejected this site out of concern that permitting photography may encourage boaters with insufficient skill to attempt these rapids. Id. at 2. With respect to Oak Springs, BLM denied the permit as to this site for safety reasons:

> This site is one of the most congested locations on the river with over 50 people congregating simultaneously at the rapids' viewpoint on busy weekends. Several vehicles will pull over to allow passengers to observe boats going through the rapid. These vehicles occupy the limited road shoulder space. This site is located just past a sharp turn with very limited visibility for drivers as they approach the site. There is a steep drop-off down to the river within four to ten feet of the roadway. Many boaters stop above the rapid and scout it from the roadside prior to proceeding. There is an existing photography permit for use of this site. This photography operation already uses considerable space at this site. Additional activity at this site would add to congestion and increase safety concerns.

Id.

In its notice of appeal, appellant disputes BLM's conclusions regarding the Devil's Hole Rapids. Appellant questions whether allowing photography at this site will attract boaters who would otherwise avoid the rapids, asserting that the river tends to carry unskilled boaters harmlessly past the rapids. Appellant also contends these rapids are not as difficult as others on the river where photography is permitted. Regarding the Oak Springs site, appellant concedes the site is a congested area, but argues that the presence of one additional photographer would not make a significant difference. Noting that BLM permits only one photographer to use the site, appellant argues that it is improper to limit the site to a single photographer.

[1/] (...continued)
for the previous year (2001) and was issued a permit for one of the sites, Wapinitia Rapids, for that year.

In its answer, BLM points out that it has considerable discretion in adjudicating applications for special recreation permits on public lands as long as there is a rational basis for the decision. Regarding the Devil's Hole Rapids, BLM notes that its field staff includes "highly qualified whitewater boaters" who participated in the process that led to the BLM conclusions respecting risks associated with the rapids. (BLM Answer at 2.) Stating that "[m]any Lower Deschutes River boaters, including inexperienced groups, are attracted to run rapids in a manner that provides the most dramatic photos," BLM asserts that this "combination of a known hazardous rapid with the added attraction of possibly getting a spectacular photograph" would increase the risk of injury and the demands on emergency response personnel. Id. With respect to the Oak Springs Rapids, BLM indicates the denial of the permit at this site is based on overcrowded conditions. Noting that the rapids are adjacent to a paved river access road, BLM states the road is very narrow at this site, which is located on a blind corner in the road. Further, BLM discloses that the popularity of these rapids for boating use has resulted in heavy vehicular and pedestrian traffic. Stating that it has a consistent policy of limiting commercial activity when "appropriate to balance public needs with public safety and resource capacity," BLM urges that the Board uphold its decision. Id. at 3.

[1] Statutory authority for issuance of SRP's by BLM is generally provided by the Land and Water Conservation Fund Act, 16 U.S.C. § 460*l*-6a(c) (2000). The relevant implementing regulations in effect at the time of the BLM decision were codified at 43 CFR Subpart 8372 (2002). [2/] The issuance of SRP's is discretionary with BLM officials. 43 CFR 8372.3; Randall G. Nelson, 164 IBLA 182, 188 (2004); Dirt, Inc., 162 IBLA 55, 58 (2004); William D. Danielson, 153 IBLA 72, 74 (2000). The decision to deny permit approval "must have a rational basis and be supported by facts of record demonstrating that an action is not arbitrary, capricious, or an abuse of discretion." Randall G. Nelson, 164 IBLA at 188, quoting Larry Amos d/b/a Winterhawk Outfitters, Inc., 163 IBLA 181, 188 (2004); see Rio Grande Rapid Transit, 161 IBLA 225, 232 (2004). In the Rio Grande case we held that while the Board is not limited to the "arbitrary and capricious" standard which applies on judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (2000), we will not ordinarily substitute our judgment for that of BLM officials delegated the authority to exercise discretion merely because there is more than one legitimate point of view on a subject. 161 IBLA at 232. To this effect, we quoted our decision in Rosita Trujillo, 21 IBLA 289, 291 (1975):

[2/] These regulations have now been superseded and, hence, removed from the CFR. 67 FR 61745 (Oct. 1, 2002). The current regulations governing SRP's are found at 43 CFR Subpart 2932. Citations herein are to the 2002 regulations unless otherwise noted.

> Appellant's contentions are neither erroneous nor unreasonable. They represent only another point of view; a different side of the ongoing controversy over the identification and priority of concerns which comprise the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal.

We find the decision of BLM officials is supported by the record and, accordingly, we affirm the BLM decision.

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.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Christina S. Kalavritinos
Administrative Judge