DIRT, INC., ET AL.

IBLA 2000-182 Decided June 24, 2004

Appeal from decision of the Lower Snake River (Idaho) District Office, Bureau of Land Management, rejecting an application for a special recreation permit to conduct a competitive motorcycle race.

Affirmed in part; vacated in part.

1. Special Use Permits

Pursuant to 43 CFR 8372.3 (1999), approval of an application and subsequent issuance of a special recreation permit for a competitive motorcycle race is discretionary with BLM. BLM may properly consider a history of lack of compliance in other permits previously issued to the applicant for competitive motorcycle races. An applicant's previous failures to comply with permit conditions designed to protect Federally-owned lands provides a good and sufficient basis for BLM to deny a subsequent application for a similar use. Thus, BLM properly refuses to issue a permit for a competitive motorcycle race to a party with a documented history of permit violations that have damaged Federally-owned lands.

2. Special Use Permits

A distinction is properly drawn between an application for a new special recreation permit (SRP) and other cases involving cancellation of or failure to renew SRPs issued for a number of years. Where an applicant applies for a

> an SRP for a single event and BLM rejects that application, BLM lacks authority to announce in the decision rejecting that application that future applications for similar events will be denied for the upcoming 3 years.

APPEARANCES: Susan E. Buxton, Esq., for appellants; Kenneth Sebby, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management; Laird J. Lucas, Esq., for amici curiae.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Dirt, Inc., et al., have appealed the February 20, 2000, decision of the Lower Snake River (Idaho) District Office, Bureau of Land Management (BLM), denying the application of Dirt, Inc., for a special recreation permit (SRP) to conduct a competitive motorcycle race and declaring as a supplemental matter that future applications for SRPs by either Dirt, Inc., or its president Bill Walsh would be rejected for a period of 3 years from the date of the decision.

Walsh filed the application between January 11 and 20, 2000, seeking an SRP for Dirt, Inc., to conduct a competitive cross-country motorcycle race on Federally-owned lands in the Owyhee Resource Area, pursuant to 43 CFR Subpart 8372 (1999). [1/] The proposed race would have involved approximately 130 participants and 300 spectators from March 31 through April 2, 2000. By letter to Walsh dated February 10, 2000, BLM rejected the application because it was not submitted in a timely manner under 43 CFR 8372.2 (1999), in that it was not filed at least 90 days prior to the proposed event. BLM also rejected the application on account of "prior violations of permit stipulations and conditions that occurred during Dirt, Inc., authorized events that were conducted in the Owyhee Resource Area on" March 22, 1998, September 26, 1998, and May 23, 1999, citing the following examples:

1. Mass start extension beyond authorized area (March 22, 1998 race).
2. Development of a new, unauthorized trail (March 22, 1998 race).
3. Failure to post a no passing zone for sensitive plants (September 26, 1998 race).
4. Rerouting the race course onto an unauthorized trail containing known special status species (September 26, 1998 race).

[1/] Effective Oct. 31, 2002, the regulations governing permits for recreation were superseded by new regulations published at 43 CFR Part 2930. 67 FR 61732 (Oct. 1, 2002). This dispute is governed by the regulations in effect in January 2000, published at 43 CFR Part 8370 (1999).

5. Allowing a mass start that was unauthorized on any public land to traverse over ½ mile of public land (May 23, 1999).

(BLM Decision Letter at 1.) BLM noted that those violations and other violations of permit stipulations had been more specifically described in letters sent to Walsh after the races in question; that "[t]here has been a repeated pattern of violation of permit stipulations during Dirt, Inc., sponsored events"; and that, "[d]espite our letters and meeting with you or your representatives to discuss permit problems and potential solutions to these problems, there has been no improvement in club management of events." BLM added that, "[b]ecause of the above violations," it would "also reject any further applications from [Walsh] as a race official, or from Dirt, Inc., as a sponsoring club for a period of three years from the date of this decision." Id.

Dirt, Inc., Walsh, and others filed a notice of appeal and petition for stay (NA/PS) of BLM's decision on March 16, 2000, [2/] as well as a Statement of Reasons (SOR) [3/] on April 17, 2000. Appellants generally challenge the factual predicate of BLM's decision concerning serious permit violations, denying that race events sponsored by Dirt, Inc., caused damage to the public lands. They also criticize BLM's use of alleged violations occurring in March 1998 and May 1999 as a basis for its decision to reject the permit application in 2000, claiming that delayed enforcement

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[2/] As BLM has not provided information indicating when Dirt, Inc., or Walsh received notice of its decision, we presume that the appeal was timely filed.

In addition to Dirt, Inc., and Walsh, the following parties are listed as appellants on the notice of appeal: Southwest Idaho Racing Association, American Motorcycle Association, Owyhee County Board of Commissioners, Owyhee Cattlemen's Association, Blue Ribbon Coalition, Carl's Cycle Service, Ady Kawasaki & Honda, Motorcycle Accessories, Moto Sports, Yamaha Sports Center, Grand View Ambulance Service, Murphy General Store, Fred Kelly Grant, Gerry Hoaglund, Gene Brown Family, Brian Brown, and Daren Lady. As the appeal was perfected by Walsh and Dirt, Inc., both parties to the case that are adversely affected by BLM's decision, it is unnecessary to review whether each of these putative appellants can also properly bring the appeal under 43 CFR 4.410(a).

On May 5, 2000, the Committee for Idaho's High Desert, The Wilderness Society, and the American Lands Alliance filed a joint motion to intervene as respondents, in support of BLM's decision. However, as these parties failed to demonstrate how they would be adversely affected if BLM's decision were to be upset on appeal (see, e.g., Las Vegas Valley Action Committee, 156 IBLA 110, 112 (2001)), their petition to intervene is denied. However, we hereby grant them status as amici curiae.

[3/] The document is styled "Statement of Reasons and Reply to Request for Stay." It is actually an SOR and reply to BLM's response to appellant's request for stay.

action is arbitrary and capricious. (SOR at 16.) Appellants challenge the decision based on BLM's failure to provide notice in advance that permit violations would result in sanctions. They point out that "racing stipulations" applicable to all racing permits in 1998 and 1999 made no reference to any sanctions to be invoked upon noncompliance with either general or event-specific stipulations. They maintain that BLM may not invoke sanctions because no advance notice was provided. (SOR at 7-8.)

BLM responds that serious violations of permit stipulations were observed by its staff during prior events conducted by Dirt, Inc., and that those violations all led to adverse effects on natural resources. (BLM Response to Petition for Stay at 3-4.) It points out that it is within its discretion to reject applications and, in evaluating them, it must consider the proposed impacts of the proposed use. Thus, BLM indicates that evidence of adverse effects from previous events justified its decision to reject appellant's application for an SRP for a similar event. We agree.

[1] Pursuant to 43 CFR 8372.3 (1999), approval of an application and subsequent issuance of an SRP is discretionary with BLM. William D. Danielson, 153 IBLA 72, 74 (2000). A rejection of an application for an SRP will be affirmed where the decision to do so is supported by facts of record and there are no compelling reasons for modifying or reversing it. Judy K. Stewart, 153 IBLA 245, 252 (2000); Red Rock Hounds, Inc., 123 IBLA 314, 318-19 (1992). The existence of discretionary authority to approve a special recreation permit necessarily establishes the existence of such authority to deny an application upon good and sufficient basis. [4/] BLM may deny an application for an SRP when the proposed use conflicts with BLM objectives, responsibilities, or programs for management of the public lands. Frank Robbins, d.b.a. High Island Ranch, 154 IBLA 93, 98 (2000); William D. Danielson, 153 IBLA at 74. Such denial of an application for a special recreation permit is a matter of BLM's discretion, but "[a]ny exercise of discretionary authority must have a rational basis supported by facts of record so as not to be arbitrary, capricious, or an abuse of discretion." Terry Kayser, 136 IBLA 148, 150 (1996); Red

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[4/] The principle on which appellants principally rely, viz., that BLM's failure to advise appellants of specific sanctions for violations of the terms of their permit vitiates the application of penalties against them (see, e.g., SOR at 3-4, 6-10), would apply only during the term of a permit or when the permit is being renewed as provided for in an existing permit. See, e.g., Obsidian Services, Inc., 155 IBLA 239 (2001); Dvorak Expeditions, 127 IBLA 145 (1993). There being no ongoing SRP in the present case, this principle is inapplicable. Thus, BLM should not have cited 43 CFR 8372.0-7 (1999) in its decision, as it applies only to violations of ongoing permits. Instead, BLM simply exercised (properly, we hold) its admitted discretionary authority to decide whether or not to issue a specific permit.

Rock Hounds, Inc., 123 IBLA at 318. Although the regulations do not expressly address the situation where applications are filed by a party with a history of lack of compliance with other previously-issued permits, an applicant's previous failures to comply with permit conditions designed to protect Federally-owned lands provides a good and sufficient basis for BLM to deny a subsequent application for a similar use. This is reflected in BLM's Recreation Permits User Guide, which instructs BLM to "check[] on past performance" to determine whether to "reject application" when it is received from the applicant. (BLM Case Record Ex. M.) BLM must manage the public lands in a manner that will protect the quality scenic and environmental values, among others. 43 U.S.C. § 1701(a)(8).

We have reviewed the record and are persuaded that allowing a mass start (called the "bomb run") to extend onto Federally-owned lands in previous races was by itself a sufficiently serious violation of permit conditions to justify BLM's rejection of the new application for the April 2000 race. On May 20, 1998, BLM advised Walsh of instances of activity that either constituted noncompliance with permit stipulations or otherwise had damaged Federally-owned lands during the March 21 and 22, 1998, Dirt, Inc., race, specifically noting that

> [t]he mass start for the race on March 22 extended in mass formation beyond the perimeter authorized for the bomb run. Dirt, Inc. indicated to us that racers would be on the designated trail by the time they crossed a large wash, and they were not. The racers continued off trail beyond the wash, up a hill and out of view of the start area.

(Letter dated May 20, 1998, from BLM to Walsh at 1). BLM specifically advised Walsh that "this action resulted in unnecessary disturbance of soils and loss of vegetation." Id. at 2.

On April 26, 1999, in advance of the May 23, 1999, race, BLM imposed a special stipulation expressly requiring that the "bomb run or mass start will be conducted entirely on private land," and that "Dirt, Inc. will install some sort of barrier system where the race course enters public lands from the private start area, to ensure that racers are restricted to a single trail, which is the designated race trail, as they enter public land." (Letter dated Apr. 26, 1999, from BLM to Walsh at 1.)

Despite this provision, the record shows that the May 23, 1999, race resulted in significant damage to vegetation on the public lands over an area approximately 250 feet wide by more than one-half mile long. This was because motorcycle riders began the race in the so-called "bomb run," where race participants apparently started the race running abreast. The bomb run start was on private property, and the race plan called for riders to form a single file, merging into the one-track trail by

the time they reached the public lands. Unfortunately, they did not do so, continuing to ride abreast for more than a half mile onto the public lands. A BLM botanist reported that at a distance of 2,150 feet past the point where participants were to form a single file, riders were still spread out approximately 425-450 feet. (Memorandum dated Sept. 20, 1999, from District Botanist to Owyhee Area Manager, BLM, at 1.) By letter dated September 20, 1999, BLM notified Walsh that allowing the mass start onto public lands was "unacceptable performance," as no barriers or restrictions had been placed where racers crossed over from private to public lands. On September 27, 1999, BLM's botanist reported "significant damage to the shrub component caused by race participants" in the May 1999 race, and that "rehabilitation of this area is impractical without undergoing enormous expense," concluding that "[a]voiding future impacts at the site is the only feasible solution." (Memorandum dated Sept. 27, 1999, from District Botanist to Owyhee Resource Area Recreation Planner, BLM, at 1.) BLM notified Walsh of this situation in a letter dated November 1, 1999. Dirt, Inc., does not dispute that the permit term regarding the mass start was violated; rather, Walsh repeatedly asserts that, although the violation occurred, it was unintentional. See Affidavit of Bill Walsh dated Apr. 13, 2000, passim.

Against this background, we do not fault BLM for refusing to issue a permit for a motorcycle race to Dirt, Inc., a party with a documented history of allowing motorcycle race activities that have damaged Federally-owned lands. This was not an exercise of unfettered discretion, as appellants claim; it is instead a well-informed exercise of discretion supported by facts of record made only after appellants were notified of and given an opportunity to solve ongoing permit violations. [5/] We do not credit appellants' assertions that BLM failed to provide notice to Walsh and Dirt, Inc., that violations had occurred or failed to allow them to respond. The record shows to the contrary that BLM carefully documented permit violations in the three races preceding its decision to deny this SRP application.

In view of our holding that BLM properly rejected appellants' SRP application on account of their violations of the terms of previous SRPs, it is unnecessary to address the effect of the apparent untimeliness of that application under 43 CFR 8372.2 (1999).

[5/] We reject appellants' suggestion that BLM could use the applicants' prior actions as a basis for rejecting their application only if it had issued decisions formally declaring them to be violations of previous permit conditions. (NA/PS at 2.) Appellants have no protected property interest which would support their claim of a due process interest in the award of a new SRP. In any event, this appeal presents appellants the opportunity to demonstrate that these violations did not occur as alleged.

[2] As noted above, a distinction is properly drawn between this case, involving an application for a new SRP, and other cases involving cancellation of or failure to renew SRPs issued for a number of years. The fact that appellants applied for only one event means that BLM lacked authority to announce that future applications would be denied for the upcoming 3 years. We agree with appellants that there is no regulatory basis for such action. BLM's decision is vacated insofar as it ruled on the acceptability of future applications.

To the extent not expressly considered herein, appellants' arguments have been considered and rejected. [6/]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and vacated in part.

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David L. Hughes
Administrative Judge

I concur:

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Lisa Hemmer
Administrative Judge

[6/] Appellants' petition for stay of the effectiveness of BLM's decision is hereby denied as moot.