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

ERNIE P. JABLONSKY, D/B/A
MONTANA BIG GAME PURSUITS

IBLA 2012-261 Decided March 18, 2014

Appeal from a decision of the Bureau of Land Management, Lewiston (Montana) Field Office, denying an application for a commercial special recreation permit to conduct guided big game hunting on public lands in central Montana. MT060-12-8.

Affirmed as modified.

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

   Appellant's actual notice of a pending investigation into allegations that he had been guiding unauthorized big game hunts on public lands is properly disclosed in responding to Special Recreation Permit application Question 15d, which asks whether the applicant has any unresolved criminal, civil or administrative actions related to the activities to be conducted under the requested permit. A "no" answer constitutes a false answer and is an adequate ground for denying the application.

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

   Any question on the Special Recreation Permit application that is answered "yes" requires a detailed explanation. Failure to provide that explanation provides an adequate ground for denying the application.

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

Appellant was not required to disclose a Warning Notice he received in responding to Question 15e on the Special Recreation Permit application, because the warning does not constitute a conviction, fine, or bond forfeiture.

APPEARANCES: Jay T. Johnson, Esq., Kalispell, Montana, for appellant; Karan L. Dunnigan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Ernie P. Jablonsky, d/b/a Montana Big Game Pursuits (hereinafter, Jablonsky) has appealed from a July 16, 2012, decision of the Field Manager, Lewistown (Montana) Field Office, Central Montana District, Bureau of Land Management (BLM), denying his application for a commercial special recreation permit (SRP), MT060-12-8, to conduct guided big game hunts on public lands in central Montana.[1]

Pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2006), and its implementing regulations in 43 C.F.R. Part 2930, on March 1, 2012, Jablonsky filed an SRP application (Form 2930-1 (January 2011)) with BLM. In the application, he stated that he was seeking an SRP for a multi-year period, subject to annual authorizations, but that the immediate period for which he sought the permit was September 1 to November 25, 2012.[2] Relying on 43 C.F.R. § 2932.26(a), "[c]onformance with laws and land use plans,"[3] the Field Manager denied the application, citing Jablonsky's untruthful answer to Question 15d, and his failure to explain his response to Question 15e by

[1] *See* http://www.montanabiggamepursuits.com/ (last visited Jan. 17, 2014).

[2] As that period (Sept. 1-Nov. 25, 2012) has passed, the Board cannot now order any relief regarding that requested use. Ordinarily, the appeal would be subject to dismissal as moot. *See, e.g., Southern Utah Wilderness Alliance*, 151 IBLA 237, 240-41 (1999). However, Jablonsky sought a multi-year SRP, subject to annual authorizations. *See* 43 C.F.R. § 2932.42; BLM Recreation Permit Administration Handbook H-2930-1 (Handbook) (BLM Manual (Rel. 2-295 (8/7/2006))), III.D.1., at 22 ("A multi-year permit must be validated annually"). The appeal therefore is not moot.

[3] Since the case does not involve conformance with a land use plan, the Field Manager obviously relied on only "[c]onformance with laws" to support the Decision.

providing the facts and circumstances of a Violation Notice and Warning Notice issued on October 15, 2011.

Jablonsky timely appealed, principally contending the administrative record does not support the basis for denying his application and BLM's decision is arbitrary and capricious. He moves the Board to reverse the decision.

Background

The SRP Application (Form 2930-1 (January 2011)) at issue contains a series of questions that the applicant is required to answer, concerning permit, bond, and compliance history. Jablonsky checked "yes" or "no" boxes on the form to answer the questions.

Question 15b asked: "Have you ever been denied or had a permit revoked?" Jablonsky answered "yes."

Question 15d asked: "Do you have any unresolved criminal, civil or administrative actions related to a permit or the activities you plan to conduct under this permit?" Jablonsky answered "no."

Question 15e asked: "Have you been convicted, or paid a fine, or forfeited a bond, for violations regarding natural resources, cultural resources or any activity related to your proposal?" Jablonsky answered "yes."

The form instructed the applicant to "[p]rovide a detailed explanation on a separate piece of paper" for *any* question answered in the affirmative. Jablonsky attached a continuation sheet to the SRP application in which he provided the following explanation:

> 15b. Have you ever been denied or had a permit revoked?
>
> One of the concerns with issuing the permit was the fact that there are other outfitters operating in the same area. We have been in operation in the area for 6 years and I have observed no use by Bill Harris or Dwane Kiehl. Mike Huff is the only outfitter we have seen operating in the area. He will no longer be using the area and we have acquired Brady's lease from him.
>
> 15e. Have you been convicted, or paid a fine, or forfeited a bond, for violations regarding natural resources, cultural resources or any activity related to your proposal?

> Pled no contesto [sic] to posting public lands in Winnett. In speaking with Assistant U.S. Attorney Jessica T. Fehr I was told that the charge was a misdemeanor and did not go on my record. This plea was several years ago and enough time has passed for this not to be an issue in this application process.[4]

Jablonsky signed the application, which constituted his "Certification of information: I CERTIFY the information in this application and supporting documents is true, complete, and correct to the best of my knowledge and belief and is given in good faith." Below the signature line, the application reinforces the significance of the certification by cautioning that 18 U.S.C. § 1001 (2006) "makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction."

The administrative record includes a detailed Incident/Investigation Report (IIR) dated October 25, 2011, prepared by Jon Edwards, a BLM Ranger. In early September 2011, BLM learned that Jablonsky might be conducting commercial big game hunts on public lands without a permit. Edwards, in the company of Alan Wolf, a BLM Assistant Special Agent in Charge, met with Jablonsky on October 18, 2011, and advised him that the allegation was being investigated. During that meeting, Edwards issued a Warning Notice to Jablonsky for leaving unattended personal property (hunting blinds) on public lands for more than 10 days in violation of 43 C.F.R. § 8365.1-2(b).[5] Edwards also issued a Violation Notice for cutting,

---

[4] BLM provided additional information on appeal. In response to a question on a 2007 SRP application form asking whether there were any pending investigations against him, Jablonsky answered "no." "Appellant denied there was any pending investigation against him when, in fact, he had been made aware of an investigation[.]" Answer at 5. BLM therefore denied the 2007 application. *See* BLM Decision dated July 17, 2007 (Ex. 1 attached to Answer), at unpaginated (unp.) 2. Jablonsky entered a guilty plea to the charge of hunter interference in return for not being prosecuted for that false answer. *See* Answer at 5; Letter to Jablonsky from Assistant U.S. Attorney dated Dec. 19, 2007 (Ex. 2 attached to Answer).

[5] The regulation at 43 C.F.R. § 8365.1-2 provides, *inter alia*, that no person shall as set forth in subsection (b), "[l]eave personal property unattended [on the public lands] longer than 10 days . . . unless otherwise authorized," and such property is "subject to disposition under [section 203(m) of] the Federal Property and Administrative Services Act of 1949, [40 U.S.C. § 552 (formerly, 484(m)) (2006)]."

burning, spraying, or removing timber from public lands, in violation of 43 C.F.R. § 4140.1(b)(3).[6] Both Notices are in the administrative record.

Edwards states that in early September 2011, Mike Huff, an outfitter holding a BLM-issued SRP, contacted him and informed him that he (Huff) had talked to a hunter in a blind on public lands on September 5. That hunter identified himself as Joe Hazel and told Huff that he "was hunting with Jablonsky," but he was "not a paying client[.]" IIR at 2. Huff identified others who were "involved," including Ed Hansen, Huff's wife, Julie, and Steve Sundeim and his son Dillon. Huff reported that Jablonsky had four blinds on public lands, and was also hunting on State lands without a permit. *Id.* Edwards conveyed the latter information to Clive Rooney, the Eastern Montana Land Office Manager.

Steve Sundeim also gave a statement to Edwards on September 25, 2011. He confirmed that he and his son were hunting with the Huffs, and that they had observed a man in a blind on public lands. Sundeim confirmed the location on his Global Positioning System (GPS) unit. *Id.*

Edwards took a statement from Hansen on September 25, 2011. Hansen told Edwards that on September 5, 2011, he observed one of Jablonsky's guides drop a client off after dark at Tin Can Hill Road on public lands. *Id.* at 3. Much later, hearing noises, Hansen went down to talk to the hunter, who had stationed himself in a blind. In response to Hansen's questions, the hunter stated that he was a paying client of Jablonsky's. *Id.* Hansen checked their position on his GPS unit, and informed the hunter he was hunting illegally on public lands, showing the hunter the GPS reading. *Id.* Hansen left the hunter, telephoned Jablonsky and left a voice message, returned to his vehicle and drove west. He found Jablonsky's truck, and determined to wait for him. Hansen asked Jablonsky "why he put a hunter in a blind on BLM lands when he didn't have a permit to do that." *Id.* Jablonsky replied that "without the outfitter sponsored licenses[,] he didn't need a permit to put his clients on public lands," further explaining that he had a signed agreement with his clients that informs them that his guiding services are provided on private lands only, and do not extend to public lands, though they can "access" public lands. *Id.* Huff and Sundeim joined the conversation between Hansen and Jablonsky. *Id.* Jablonsky stated he had placed another blind on public lands in an area called "camper dam." Edwards located a blind south of Tin Can Hill Road, noting that "a number of cut

[6] The regulation at 43 C.F.R. § 4140.1(b) provides, *inter alia*, that any person who engages in the "[c]utting, burning, spraying, destroying, or removing vegetation without authorization" on BLM-administered public lands is engaging in a "prohibited act[]" and is "subject to civil and criminal penalties set forth at §§ 4170.1 and 4170.2[.]" 43 C.F.R. § 4140.1(b)(3).

branches from live trees" were on and around the structure, and that two live pines were missing "many" branches. *Id.* Edwards counted 33 cuts. *Id.* at 3-4.

Edwards provided copies of the witnesses' statements to Special Agent Wolf, and referred him to Steve Vinnedge, Warden Sargent, Montana Fish, Wildlife and Parks (MFWP). On October 3, 2011, Edwards and Rooney went to the Tin Can Hill area, but could not reach State lands without traversing private property. On October 15, 2011, Edwards accompanied a MFWP Warden to Tin Can Hill Road, where the blind was confiscated.

On October 15, 2011, Edwards received a telephone message from Jablonsky, and on the following day, Edwards called Jablonsky and scheduled a meeting. Edwards and Wolf met with Jablonsky at his hunting camp on October 18, 2011. *Id.* at 4. In that meeting, Jablonsky admitted he had placed two blinds on public lands two weeks before the September 5 incident, but denied paying clients had used them, explaining they had been provided for his girlfriend's use. He confirmed that a photograph of the blind confiscated by MFWP was his, and admitted that he had cut branches to camouflage it. *Id.* at 5. Regarding the events of September 5, 2011, Jablonsky maintained the individual was not a paying client, and that he had not directed that person to use the blind. *Id.* Jablonsky identified that hunter as Todd Yoder, who had been a paying client, but was only hunting "out of his camp" free of charge, because Yoder had brought a lot of business to Jablonsky in the past. *Id.* According to Jablonsky, Yoder merely found the blind and used it. When presented with a map to indicate where the blinds were, Jablonsky admitted that he had three blinds on public lands. *Id.* Edwards pointed out that Jablonsky had repeatedly asserted that there were only two blinds, and denied using them at all.

Hans Marks owns land adjoining the area Jablonsky hunts. Though Marks questioned his presence at the meeting, according to Edwards, "Jablonsky wanted Marks to tell Edwards/Wolf that Huff did not have permission to cross his (Marks) private land," a statement that Marks did not make, although he acknowledged he had given Huff permission in the past. *Id.* Marks left the meeting.

Jablonsky denied any knowledge of a contract with him that his hunters signed. He acknowledged that he "'probably did'" admit placing the blinds on public lands to deter other hunters from entering the area, just to get Huff "'worked up.'" *Id.* Jablonsky became upset by the idea that Huff and Hansen had "'filed complaints,'" and threatened to file complaints against them. *Id.*

Jablonsky raised the apparently unrelated issues of a new road and a BLM sign posted on "Murnions private property" on or near Blood Creek and Huff's Suburban (vehicle) allegedly parked on public lands. *Id.* at 6. Edwards inquired about Austin

Turner, a guide who had worked for both Jablonsky and Huff. Jablonsky stated that Turner had been in the area hunting in September. *Id.*

Jablonsky, Edwards, and Wolf went to the Tin Can Hill area, where Jablonsky designated a place where Huff parks his Suburban vehicle, purportedly reached only by trespassing. Edwards indicated he would pursue the allegation further. Edwards then "advised Jablonsky that he would be getting a citation for cutting the trees and written warning for having the blinds on public lands." *Id.* Edwards further "advised that the BLM would continue to investigate the allegations of Jablonsky outfitting on public lands without a permit." *Id.*

The Warning Notice was issued on October 15, 2011. The Violation Notice does not indicate the date it was issued, or the date Jablonsky signed it, but the parties seem to accept that it was issued the same day.

On October 21, 2011, Jablonsky telephoned Edwards to inform him that he had mailed in the $225 "bond" for the Violation Notice.[7] *Id.* at 7. Jablonsky asked that the confiscated blind be returned to him, noted that the Blood Creek sign was still in place, and inquired about the investigation of Jablonsky's other allegations. *Id.*

The IIR concluded by, among other things, identifying the Warning and Violation Notices, and again noting that "Edwards/Wolf also advised Jablonsky that they would continue the investigation into commercial operations on public lands without a permit." *Id.* at 8.

Discussion

BLM has considerable discretion under section 302(b) of FLPMA and its implementing regulations in 43 C.F.R. Part 2930 regarding the approval of SRPs for recreational use on the public lands. *See* 43 C.F.R. § 2932.26 ("BLM has discretion over whether to issue a Special Recreation Permit"); Handbook, III.A., at 16; *Shooters-Edge, Inc.*, 178 IBLA 366, 369-70 (2010); *Larry Amos d/b/a Winterhawk Outfitters, Inc.*, 163 IBLA 181, 188 (2004); *William D. Danielson*, 153 IBLA 72, 74 (2000). A BLM decision to approve or disapprove an SRP made in the exercise of its discretionary authority will not be reversed unless it is arbitrary and capricious, and

[7] The Violation Notice contains two boxes to be checked by the issuing officer. If Box A is checked, the recipient must appear in court. If Box B is checked, the recipient must either pay the amount shown or appear in court. Neither box was checked, and a "Forfeiture Amount" of $200 was entered, plus a $25 "Processing Fee," for a total "Collateral" of $225.

thus without any rational basis. *See, e.g., Shooters-Edge, Inc.*, 178 IBLA at 370; *Larry Amos d/b/a Winterhawk Outfitters, Inc.*, 163 IBLA at 188-89.

The burden is upon the person challenging such a BLM decision to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision is not supported by a record that shows that BLM gave due consideration to relevant factors and acted on the basis of a rational connection between the facts found and the choice made. *See, e.g., Shooters-Edge, Inc.*, 178 IBLA at 370; *Utah Trail Mach. Ass'n*, 147 IBLA 142, 144 (1999). That burden is not carried by conclusory allegations of error or expressions of disagreement with BLM's analysis and conclusions. *See, e.g., Utah Trail Mach. Ass'n*, 147 IBLA at 144; *Tom Cox*, 142 IBLA 256, 258 (1998).

Jablonsky does not dispute BLM's authority to deny an SRP application when it determines an applicant has failed to disclose relevant information in response to questions on the SRP application. Instead, he contends that (1) he "accurately answered" Question 15d "based upon the facts and information known to him" at the time; (2) he failed to disclose the Violation Notice for cutting, burning, spraying, or removing timber in answer to Question 15e because of "simple oversight," which does not alone justify denial of the SRP application; and (3) he did not disclose the Warning Notice for unattended personal property in excess of 10 days in answer to Question 15e because the question does not require disclosure. Statement of Reasons (SOR) at 3, 4.

The objective of Questions 15d and 15e is to elicit information concerning nonconformance with laws involving the SRP applicant and activities on the public lands, because such information justifiably and reasonably bears upon the larger question of whether the applicant will conform to applicable laws and regulations if the requested SRP is granted. BLM accordingly has the right to expect accurate, complete answers, lacking which it properly may deny an SRP application. 43 C.F.R. §§ 1810.4 ("[T]he Director [of BLM] may in [a] form [required or prescribed by regulation] require the submission of any information which he considers to be necessary for the effective administration of that regulation") and 2932.24; *Jess Rankin, d/b/a West Tex-New Mex Hunting Serv.*, 176 IBLA 162, 163 (2008) ("BLM relies on the accuracy and completeness of the information provided by the applicant in determining the applicant's qualifications for the permit"); *David L. Antley, Jr., d/b/a High Desert Outdoors, Inc.*, 178 IBLA 194, 198 (2009) ("A false answer to [an SRP application] question deprives BLM of the information necessary to judge an applicant's regard for the regulations and other natural resources-related laws in order to determine his qualifications for the permit"); *William D. Danielson*, 153 IBLA at 73, 74 ("[The SRP applicant's] failure to disclose information . . . in response to [questions] . . . on the [application] form is a rational basis for [BLM's] . . . denial of the application").

Whether Jablonsky Answered Question 15d Falsely

We think the import of Question 15d is unmistakable. That interrogatory seeks information about "any" action related to a permit or activities to be conducted under the requested permit that are "unresolved," of a criminal, civil, or administrative nature.[8] Jablonsky states that he received a "voice message" on or about October 18, 2011, informing him that "BLM was looking into a complaint that Jablonsky was guiding on public land without a permit." SOR at 3. He asserts, however, that he received no other communication from BLM, either orally or in writing, regarding the "purported investigation," and concluded the investigation had ended. Jablonsky reasons that he justifiably answered, "over four months" later, that he had no unresolved criminal, civil, or administrative actions against him. *Id.*

BLM responds that Jablonsky was personally informed that the investigation would continue on October 18, 2011. We agree. More than that, it was the serious and material allegation that Jablonsky was guiding hunts on the public lands without a permit, supported by the statements of several observers and confirmed by an individual discovered on public land who stated he was hunting with Jablonsky, that started the investigation that led to the October 18 meeting in which he was notified the investigation was under way. We are not convinced that a person who has been informed that an allegation of that nature is being investigated, which could lead to criminal sanctions, would rationally assume that the investigation was concluded or, as Jablonsky implies, that he had been absolved of the charge merely because 4 months had passed. Jablonsky simply had no objective or plausible reason to conclude that the investigation had ended or been resolved in his favor. If he had any real doubt about the status of the investigation, it behooved him to ascertain the

[8] Over the years, the questions asked in the SRP Application form have changed. For example, SRP Form 8730-1 (January 1999) contained Question 7a, which inquired whether there was "any investigation or legal action pending against you or your organization for use of the public lands." Form 2930-1 (March 2004 and August 2007) contained Question 17d, which asked whether there were "any pending investigations against you" and Question 17e, which asked whether the applicant had been "convicted of violations regarding natural resources, cultural resources or any activity related to your proposal." Considering the Government-wide mandate to use "plain English" in official documents, regulations, and communications, and the common and ordinary meaning of "actions" in criminal, civil, or administrative contexts, we do not view these changes as alone signifying or establishing an intent to eliminate the obligation to provide information about any investigations related to a permit or the activities to be conducted under a permit that may be pending against an applicant. To decide otherwise, on the facts of this case, would wholly negate the point or utility of making any inquiry at all.

true facts of the matter. Because the allegation and investigation directly and substantially related to a permit or activities to be conducted under the requested permit, if he had any genuine doubt about whether Question 15d included his situation, Jablonsky should have either sought instruction and assistance from BLM, or provided the facts and an explanation.

[1] We find that when Jablonsky submitted his SRP application, he plainly was the subject of investigative action of an administrative nature, with the potential of ripening into criminal or civil action, that was at that point unresolved, and that he had actual notice of it. The pending investigation is precisely the information sought by Question 15d. Had he answered the question truthfully, he would have been required to provide a detailed explanation. Jablonsky's negative answer therefore provided adequate ground for rejecting the application.

Whether Jablonsky's Answer to Question 15e Required a Detailed Explanation

Jablonsky answered Question 15e of his SRP application affirmatively, acknowledging he had been convicted, or paid a fine, or forfeited a bond, for violations regarding natural resources, cultural resources or any activity related to the SRP for which he applied. In its Decision, BLM determined that Jablonsky should have disclosed the Warning and Violation Notices issued on October 18, 2012. Jablonsky argues that his failure to disclose the citation in answer to Question 15e was "simple oversight" that does not justify BLM's denial of his application. SOR at 4. He further contends that he was not required to disclose the Warning Notice, because receiving a warning is not a conviction, paid fine, or bond forfeiture. *Id.* at 4-5.

[2] Jablonsky did not overlook admitting he had previously been denied an SRP in 2007.[9] We are not persuaded that Jablonsky recalled the 2007 criminal case that followed from the false answer on the 2007 permit application, yet overlooked the need to disclose a Violation Notice that he received only a few months before he submitted the 2012 SRP application. Any question with a "yes" answer required a detailed explanation, which Jablonsky does not dispute. Without that explanation, Jablonsky's answers were not "true, complete, and correct to the best of his knowledge and belief," as he certified they were. Consequently, the failure to provide detailed explanations provided an adequate ground for denying the application.

[9] We must note that by not mentioning his failure to disclose a pending investigation in 2007, Jablonsky's explanation for his answer to Question 15b conveyed the misleading impression that the number of outfitters in the hunting area was the major factor in denying the prior SRP application. That impression was only strengthened by the failure to explain that the nolo contendere plea was a direct consequence of the false statement he made on the 2007 application.

[3] Jablonsky correctly maintains that Question 15e did not compel disclosure of the Warning Notice, as it did not constitute a conviction, fine, or bond forfeiture. The Warning Notice provided: "This is not a citation and no court appearance is required. This warning has been issued to encourage your compliance with regulations designed to protect natural resources and make your Public Lands safe and enjoyable for all users." BLM erred to the extent it rested its Decision on the failure to disclose the Warning Notice. The Decision is modified accordingly.

One final point remains to be addressed. BLM denied the SRP application based on its conclusion that Jablonsky failed to "conform[] with laws," within the meaning of 43 C.F.R. § 2932.26(a). *See* Decision at unp. 1 ("I have reviewed your application and have decided to deny your request for a SRP after considering criteria a) [43 C.F.R. § 2932.26(a) (Conformance with laws and land use plans)]"). The Decision did not cite a law. On appeal, BLM notes the warning in the application form to the effect that under 18 U.S.C. § 1001 (2006), it is a crime for any person to knowingly and willfully make any false, fictitious, or fraudulent statements or representations to any department or agency of the United States as to any matter within its jurisdiction. Answer at 2 (quoting SRP Application (Form 2930-1 (January 2011))). *See also* 43 U.S.C. § 1212 (2006) ("Unsworn written statements made in public land matters within the jurisdiction of the Department of the Interior shall remain subject to section 1001 of Title 18"); *Lee S. Bielski*, 39 IBLA 211, 223-24, 228, 86 I.D. 80, 87, 89 (1979).

BLM could have better explained why Jablonsky's answers failed to conform to applicable law. In more typical circumstances, the failure to do so might result in a remand of the case to rectify its omission and again issue an appealable decision. The failure to disclose a pending investigation of which Jablonsky had actual notice was prosecuted by the U.S. Department of Justice (DOJ) as a knowing and willfully false, fictitious or fraudulent statement or representation that is prohibited by 18 U.S.C. § 1001 (2006). Answer at 5, Ex. 2 Letter to Jablonsky from DOJ dated Dec. 19, 2007, at 1; *see also* n.4. The same failure is before us in this appeal. There accordingly can be no serious doubt about what statute and regulation were violated by Jablonsky's answers.

Even without Jablonsky's prior violation, however, the facts and events of this case clearly show that BLM's Decision is well supported and justified under other criteria contained in 43 C.F.R. § 2932.26: (b) public safety; (d) resource protection; (e) the public interest; or (g) such other information as BLM finds appropriate. The record thus shows BLM gave due consideration to relevant factors and acted on the basis of a rational connection between the facts found and the choice made. As we have often held, if a decision has any rational basis, it will not be held arbitrary and capricious, or an abuse of discretion. *Michael Voegele*, 174 IBLA 313, 318 (2008); *Obsidian Serv., Inc.*, 155 IBLA 239, 248 (2001). In these circumstances, a remand is

neither necessary to convey or grasp the reasons why the application was denied, nor a productive use of Departmental resources.

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 modified to omit the Warning Notice as a ground therefor, and the Decision is affirmed as modified.

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge

ADMINISTRATIVE JUDGE JACKSON DISSENTING:

Ernie P. Jablonsky, d/b/a Montana Big Game Pursuits (Jablonsky), appeals from a decision of the Field Manager, Lewistown (Montana) Field Office, Bureau of Land Management (BLM), that denied his application for a commercial special recreation permit (SRP) because it was not in "conformance with law." Decision at 1 (quoting 43 C.F.R. § 2932.26(a)). BLM did so based on its finding that Jablonsky provided false and incomplete information when he answered and responded to two questions posed on BLM Form 2930-1 (January 2011), Special Recreation Permit Application, which was filed with BLM on March 1, 2012 (Jablonsky Application).[1] The majority affirms both of BLM's findings and its denial of this SRP, but since I find BLM erred in making those findings, I must respectfully dissent.

It is uncontroverted that BLM issued and Jablonsky received by mid-October 2011 both a Warning Notice, Form 9260-10, for leaving unattended personal property on BLM-administered lands in violation of 43 C.F.R. § 8365.1-2(b), and a Violation Notice, Form 9260-9, for cutting timber on public lands in violation of 43 C.F.R. § 4140.1(b)(3), which was resolved when he paid BLM the $225 identified on its notice form. BLM informed Jablonsky he was under investigation for a possible violation of 43 C.F.R. § 2932.14(b),[2] but it did not thereafter initiate a criminal, civil, or administrative enforcement action and was under no obligation to inform him that its 2011 investigation had ever been concluded.

The Jablonsky Application was on BLM Form 2930-1 (January 2011), OMB No. 1004-0119,[3] which asked a series of questions and required him to certify that

---

[1] Form 2930-1 expressly states that it is a felony "knowingly and willfully to make to [BLM] any false, fictitious, or fraudulent statements or representations." Jablonsky Application; *see* Answer at 2; 18 U.S.C. § 1001 (2006) ("whoever, in any matter within the jurisdiction of the [Department of the Interior], knowingly and willfully--makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title, imprisoned not more than 5 years . . . or both").

[2] The rule at 43 C.F.R. § 2932.14(b) prohibits outfitters and guides from "providing services to hunters" unless they have an SRP; an outfitter/guide who violates this prohibition commits a misdemeanor, may be sued by the United States, and could be the subject of an administrative sanction under the Federal Land Policy and Management Act of 1976. *See* 43 U.S.C. § 1733(a), (b) (2006); 43 C.F.R. § 2932.57(b); *Frank Robbins, d.b.a. High Island Ranch*, 167 IBLA 239, 248 (2005).

[3] Like earlier versions of this SRP application form, its use was approved by the Office of Management and Budget (OMB), as required by the Paperwork Reduction (continued...)

his application and supporting documents were "true, complete, and correct to the best of my knowledge and belief." Jablonsky answered the 6 questions on that form, provided an explanation for each of his "yes" answers, and then signed, certified, and filed his application with BLM on March 1, 2012. This appeal involves only two of those questions, Questions 15d and 15e.

Jablonsky answered "no" to Question 15d: "Do you have any unresolved, criminal, civil or administrative actions related to a permit or the activities you plan to conduct under this Permit?" Jablonsky Application. BLM found he "provided false information" because "BLM Ranger Jon Edwards and BLM Special Agent Alan Wolf contacted you and advised you that you were under investigation for commercial operations on public lands without a permit." Decision at 1. He answered "yes" and provided a detailed response to Question 15e: "Have you been convicted, or paid a fine, or forfeited a bond, for any violations regarding natural resources, cultural resources or any activity related to your proposal?" Jablonsky Application. BLM found his detailed explanation was not truthful because: "You failed to disclose that on September 2, 2011[,] BLM Ranger Jon Edwards issued you a citation (LO188286) for 43 CFR 4140.1(b)(3), Cut, Burn, Spray, or Remove Timber. You also failed to disclose that on October 15, 2011[,] BLM Ranger Jon Edwards issued a warning for 43 CFR 8365.1-2(b) for Unattended personal property in excess of 10 days." Decision at 1-2. Based on both of its findings, BLM denied the Jablonsky Application because it was not in "conformance with law." *Id.* at 1 (quoting 43 C.F.R. § 2932.26(a)). BLM explains on appeal that the law it was referring to was the law making it a crime "for any person knowingly and willfully to make to [BLM] any false, fictitious, or fraudulent statements or representations." Answer at 2 (quoting Form 2930-1 (January 2011)); *see supra* note 1.

Jablonsky avers he "accurately answered [Question 15d,] based upon the facts and information known to him," and that the record does not support BLM finding he provided false information because he had no "criminal, civil, or administrative actions" then pending against him. SOR at 3 (quoting Jablonsky Application).[4] The majority finds BLM's "pending investigation is precisely the information sought by Question 15d. Had he answered the question truthfully, he would have been required to provide a detailed explanation." 184 IBLA at 340.

---

[3] (...continued)
Act, 44 U.S.C. § 3507 (2006). *See* 75 Fed. Reg. 51283, 51284 (Aug. 19, 2010).

[4] Appellant asserts that while he was informed that "BLM was looking into a complaint that Jablonsky was guiding on public land without a permit," he reasonably believed BLM had concluded that investigation because it "made no further contact with Jablonsky for over four months prior to the filing of the Application." SOR at 3.

Question 15e asked Jablonsky if he had been convicted of a crime, paid a fine, or forfeited a bond "regarding natural resources, cultural resources or any activity related to your proposal." Jablonsky Application. BLM determined his application was not in conformance with law because it failed to disclose the above-described Warning and Violation Notices. *See* Decision at 1 (citing 43 C.F.R. § 2932.26(a)). The majority agrees with Jablonsky's claim that he was not required to disclose the Warning Notice and therefore finds BLM erred in resting "its Decision on the failure to disclose the Warning Notice," and ruled that the "Decision is modified accordingly." 184 IBLA at 341. As to the Violation Notice, however, they reject Jablonsky's claim that its omission was a "simple oversight," find his response was not "'true, complete, and correct to the best of his knowledge and belief,'" and conclude that his failure to disclose the Violation Notice constituted "an adequate ground for denying the application." *Id.* (quoting Jablonsky Application).

I respectfully disagree with the majority and how they have disposed of this appeal. Rather than affirm the Decision, as they have modified it, I would reverse its finding Jablonsky falsely answered Question 15d and was not truthful in responding to Question 15e. Alternatively, I would set the Decision aside because it fails adequately to explain its decision rationale and also because it was based on a clearly erroneous finding of fact, which even the majority recognizes.

Discussion

The Board will overturn a decision to approve/disapprove an SRP if it is arbitrary, capricious, an abuse of discretion, or lacks a rational basis that is adequately stated in the decision and supported by the record. *See Larry Amos d/b/a Winterhawk Outfitters, Inc.*, 163 IBLA 181, 188 (2004), and cases cited; *see also Shooters-Edge, Inc.*, 178 IBLA 366, 369-70 (2010); *David L. Antley, Jr., d/b/a High Desert Outfitters, Inc.*, 178 IBLA 194, 197 (2009) (an appellant must "show, by a preponderance of the evidence, that a challenged [SRP] decision is in error"), and cases cited; *William D. Danielson*, 153 IBLA 72, 74 (2000). I do not doubt that BLM would like every bit of information that could be potentially relevant to its decision-making, but the issue here is not what BLM would like to have but what was asked of Jablonsky on its application form.

It is well-established that the regulated community does not run afoul of a law (or applicable regulatory requirement) unless it is sufficiently clear as to leave no reasonable basis for noncompliance. *See, e.g., Charles J. Rydzewski*, 55 IBLA 373, 379, 88 I.D. 625, 627-28 (1981); *Mary I. Arata*, 4 IBLA 201, 203-04, 78 I.D. 397, 398-99 (1971); *A.M. Shaffer*, 73 I.D. 293, 298-300 (1966). The Board applied that principle when it reviewed an MMS penalty for alleged shortcomings in how the company completed a royalty reporting form. *See Exxon Co., U.S.A. (Exxon)*,

113 IBLA 199 (1990). As those circumstances are analogous to the facts of this case, I find our decision and analysis in *Exxon* to be instructive for resolving this appeal.

MMS found Exxon used the wrong adjustment response code (ARC) to revise its entries for royalty due (TC 01) and royalty-in-kind (TC 06) on Form MMS-2014, Report of Sales and Royalty Remittance, and then assessed the maximum penalty allowed for that "erroneous reporting." *Exxon*, 113 IBLA at 200, 205 (citing 30 C.F.R. § 218.40 (1986)). Exxon claimed "it did not err when using ARC 34 with TC 01 and TC 06 because, based on the information it had, its use of that ARC number was reasonable and appropriate." 113 IBLA at 205. The Board agreed with Exxon and its reading of what was required to complete that MMS form:

> Often appellants will argue that a regulation is vague. In many of those cases we have stated that a regulation should be sufficiently clear that there is no basis for an oil and gas lessee's noncompliance with the regulation before that regulation is interpreted to the detriment of a lessee. *See, e.g., Dennis W. Belnap*, 112 IBLA 243 (1989); *Beard Oil Co.*, 97 IBLA 66 (1987); *James M. Chudnow*, 82 IBLA 262 (1984); *Charles J. Rydzewski*, 55 IBLA 373, 88 I.D. 627 (1981); *Wallace S. Bingham*, 21 IBLA 266, 82 I.D. 337 (1975); *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971); *A. M. Shaffer*, 73 I.D. 293 (1966). If a regulation is ambiguous, any doubt as to its meaning should be resolved favorably to the lessee. *Wallace S. Bingham, supra; Mary I. Arata, supra; A. M. Shaffer, supra.*
>
> The need for clarity is even more imperative when MMS attempts to base a significant monetary assessment on a lessee's failure to properly apply provisions of the Oil and Gas Payor Handbook because that Handbook lacks the force and effect of law enjoyed by a statute or regulation. *See Mesa Petroleum Co.*, 107 IBLA 184, 192 (1989); *Chevron U.S.A. Inc.*, 105 IBLA 21, 26 n.5 (1988).
>
> An examination of the descriptions of ARC 34 and ARC 38, as found in the 1982 Handbook, leaves little doubt that those descriptions do not unambiguously inform a payor that ARC 34 cannot be used with TC 01 and TC 06. In fact, those descriptions actually support Exxon's choice of ARC 34 instead of ARC 38. . . . A search of the Handbook for a proper code for the entry reported by Exxon could logically lead to the selection of ARC 34. In addition we find nothing which can be construed as explicitly instructing a payor that it is inappropriate to use ARC 34 with TC 01 and TC 06. Accordingly, we find that, although Exxon may have erroneously used ARC 34 with TC 01 and TC 06, the

> MMS Handbook is ambiguous, and the doubt as to the proper use of ARC 34 should be resolved in Exxon's favor.

113 IBLA at 206-07. The clarity we have required of the Department for properly completing Form MMS-2014 should also apply to BLM Form 2930-1, particularly since a false answer/response exposes the applicant to prosecution for a felony, which is no less severe than the civil penalty at issue in *Exxon*.[5]

Applying the standard we established in *Exxon* to this case, I find Question 15d is clearly ambiguous as to whether it asked Jablonsky if he had ever been investigated for possible noncompliance, and as to Question 17e, I find no record evidence to support BLM finding that his response to Question 15e was not truthful. I therefore disagree with the majority affirming both these BLM findings and its determining that the Jablonsky Application was not in "conformance with law," which I separately discuss below.

I. Jablonsky Did not Provide a False Answer in Response to Question 15d.

Question 15d asked whether Jablonsky had "any unresolved, criminal, civil or administrative actions related to a permit or the activities you plan to conduct under this permit," to which he answered "no." Jablonsky Application. According to BLM, he was required to answer "yes" and provide details of its investigation in order to truthfully and completely answer/respond to Question 15d. Answer at 4; *see id.* at 5 ("it was his responsibility to confirm the accuracy of his answer or risk making false statements [that could result in his being charged with a felony]"). The majority affirms BLM's finding he provided a false answer to Question 15d, whereas I would reverse that finding. *See* 184 IBLA at 340.

The criminal, civil, and administrative actions referred to in Question 15d are readily understood and easily identified. Thus, an SRP applicant is clearly required to answer "yes" to Question 15d if he has been charged with a crime, sued by the United States, or was the recipient of a notice of noncompliance, trespass or the proposed amendment, suspension, or cancellation of an SRP. *See* 43 C.F.R.

---

[5] Since BLM found Jablonsky provided "false information" when he answered Question 15d, it could refer that matter to the Department of Justice for felony prosecution, which is neither a remote or hypothetical possibility. After all, Jablonsky was under investigation for a different alleged violation when he applied for an SRP under a different BLM form that asked him if "there are pending investigations against you." Since he knew of that investigation when he answered "no" to that question, BLM referred it to the U.S. Attorney for criminal prosecution in 2008. *See* Answer at 5 (citing BLM decision dated July 17, 2007); Answer, Attach. 1 and 2.

§§ 2920.1-2, 2932.56, 2932.57. Since an investigation is none of the above, I find Question 15d is ambiguous and unclear as to whether that question was also asking about open BLM investigations of Jablonsky and whether he knew or should have known that the unresolved administrative actions referred to in Question 15d included any investigation of possible noncompliance. The majority avoids these questions by summarily stating an "investigation is precisely the information sought by Question 15d" and finding that Jablonsky provided a false answer because "if he had genuine doubt about whether Question 15d included his situation, Jablonsky should have either sought instruction and assistance from BLM, or provided the facts and an explanation." 184 IBLA at 340. I reach the opposite result because I do not find his answer was unreasonable or that the burden was on him to ask BLM if its investigation of him was an unresolved administrative action requiring a "yes" answer and detailed explanation in response to Question 15d.

In my view, Jablonsky's "no" answer was a reasonable and factually sound response to what BLM asked in Question 15d. Nor do I find this question sufficiently clear to expose him to felony prosecution for his "no" answer. *See supra* note 5. Rather, I find Question 15d is ambiguous for divining whether Jablonsky knew or should have known that BLM's 2011 investigation was an "unresolved criminal, civil or administration action" when he signed and submitted his SRP application to BLM on March 1, 2012. To paraphrase the Board's ruling in *Exxon*,113 IBLA at 206, if a question on a permit application is ambiguous, any doubt as to its meaning should be resolved favorably to the applicant. Stated another way, any reasonable doubt as to the proper meaning of a term should be resolved in Jablonsky's favor because, in the end, reasonable minds cannot disagree over what is reasonable.

Differences between investigations and either legal actions or criminal, civil, or administrative actions have long been recognized by BLM (and OMB). Form 8370-1 (January 1999), OMB No. 1004-0119, first asked applicants if there is "any *investigation or legal action pending against you*" (emphasis added). When it replaced that form with Form 2930-1 (March 2004), OMB No. 1004-0119, BLM deleted "legal actions" but retained its reference to "investigations." Form 2930-1 was revised in 2011 to delete "investigations" and replace it with "criminal, civil or administrative actions." Form 2930-1 (January 2011); *see* 75 Fed. Reg. at 51284 (before it replaced investigations with criminal, civil, and administrative actions, BLM solicited public comment on "the clarity of the information to be collected" under that change); *see also* Form 2930-1 (August 2011). In light of this history, I find it is by no means clear that Jablonsky knew or should have known that an open BLM investigation was also an "unresolved criminal, civil, or administrative action" that required him to answer "yes" to Question 15d.

BLM may want applicants to provide details on its pending investigations of them, but regardless of the reasonableness of its desire for more information, I cannot affirm finding that Jablonsky provided false information when he answered "no" to Question 15d or that he acted unreasonably by failing to ask BLM whether its investigation of him was an unresolved administrative action that required him to answer "yes" to that question. I must therefore dissent from the majority affirming that BLM finding.

II. Jablonsky Did Not Provide a False or Untruthful Response to Question 15e.

Question 15e asked whether Jablonsky had been "convicted, paid a fine, or forfeited a bond, for violations regarding natural resources, cultural resources or any activity related to your proposal." Jablonsky Application. He answered "yes," provided details about his having pled "no contest" to a criminal charge of hunter harassment, but did not disclose the Warning and Violation Notices he received in October 2011. *Id.*, Continuation Sheet; *see* Answer, Attach. 2. BLM found his response was not truthful because he failed to disclose those notices. Decision at 1-2.[6]

I agree with the majority in their finding "Jablonsky correctly maintains that Question 15e did not compel disclosure of the Warning Notice, as it did not constitute a conviction, fine, or bond forfeiture" and concluding that "BLM erred to the extent it rested its Decision on the failure to disclose the Warning Notice." 184 IBLA at 341. I believe the same standard should apply in deciding whether Jablonsky was required by Question 15e to provide details of the Warning and Violation Notices. The majority does so for the Warning Notice but does not do so for the Violation Notice, apparently because that specific claim had not been clearly raised by Jablonsky in his SOR. *See* 184 IBLA at 340-41; *supra* note 6.

Jablonsky received a Violation Notice on BLM Form 9260-9, which cited him for a violation of 43 C.F.R. § 4140.1(b)(3). This alleged violation was settled and resolved when he paid BLM the $225 identified on that form because it did not refer that matter "for appropriate legal action by the United States against the violator." 43 C.F.R. § 4170.1-1(c). While his payment may include "all damages to the public lands . . . and all reasonable expenses incurred by the United States" to detect, investigate, and resolve this alleged violation, it did not relieve him of "criminal liability under Federal or State law." 43 C.F.R. § 4150.3(d). It is therefore clear from the record and applicable BLM rules that this Violation Notice resulted in a civil settlement for this alleged violation.

[6] BLM also contends Jablonsky's failure to disclose the Violation Notice cannot be excused by his "inadvertence or oversight." Answer at 6; *see* SOR at 4.

Question 15e asked Jablonsky if he had been "convicted, or paid a fine, or forfeited a bond, for any violations regarding natural resources, cultural resources or any activity related to your proposal." Jablonsky Application; *see* 184 IBLA at 340. It defies common understanding to suggest that this Violation Notice or its resolution by a civil settlement show that Jablonsky was "convicted" of a crime, paid a "fine," or forfeited a "bond," as asked for by this question.[7] I find no basis in fact or law to affirm a BLM finding that Jablonsky's response to Question 15e was not truthful because he failed to disclose the Warning and Violation Notices and would, therefore, reverse that finding and remand this matter for further action by BLM.

III. BLM Failed Adequately to Explain its Decision Rationale.

The majority recognizes that the Decision did not explain how the Jablonsky Application was not in "conformance with law," but rather than remand for BLM to address that lacuna, as is typically required under such circumstances, the majority dispensed with doing so because it found Jablonsky knew (or should have known) that the "law" his application failed to be in conformance with was 18 U.S.C. § 1001. 184 IBLA at 341 (citing Answer at 2, 18 U.S.C. § 1001); *see id.* at 341-42 ("In these circumstances, a remand is neither necessary to convey or grasp the Decision rationale, nor a productive use of Departmental resources,"). However, their reasoning glosses over the real question presented, which is how an incomplete response to Question 15e (*i.e.*, a failure to disclose the Violation Notice) could lead to a felony prosecution under 18 U.S.C. § 1001.[8] I would not excuse a failure to articulate that decision rationale. BLM based its decision on separate findings regarding its 2011 investigation, Warning Notice, and Violation Notice. The majority correctly reversed its finding regarding the Warning Notice, but rather than modify the decision, I would remand for a proper decision rationale and issuance by BLM of a new decision to either approve or deny the Jablonsky Application.

---

[7] Bond forfeiture requires that there be a bond and a proper decision declaring that bond forfeit. *See, e.g., Cottonwood Gold Co.*, 178 IBLA 386 (2010). As neither circumstance applies in this case, Jablonsky could not have forfeited a bond he never had or was required to have.

[8] The majority attempts to avoid that question by conflating a "false, fictitious, or fraudulent statement" under 18 U.S.C. § 1001 with an allegedly incomplete response to Question 15e that could be inconsistent with Jablonsky certifying that his application was "'true, complete, and correct to the best of my knowledge and belief.'" 184 IBLA at 340 (quoting Jablonsky Application). However, they cite neither law nor precedent for concluding that an incomplete response constitutes a felony under 18 U.S.C. § 1001 or identify any other law the Jablonsky Application was not in conformance with, which was the stated rationale for BLM denying that application. *See* Decision at 1 (quoting 43 C.F.R. § 2932.26(a)).

For the reasons discussed above, I must respectfully dissent.

/s/
James K. Jackson
Administrative Judge