INTERIOR BOARD OF LAND APPEALS

Coalition for the High Rock/Black Rock Emigrant Trails National Conservation Area, et al.

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COALITION FOR THE HIGH ROCK/BLACK ROCK
EMIGRANT TRAIL NATIONAL CONSERVATION AREA, ET AL.

IBLA 96-564 Decided December 21, 1998

Appeal from a Finding of No Significant Impact/Record of Decision issued by the Acting Assistant District Manager, Nonrenewable Resources, Winnemucca District Office, Bureau of Land Management, approving an application for a special recreation permit for the Burning Man Event. N2-12-96.

Affirmed.

1. Rules of Practice: Appeals–Public Lands: Special Use Permits--Special Use Permits

This Board has held that an appeal is ordinarily dismissed as moot where, as a result of events occurring after the appeal is filed, no effective relief may be granted to the appellant. However, the rule is not absolute and the Board may decline to dismiss an appeal challenging the approval of a special recreation permit as moot when the appeal presents issues that may be recurring and, under particular circumstances, could evade review.

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

The Bureau of Land Management has discretion under 43 U.S.C. § 1732(b) (1994) and 43 C.F.R. Subpart 8372 to issue a special recreation permit for a commercial event on public lands and to impose permit conditions. However, any exercise of this discretionary authority must have a rational basis and be supported by facts of record.

3. National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Public Lands: Special Use Permit--Special Use Permit

BLM's decision approving an application for a special use permit for a commercial event on public lands, based on the preparation of an environmental assessment and finding of no significant impact, will be affirmed when, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994), BLM has taken a hard look at the environmental consequences of such an event, and there is no objective proof that BLM failed to consider a substantial environmental problem of material significance or otherwise failed to abide by the Act.

APPEARANCES: Susan Lynn, Reno, Nevada, pro se, and for the Coalition for the High Rock/Black Rock Emigrant Trails National Conservation Area (Coalition) and Public Resources Associates; Rose Strickland, Reno, Nevada, for the Coalition and the Sierra Club; Chuck Dodd, Reno, Nevada, for the Coalition and the Oregon-California Trails Association; Desna Young, Reno, Nevada, for Public Resources Associates; Acting District Manager, Winnemucca District Office, U.S. Department of the Interior, Winnemucca, Nevada, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Coalition, the Oregon-California Trails Association, Public Resource Associates, the Sierra Club, and Susan Lynn have appealed from an August 1, 1996, Finding of No Significant Impact/Record of Decision (FONSI/ROD), issued by the Acting Assistant District Manager, Nonrenewable Resources, Winnemucca (Nevada) District Office, Bureau of Land Management (BLM), approving an application for a special recreation permit for the Burning Man Event from August 24 through September 7, 1996. On the same day, BLM issued permit No. N2-12-96.

The Burning Man Event, as described in Environmental Assessment (EA) NV-020-6-XX, is "a social/artistic/cultural event on the playa of the Black Rock Desert." (EA at 1.) It further described the event as

> a festival involving many different aspects. The promoter terms it a temporary experiment in community living. There are many objectives of the event, among which are to display sculptures, and hold various social functions, bake bread in ovens set up on the playa, and build waterfalls. Booths would be raised, talks given, and various social functions would be held. In the past

> bands have been formed on the spot and weddings have been held, as well as ice cream socials. The event would be culminated by the burning of a forty foot tall sculpture.

Id.

Appellants filed their notice of appeal on August 30, 1996. They complain that the permit was signed and implemented "before the 30 days waiting period was complete." The regulations governing the issuance of special recreation permits provide that any person adversely affected by a decision of the authorized officer under 43 C.F.R. Part 8370 may appeal under 43 C.F.R. Part 4. 43 C.F.R. § 8372.6(a). Under Part 4, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, except as otherwise provided by law or other pertinent regulation. 43 C.F.R. § 4.21(a)(1). In this case, there was another pertinent regulation. "All decisions of the authorized officer under this part shall remain effective pending appeal unless the Secretary rules otherwise. Petitions for stay of decisions shall be filed with the Office of Hearings and Appeals, Department of the Interior." 43 C.F.R. § 8372.6(b). In this case, BLM issued the FONSI/ROD approving the permit and the permit itself on the same day, August 1, 1996. Under 43 C.F.R. § 8372.6(b), the approval of the application was effective immediately, although the term of the permit was from August 24 through September 7, 1996. 1/ Appellants did not file a petition for stay of the Burning Man Event.

The Burning Man Event has been taking place on public lands in the Black Rock Desert since 1992. While the original event in 1992 attracted only approximately 400 people, each year has seen an increase in the number of people attending. BLM anticipated approximately 5,500 people in 1996.

In their notice of appeal, Appellants noted that "the Appeal is moot as the Burning Man will have already occurred upon receipt of this Appeal." (Notice of Appeal/Statement of Reasons (NA/SOR) at 9.) While the event had not been completed at the time Appellants filed their appeal, it was completed shortly thereafter. Moreover, BLM did not forward the case file to this Board until September 30, 1996, well after the expiration of the permit. 2/

[1] This Board has held that an appeal is ordinarily dismissed as moot where, as a result of events occurring after the appeal is filed,

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1/ BLM stated in its response that it "inadvertently issued the permit on August 1, (the date the Record of Decision was signed)." (Response at 1.) BLM does not explain when it intended to issue the permit.

2/ As the Board has stated on numerous occasions, BLM is expected to promptly forward the complete, original case file to the Board within 10 days of receipt of the notice of appeal, in order to allow the Board to exercise its authority over the matter. E.g. Patrick G. Blumm, 116 IBLA 321, 334 (1986).

no effective relief may be granted to the appellant. The Hopi Tribe v. OSM, 109 IBLA 374, 381-82 (1989); The Sierra Club, 104 IBLA 17, 19 (1988). Admittedly, this rule is not absolute, and the Board will decline to dismiss an appeal on the basis of mootness if the issues raised are, in the words of the United States Supreme Court in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), "capable of repetition, yet evading review." Wildlife Damage Review, 131 IBLA 353, 355 (1994). Under that exception, jurisdiction may be exercised over a matter which is otherwise moot if (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same challenging party will be subject to the same action again. As we have emphasized, however, the mere fact that an issue may be a recurring one does not preclude dismissal for mootness if future actions will be subject to review. Southern Utah Wilderness Alliance, 137 IBLA 24, 26 (1996); Wildlife Damage Review, supra.

Although future approvals of a special recreation permit for the Burning Man Event would be subject to review, effective review may be difficult to obtain. Under the applicable regulations, the approval of a special recreation permit is immediately effective. 43 C.F.R. § 8372.6(b). In this case, BLM issued its decision on August 1, 1996, less than 30 days prior to commencement of the event, and, following receipt of the appeal on August 30, 1996, delayed forwarding the case file to this Board until September 30, 1996. Although Appellants in this case did not, as noted above, seek a stay of the Burning Man Event, failure to provide adequate time for filing an appeal of the approval of an application for a special recreation permit and delay in forwarding a case file could effectively prevent the Board from providing adequate review, including the option of staying approval should the appellant petition for it and circumstances warrant. In addition, given the annual nature of the event, we believe review of the appeal is justified in this case. See Sierra Club, 57 IBLA 79, 80 (1981).

[2] Special recreation permits are issued under the general authority of the Secretary of the Interior to regulate the use of public lands, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1994). Special recreation permit requirements are set forth in 43 C.F.R. Subpart 8372. The applicable regulation, 43 C.F.R. § 8372.3, regarding issuance of special recreation permits, provides: "The approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer." BLM may issue a special recreation permit if the proposed use is consistent with BLM's objectives, responsibilities, or programs for management of the public lands involved. Mendicino County Tax-Payers Land Use Committee, 86 IBLA 319, 320 (1985). However, any exercise of discretionary authority must have a rational basis supported by facts of record. Red Rock Hounds, Inc., 123 IBLA 314, 318 (1992); Four Corners Expeditions, 104 IBLA 122, 125-26 (1988).

[3] In this case, in order to evaluate the application for a permit, BLM compiled an EA. In preparing an EA, which assesses whether an environmental impact statement (EIS) is required under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321(2)(C)(1994), an agency is required to take a "hard look" at the proposed action, identifying relevant areas of environmental concern, and make a convincing case that the environmental impact is insignificant. Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Owen Severance, 118 IBLA 381, 385 (1991).

We have stated that we will affirm a determination that approval of a proposed action will not have a significant impact on the quality of the human environment if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. Southern Utah Wilderness Alliance, 140 IBLA 341, 348 (1997); The Ecology Center, Inc., 140 IBLA 269, 271 (1997); Blue Mountains Biodiversity Project, 139 IBLA 258, 265-66 (1997). A party challenging the determination must show that it is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Southern Utah Wilderness Alliance, supra, at 348; The Ecology Center, supra, at 271; Hoosier Environmental Council, 109 IBLA 160, 173 (1989). The ultimate burden of proof is on the challenging party. G. Jon and Katherine M. Roush, 112 IBLA 293, 298 (1990); In Re Blackeye Timber Sale, 98 IBLA 108, 110 (1987). Mere differences of opinion provide no basis for reversal.

Appellants assert that they were informed by BLM that it has "no discretion in turning down Special Recreation Permits." (NA/SOR at 4.) In response, BLM denies that allegation, stating that it has discretion to deny applications for special recreation permits, but that it may not be arbitrary and capricious in doing so. It is BLM's position that there is no basis for denying applications in most cases for activities on the Black Rock Desert playa provided adequate stipulations are developed to mitigate the potential for adverse impacts and those stipulations are enforced. Appellants assert that they "believe the burden of proof is on the applicant for a Special Recreation Permit in a sensitive area such as the Black Rock Desert." (NA/SOR at 1.) Clearly, this is not the case. BLM is responsible for reviewing an application for a special recreation permit and granting or denying that permit on the basis of the record it develops. That record must support the action taken. The person challenging BLM's action has the burden of proof to establish that BLM action in approving the application was improper.

Appellants' principal concerns relate to the adverse impact on historic, archaeologic, biologic, and other recreational resources from the large numbers of people attracted to the event in the Black Rock Desert. BLM counters that there is no evidence that significant, permanent adverse impacts have occurred as a result of this event in the past. It contends

that potential adverse effects were addressed in the EA and that specific stipulations were added to the permit to counter such effects. Nevertheless, BLM recognizes that its management framework plan (MFP), completed in 1982, does not adequately address increased use of the public lands in the Black Rock Desert from large commercial recreation events. It states that in 1982 the area was not experiencing such a degree of use. In BLM's opinion, an amendment of the MFP is the best way to address those concerns. It represents that "the district is planning to initiate this effort during the spring of 1997." (Response at 2.)

In response to a number of complaints from Appellants regarding "procedural" deficiencies, BLM admitted that when it sent a copy of the FONSI/ROD and the permit to the affected interests it failed to include the address for submitting an appeal; failed to include a copy of the map outlining the boundaries of the event; and failed to provide a copy of the standard permit stipulations. In addition, although in late May 1996 Appellants requested copies of the Burning Man application, evaluation reports of the completed event for 1994 and 1995, and procedures for filing appeals, BLM did not respond until August 1996, when it forwarded a copy of the FONSI/ROD and the permit. As noted above, that package was deficient in a number of respects. While BLM's failure to provide complete and timely information to Appellants is disturbing, we cannot find that it establishes that BLM acted improperly in approving the application for a permit.

Appellants present a list of alleged inadequacies in the EA. They contend that the EA fails to address the environmental impacts of actual activities taking place such as drive-by shootings and art shows using mud from Trego Hot Springs. BLM admits that a shooting incident did take place at a prior Burning Man Event involving people in a moving vehicle shooting at stationary targets. It asserts that the applicant was notified that such activities were not condoned and could not take place in 1996 and that any person participating in such an activity would be arrested and prosecuted. Regarding the use of mud from Trego Hot Springs, the record shows that on August 14, 1996, BLM informed the applicant by letter that such a practice was not authorized and that there could be no disturbance of any spring on public lands "due to potential damage to cultural and natural resources."

Appellants assert that the EA failed to address impacts to the Lassen-Applegate Trail. The EA states that use of campsites along the trail might be anticipated from the event, although "these sites already receive fairly heavy use by the public, particularly on holiday weekends." (EA at 5.) Further, the EA states that "[d]ue to the ruggedness of the Applegate-Lassen Trail, little use of the trail itself is anticipated." Id. Moreover, special stipulation No. 15 requires that the event be a minimum of 6 miles from the trail.

Health, safety, and sanitary issues were not adequately dealt with in the EA, Appellants contend. In response, BLM points to special stipulation No. 1 requiring the permittee to assume responsibility for public

safety and health and to provide first aid facilities, as well as at least 80 portable toilets. BLM states that the permittee was required to keep the event area clean (special stipulation No. 6), and that the posting of a bond was intended to ensure that the area was left clean (special stipulation No. 11).

Appellants complain that the EA ignored search and rescue operations; however, BLM points out it was not addressed because the local counties are responsible for search and rescue. Appellants also assert that the EA fails to make an accurate statement regarding fossils, charging that there is a high potential for large mammal fossils at the Black Rock Point location in the Black Rock Desert. In the EA, BLM stated that "[t]here are no known fossil remains in this portion of the Black Rock Desert. Large fossil remains have been found in the east arm of the desert, approximately 30 miles away." (EA at 3.) In its response, BLM explains:

> No older sedimentary rock outcrops occur within or adjacent to the Burning Man Event site. Therefore, no adverse impacts to older fossils were anticipated to occur. Invertebrate fossils have been reported at Black Rock, but there is no documentation of the presence of fossils at Black Rock Point as described by appellants. The Permian invertebrate fossils at Black Rock were not considered to have the potential to be affected by the Burning Man Event, since the outcrops are over six miles away. Also, common invertebrate fossils can legally be collected in reasonable quantities for personal use from public land, including from this area.

(Response at 4.)

Appellants contend that the EA fails to "state accurately the number of people in attendance at previous Burning Man events or predict what number will attend this year." (NA/SOR at 6.) The EA stated at 4:

> While it is true that the exact number of participants that may attend is not known, it is known that there were approximately 4000 people present in 1995. The extremely large playa was capable of handling that number with no impacts. The 1996 projection would be for 5500 people. The extensive acreage of the playa would be able to handle this increase in numbers with no difficulty.

We note that the application itself listed the 1996 anticipated attendance at 6,000. It is unclear why BLM used the figure 5,500 in the EA. Nevertheless, we do not find that the discrepancy in numbers is sufficient to warrant overturning the EA.

Appellants complain that the EA does not "address the aftermath of the Burning Man." (NA/SOR at 6.) They claim that many of the participants will return to the Black Rock Desert after the event "to explore" and that

they might engage in "illegal" activities, such a building bathtubs at the hot springs and collecting artifacts. Such an analysis is clearly beyond the scope of the EA. The fact that participants may return to the desert after the event is not a relevant factor to determining the impacts of the event. As BLM notes, "casual recreational use is encouraged." (Response at 6.) Appellants' assertion that such visitors might engage in illegal activities is purely speculation.

The EA fails to "specify camping and activity use sites around the playa including Gerlach" (NA/SOR at 6), Appellants contend. BLM responds that casual use camping is an accepted use and that there have not been any significant, adverse impacts to the area surrounding the Black Rock Desert as a result of past Burning Man Events, "and none are anticipated from the proposed event." (Response at 6.)

Appellants contend that the EA does not consider cumulative impacts from all the commercial events in the Black Rock Desert. They believe that all the activities are causing degradation of historic resources. BLM acknowledged in the EA that cumulative impacts were a concern (EA at 6-7), but that, at the time of the preparation of the EA, it did not believe that there would be any significant, adverse impacts from the events. It acknowledged, as noted above, the necessity for long-range planning for the Black Rock Desert.

Air quality and safety issues from the large number of vehicles expected at the event were ignored in the EA, according to Appellants. BLM responds that adverse impacts to air quality from vehicles were not considered to be significant over the course of the entire event. It admits that dust can present a significant visibility problem during periods of high wind, but that "this is an act of nature and is beyond our control to manage." (Response at 6.)

Appellants' complaint that the EA did not reflect consultation with Native American groups is answered by BLM's explanation that such groups were served with scoping letters to which there were no responses. In addition, BLM states that "a review of available ethnographic data did not reveal any areas of potential Native American concern in the proposed project area." (Response at 7.)

Appellants also find fault because the EA does not "deal with visitors who come to the Black Rock who don't want to attend or pay the fee for the event." (NA/SOR at 7.) BLM states that the event covers less than 10 percent of over 100 square miles of playa, providing casual users with adequate area to recreate. BLM points out that there is no fee to enter the playa, just to attend the event, and the applicant was responsible for collecting fees.

Finally, Appellants charge that BLM should have considered an alternative other than the no action alternative, such as an alternative limiting attendance to a smaller number such as 500. BLM explains that its analysis

failed to identify significant, adverse impacts from the projected number of people for the event. Therefore, it found no necessity to consider a limitation on the number of participants.

Having reviewed Appellants' alleged inadequacies in the EA, we find that none provides any basis for concluding that BLM violated NEPA in conducting its analysis. Rather, the record shows that BLM took a hard look at the environmental consequences of the event.

Appellants also set forth a number of reasons why they believe the permit is inadequate. BLM responded to each of those pointing to various special stipulations which address the concerns of Appellants. Although those stipulations clearly do not satisfy Appellants, we find no basis for finding BLM's mitigation measures to be inadequate.

We conclude that BLM's decision to approve the application and issue the permit is supported by the record. Appellants have provided no basis for overturning BLM's action.

Appellants also request that the Board stay all future recreation event applications until (1) completion of a recreation management plan or a land use amendment addressing the cumulative impacts of recreation events on resources in the Black Rock Desert, (2) "BLM can guarantee sufficient law enforcement staffing for such events," and (3) "BLM can disclose what fees are collected and whether that money can be used to pay for additional law enforcement and planning." (NA/SOR at 9.) Appellants further request that the Board stay all "currently permitted recreational events during which attendance surpasses 250 people" until completion of an EIS or further planning. Finally, they ask the Board to require an EIS dealing with the cumulative impacts of all current permit holders.

These requests by Appellants are beyond the jurisdiction of this Board. This Board has appellate jurisdiction to review decisions of BLM. See 43 C.F.R. § 4.1((b)(3). It does not have supervisory authority over BLM employees. See State of Alaska, 85 IBLA 170, 172 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the FONSI/ROD is affirmed.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge