



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



ACADIA MOUNTAIN GUIDES, INC., *ET AL.*

173 IBLA 1

Decided October 18, 2007



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IBLA 2006-167, *et al.*

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Appeals from a decision of the Las Vegas Field Office, Bureau of Land Management, awarding a special recreation permit for commercial rock climbing services. NV Permit No. 2931.

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. The Board will affirm a decision to award a special recreation permit to an applicant when the record shows a rational basis for selecting the applicant, and other unsuccessful applicants, who appeal that decision, fail to show, by a preponderance of the evidence, any error in that decision.

APPEARANCES: Jon Tierney, Orono, Maine, for Acadia Mountain Guides, Inc.; Edward F. Boddy d.b.a. Red Rock Climbing School and Guide Service, Las Vegas, Nevada, *pro se*; Andrew Fulton, Las Vegas, Nevada, *pro se*; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Acadia Mountain Guides, Inc. (Acadia or AMG), Edward Boddy d.b.a. Red Rock Climbing School and Guide Service (Boddy), and Andrew Fulton have separately appealed from a March 6, 2006, decision of the Las Vegas Field Office, Bureau of Land Management (BLM), awarding Special Recreation Permit (SRP)

No. 2932 for commercial rock climbing services to Red Rock Climbing Center (RRCC).¹ For the reasons that follow, we affirm BLM's decision.

I. BACKGROUND

Red Rock Canyon is located in the Mojave Desert and was designated as a National Conservation Area in 1990. Red Rock Canyon National Conservation Area (RRCNCA) falls within BLM's Las Vegas Field Office management area. Under the RRCNCA Resource Management Plan (RMP), there is a limit of only five full-time rock climbing guided Special Recreation Permits (SRPs) authorized to offer guided climbing services in the RRCNCA. In May 2005, BLM canceled one of the five SRPs for commercial rock climbing due to noncompliance issues. BLM maintained a mailing list of individuals and organizations who had expressed an interest in obtaining an SRP to offer guided rock climbing services in the RRCNCA on a full-time basis. As a result of the cancellation, BLM notified those individuals that it would be issuing a commercial rock climbing SRP. *See Prospectus: An Opportunity for Rock Climbing Guiding in Red Rock Canyon National Conservation Area* dated Nov. 30, 2005 (Prospectus), at 3. In its Letter to Prospectus Applicants (Prospectus Letter) dated November 30, 2005, applicants were informed as follows: "The completed application package must be received at the BLM Las Vegas Field Office by January 27, 2006. *Incomplete application packages will not be considered. Any application packages not received at the BLM by the Close of Business January 27, 2006, will not be considered.*" (Emphasis in original).

The Prospectus identified the information required for a complete application, including (1) a special recreation form prepared in duplicate, (2) a Rock Climbing Guide Operating Plan with detailed information, (3) a business plan, (4) evidence of any current climbing/guiding certification, and (4) detailed topographic maps showing travel routes, proposed camp locations, parking areas, interpretive stops, and any private or other lands needed in the proposal (along with written permission from the landowner to use such lands). *See Prospectus* at 7-8. The Prospectus identified three selection criteria and stated the value percentage that would be accorded each criterion in evaluating completed applications. The type and quality of customer service was weighted 45%, experience was weighted 30%, and the business

¹ The Board docketed Acadia's appeal as IBLA 2006-167, Boddy's appeal as IBLA 2006-174, and Fulton's appeal as IBLA 2006-175. By order dated June 27, 2006, the Board granted BLM's motion to consolidate these three appeals, denied BLM's motion to dismiss Boddy's appeal for filing an untimely statement of reasons (SOR), denied Fulton's request for stay, and took under advisement Boddy's request for a hearing. Given our present disposition of these appeals, we hereby deny Boddy's request for a hearing as moot.

plan was weighted 25%. The methodology employed by BLM in awarding the SRP to RRCC, as described in the Prospectus, is set forth below:

Our objective is to select the proponent whose proposal best meets the public need. The proponent selected will be the best qualified to operate and maintain these public services based on, but not limited to, the written materials submitted in the proposal package.

A fair and impartial review panel with experience in SRP, business operations, and land issues will evaluate each proposal independently and collectively. The panel will review, evaluate and compare proposals using a weighted selection criteria and professional judgment and will not use a strictly mathematical scoring system.

After all proposals have been rated, the panel will recommend, to the Authorizing Officer, the top three proposals. The Authorizing Officer has final selection authority to accept one of the three proposals to be awarded the open SRP.

Prospectus at 8.

BLM received a total of 12 prospectus packages by close of business January 27, 2006, three of which were submitted by appellants Acadia, Boddy, and Fulton. Two prospectus packages were complete duplicates and were considered as one, leaving 11 packages for consideration. Out of the 11 packages, only eight were complete submittals. Fulton's prospectus package was not complete and, therefore, was not considered further by BLM. The packages submitted by Acadia and Boddy (on behalf of Red Rock Climbing School) were complete and were included among the 8 packages referred to the panel for evaluation and ranking.

The 5-person panel was composed of two Outdoor Recreation Planners (one from BLM and one from the U.S. Forest Service), an intern working directly with rock climbing management issues in the RRCNCA, an individual with a business background, and a BLM lands staff-person not affiliated with the RRCNCA. After reviewing and ranking the eight complete submittals, the panel selected RRCC, Acadia, and Red Rock Mountain Guide as the top three proposals. Thus, Boddy's application on behalf of the Red Rock Climbing School was not forwarded as one of the top three proposals. On March 3, 2006, the RRCNCA Manager selected RRCC as the new permittee for the rock climbing guided SRP. On March 7, 2006, all applicants who submitted a prospectus were notified of BLM's decision, and Acadia, Boddy, and Fulton timely appealed BLM's decision.

II. ARGUMENTS OF THE APPELLANTS

Acadia, Boddy, and Fulton all state that RRCC has limited experience in outdoor climbing and is unqualified to provide rock climbing services in the RRCNCA under the criteria set forth in the Prospectus. Each of the appellants claim to be more qualified than RRCC to receive the SRP. We summarize their arguments below.

In its SOR, Acadia contends generally that the selection of RRCC “will result in a greater than necessary risk of public injury and a lower quality of visitor experience” because it is “an organization with no demonstrated outdoor climbing history.” Acadia’s SOR at 1. Acadia states that “RRCC has limited experience in this area whereas AMG has a long-standing history . . . in understanding and supporting the mission of agencies such as the BLM and the National Park Service as well as local advocacy groups.” *Id.* Acadia lists its activities related to trail maintenance projects, “clean ups,” and outdoor recreation management, while “there is no public evidence that the RRCC has sponsored any natural resource initiatives in RRCNCA despite operating in Las Vegas for several years.” *Id.* at 2.

Acadia asserts that several members of its staff have been certified by the American Mountain Guides Association (AMGA), which, according to Acadia, is the only entity in the United States that “train[s] and evaluat[es] individual ability to guide in terrain such as Red Rock Canyon,” and is “recognized internationally by the International Federation of Mountain Guides (IFMGA).” *Id.* at 3. Acadia provides a breakdown of AMGA’s rock climbing guide training and certification program. Acadia asserts that six of the applicants for the SRP have trained and certified guides on staff, whereas “RRCC has none.” *Id.* Acadia states that “**RRCC is not an accredited outdoor climbing program** whereas several applicants have been accredited for several years.” *Id.* (emphasis Acadia’s). Acadia complains that there is “no indication of who the RRCC staff will be and what their medical and rescue training is,” whereas Acadia “is directed by a paramedic whose specialty is wilderness medical care and who instructs for Wilderness Medical Associates.” *Id.* at 4. Further, Acadia states that “[t]here is no evidence that RRCC has operated a climbing program or held such a permit on Federal land whereas AMG, Inc. works under a special recreation permit with Acadia National Park (since 1993) and has held permits with Joshua Tree National Park, and White Mountain National Forest.” *Id.* at 5. And finally, Acadia states that “there is no evidence to suggest that RRCC has demonstrated the ability to operate and maintain a guided rock climbing business.” *Id.*

Boddy, the managing and majority member of Red Rock Climbing School, incorporates by reference the arguments made by Acadia regarding RRCC’s lack of qualifications to receive the disputed SRP. In addition, he asserts that he is a certified

AMGA Rock Climbing Guide. He asserts that RRCC did not meet, “in any form or fashion,” the criteria set forth in the Prospectus; that RRCC’s application reflects limited experience in the areas of education and safety; and that RRCC does not show how its operation will protect the resources of the RRCNCA. Boddy states, as did Acadia, that “RRCC does not have any AMGA certified rock climbing guides nor does it appear that any of their guides have even received specific training in this regard.” Boddy’s SOR at 2. In Boddy’s view, such lack of training “alone should have prevented RRCC from receiving this permit.” *Id.* Further, Boddy states that “RRCC is also lacking considerably in experience in rock climbing and related fields” and that “RRCC’s business plan does not demonstrate in any form or fashion that it is capable of running an outdoor guiding service simply because it has operated a rock climbing gym.” *Id.* at 3. Boddy concludes that “RRCC failed to meet any of the elements of the three criteria published by BLM for applicants of this permit.” *Id.*

Similarly, Fulton questions RRCC’s qualifications to receive the SRP, stating that BLM’s decision is “shocking,” given RRCC’s failure to “have a single individual listed on their application that has any guiding background what so ever.” Fulton’s SOR at 4. Fulton states that RRCC “has never had any experience in the highly skilled profession of teaching and guiding rock climbing and related activities **OUTDOORS,**” and that “[t]his is a paramount safety issue.” *Id.* at 5 (emphasis in this and following quotes from Fulton’s SOR provided by Fulton). He states that, by contrast, he is “the most experienced Las Vegas applicant [with] an outstanding business plan, solid financial backing, having over a decade of guiding experience in Red Rock Canyon and abroad, as well as establishing the first office for Jackson Hole Mountain Guides here in Las Vegas, as well as doing their marketing.” *Id.* at 6. He questions why he did “not even make it into the ‘**final three**’ round.” *Id.* Unlike the other applicants, including Acadia, Fulton states that he “has lived and worked in Las Vegas/Mojave Desert for going on fifteen years, he is a desert climber and a desert guide, as well as a Las Vegas local that understands the communities’ needs.” *Id.* He concludes that “[a] **fair and impartial review was not conducted!**” *Id.* at 9. Had it been, he claims that he “would have been awarded the permit, as [he] is the most qualified and experienced local candidate, [he] submitted an incredible business plan that clearly demonstrates his understanding of Las Vegas and how to run a successful modern day guide service benefitting the public needs for guiding and instructing the skills of rock climbing in Red Rock Canyon.” *Id.*

III. BLM’S ANSWER

In its Answer, BLM states that “[w]hile Appellants are correct in noting that RRCC does not currently have any AMGA certified guides on staff, neither the Prospectus nor the RRCNCA Resource Management Plan require that any guides operating be certified by the AMGA or other accreditation program”; that “BLM also

did not require that SRP applicants have guides employed at the time the SRP was awarded”; that “RRCC can hire guides at any time”; that RRCC’s “application indicates that if RRCC received the SRP permit, they would hire a guide manager to manage any guides they hired”; and that “BLM does not require any guide to be certified with any organization as a condition of the SRP and does not endorse any specific certification program.” Answer at 13. Further, BLM states that “Acadia has not demonstrated that just because RRCC does not currently have a top rope site certified manager, that it will be unable to hire guides with the requisite experience or that local guides will be unable to obtain training that they may need to provide adequate guide services.” *Id.* at 13-14.

BLM provides the following explanation for having selected RRCC despite the deficiencies pointed out by appellants:

Similarly, although RRCC is not well established in the arena of outdoor rock climbing guide services, as was the case for certain other applicants such as Acadia, its application demonstrated that it could provide the type and quality of service described in the Prospectus. If only well-established outdoor rock climbing organizations were eligible to receive a SRP to operate on public lands, then this would effectively block all new organizations, that have not yet had an opportunity to become established, from entering the field. While RRCC may not have a track record with respect to land stewardship, as with applicants that currently hold SRPs on public lands, the SRP is a one-year conditional SRP. Thus, if RRCC does not demonstrate the level of land stewardship required, and the type and quality of customer service it is expected to deliver, then its SRP will not be renewed. However, based on its application, the BLM panel rated RRCC as capable of delivering the type and quality of customer service set out in the Prospectus.

Id. at 14.

Moreover, BLM states that “[t]he panel of five rated several other applicants higher than RRCC with respect to level of experience, which was broken down into (1) experience in the industry; and (2) certification.” *Id.*

BLM states, however, that “RRCC was rated among the top three applicants with respect to its business plan,” based upon “(1) description of the business experience; (2) business plan & financial resources; (3) other; and (4) revenue.” *Id.* at 15. BLM states that “Appellants do not explain why RRCC’s demonstrated ability to run a successful indoor climbing business is inapplicable to running an outdoor climbing school,” and that they have not “demonstrated that the business skills

required to run a successful outdoor climbing business are different from those required to run a successful climbing gym.” *Id.*

BLM concludes that “once all of the scores for each of the three areas was weighted and tallied, RRCC was in the top three applications forwarded to the Authorized Officer,” and that “Appellants have not demonstrated that the panel’s rankings of RRCC in the three selection areas was arbitrary or erroneous, or that the panel’s ultimate ranking of the top three applications overall was erroneous.” *Id.*

Further, BLM acknowledges that “Acadia has a proven track record for type and quality of customer service, as well as a higher level of experience in outdoor rock climbing guide services than RRCC,” and, thus, “Acadia was one of the top three applications forwarded to the Authorized Officer, and indeed, received the highest overall rating under the numerical rating system used by the five-person panel to identify the top three applications.” *Id.* at 16. However, BLM emphasizes that the Prospectus made clear that “the final decision would be made by the Authorized Officer.” *Id.*

In further response to Acadia’s claim that it was more qualified than RRCC to receive the SRP, BLM quotes the explanation given by the RRCNCA Manager for the selection of RRCC, as follows:

Red Rock Climbing Center is a local company with an existing indoor climbing facility and climbing program. Their finances are solid and diversified. They focus on education of their customers and group climbing. They have 3 climbers on staff and use their contacts with casinos to develop a customer base and service contracts. The company is solid and well organized operationally. They will also participate in additional programs should the BLM want them to. . . . I selected this company as I feel they are financially capable of conducting and meeting the demand for climbing guide services almost immediately upon issuance of the permit.

RRCNCA Manager’s Memo to File dated Mar. 3, 2006. The Manager’s specific reasons for not selecting Acadia for the SRP are as follows:

They [Acadia] do not have a local officer here in Las Vegas and would only establish one if the permit was renewed. Their plan for the first year is to place 1-2 guides here locally and then hire locals to operate the new permit. . . . This company offers a highly educated and experienced Principle [sic] who would not locate an office here to run the permit until, and unless, the permit was renewed. I do not feel this

company would fulfill the public need especially the first year of use. The local staff would be too small and intermittent and engrossed in establishing themselves in the Las Vegas climbing market to provide the desired climbing services to the public.

Id.

BLM concludes that while Acadia may disagree, the Authorized Officer articulated a rational basis for deciding to award the SRP to RRCC rather than to one of the other top three applicants. As an exercise of administrative discretion, states BLM, that decision may be regarded as arbitrary and capricious only if it is not supportable on any rational basis. Answer at 17, *citing United States v. Maher*, 5 IBLA 209, 218 (1972). BLM concludes that appellants have not shown, by a preponderance of the evidence, that BLM lacked a rational basis either in ranking the applicants to identify the top three or in making its final selection from among that top three. Answer at 17.

V. ANALYSIS

[1] Statutory authority for issuance of SRPs by BLM has historically derived from the Land and Water Conservation Fund Act (LWCFA), *as amended*, 16 U.S.C. § 460l-6a (2000).² The relevant implementing regulations are codified at 43 C.F.R. Subpart 2932. The issuance of SRPs is discretionary with BLM officials. 43 C.F.R. § 2932.26; *Pronto Pics, Inc.*, 165 IBLA 90, 92 (2005); *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.” *Pronto Pics, Inc.*, 165 IBLA at 92; *Randall G. Nelson*, 164 IBLA at 188, *quoting Larry Amos d/b/a Winterhawk Outfitters, Inc.*, 163 IBLA 181, 188 (2004); *Rio Grande Rapid Transit*, 161 IBLA 225, 232 (2004); *Judy K. Stewart d/b/a Western Wilderness Outdoor Adventure*, 153 IBLA 245, 251

² In December 2004, Congress enacted the Federal Lands Recreation Enhancement Act of 2004 (FLREA), 16 U.S.C. §§ 6801-13 (2005 Supp.), which repealed the LWCFA, subject to a grandfather provision for existing permits. *Id.* at § 6804(f)(2). The current Departmental rules, codified at 43 C.F.R. Subpart 2932, superseded 43 C.F.R. Subpart 8372. *See* 67 Fed. Reg. 61745 (Oct. 1, 2002). Thus, the rules at 43 C.F.R. Subpart 2932 predate enactment of the FLREA. The Department issued proposed rules in 2005 to modify the regulations to comport with the FLREA in ways not relevant here, 70 Fed. Reg. 70570 (Nov. 22, 2005), finalizing the changes in 2007. 72 Fed. Reg. 7832, 7836 (Feb. 21, 2007) (changes to 43 C.F.R. § 2932.57).

(2000), *citing Terry Kayser*, 136 IBLA 148, 150 (1996); *Four Corners Expeditions*, 104 IBLA 122, 125-26 (1988).

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; *see also Pronto Pics, Inc.*, 165 IBLA at 92. To this effect, we quoted our decision in *Rosita Trujillo*, 21 IBLA 289 (1975):

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.

21 IBLA at 291; *Judy K. Stewart*, 153 IBLA at 251. If a BLM decision approving an SRP “has any rational basis, it will not be held arbitrary and capricious.” *Id.*

The burden is on an objecting party to show that BLM’s decision is improper. As stated in *Larry Amos*, 163 IBLA at 188, “[i]n order to prevail on a claim that BLM committed an error of fact, an appellant appearing before the Department bears the burden of proof to show, by a preponderance of the evidence, that a challenged decision is in error.” *See also Iriart v. BLM*, 126 IBLA 111 (1993). For the following reasons, we conclude that appellants have failed to meet this burden.

A. Fulton Submitted an Incomplete Prospectus Package

BLM determined that Fulton’s prospectus package was incomplete and, therefore, did not consider his application. Other than making a conclusory statement that BLM erred in making this determination, Fulton fails to demonstrate error. In its Answer, BLM states that “Fulton’s qualifications are immaterial where he failed to submit a completed prospectus package for consideration by the BLM.” Answer at 9.

B. Boddy's Application Was Not Among the Top Three

Boddy's principal argument is that he, on behalf of Red Rock Climbing School, was more qualified to receive the SRP than RRCC. Our review of the record confirms BLM's response that rather than challenge the specific elements of BLM's process of ranking the applications, Boddy argues that RRCC did not meet BLM's selection criteria. BLM states that a panel of five members ranked numerically each of the 11 complete prospectus packages in the three areas of (1) type and quality of customer service, (2) experience, and (3) business plan based on specific elements pertaining to each area. The individual scores were averaged across the 5 panel members, then weighted consistent with the prospectus, *i.e.*, 45% for type and quality of customer service, 30% for experience, and 25% for business plan, and then tallied for a final score for each of the 11 complete packages. The top three packages were then forwarded to the Authorized Officer for selection of the recipient of the SRP. The top three applicants, based on the panel's rankings, were RRCC, Acadia, and Red Rock Mountain Guide. Red Rock Climbing School was not among the top three, nor, states BLM, was it ranked among the top four candidates.

We agree with BLM's response to Boddy's claim that he was the most qualified to receive the SRP, as set forth below:

Appellant has not demonstrated that the ranking method used by the BLM to identify the top three prospectus packages to be forwarded to the Authorized Officer was arbitrary and capricious. BLM had a rational basis on which it selected a group of five individuals with different background to rank each prospectus application, a rational basis for ranking each application across the three key criteria, and a rational basis on which those rankings were then weighted and tallied. Appellant was not ranked among the top three applications from which a selection was made. Appellant's claim that he was entitled to be awarded the SRP permit is not supported by the record or by the rankings assigned to each of the applications by the panel of five.

Answer at 11; *see Judy K. Stewart*, 153 IBLA at 21.

C. RRCC Met BLM's Selection Criteria

Appellants allege that RRCC does not meet any of the three key criteria established by BLM for receiving the SRP. In rating the prospectus applications on the element of type and quality of customer service, the panel-of-five considered several factors, including, *inter alia*, the operating plan proposal; special services offered by applicant; plan of the applicant to become part of the Las Vegas

community; and ability of the applicant to protect and interpret the resources of Red Rock Canyon. Based upon these elements, the panel-of-five ranked RRCC among the top three applicants for type and quality of customer service. The Area Manager's decision to select RRCC, as an exercise of discretion, while disappointing to the other applicants, reflects a reasoned evaluation of the relative merits of the three finalists.

VI. CONCLUSION

We recognize, as did the panel-of-five and the Area Manager in making the final selection, that all the applicants have strengths and weaknesses. Again, however, the burden is on an objecting party to show, by a preponderance of the evidence, that BLM's decision is improper. *E.g.*, *Larry Amos*, 163 IBLA at 188; *Iriart v. BLM*, 126 IBLA 111 (1993). The appellants have failed to carry this burden.

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/
James F. Roberts
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge