

DEPARTMENT OF THE NAVY  
NAVAL WEAPONS CENTER, CHINA LAKE

IBLA 76-778

Decided March 30, 1977

Appeal from a decision of the Bakersfield, California, District Office, Bureau of Land Management, dismissing the protest of the Department of the Navy, Naval Weapons Center, China Lake, California, to the issuance of special land use permit 0401-B-1018.

1. Special Use Permits

Where a corporation has applied for a special land use permit to use certain natural resource lands in its flight testing programs and the Bureau of Land Management has compiled an environmental analysis record and determined that any impact on the environment due to granting of the permit would be minimal and the Federal Aviation Administration is aware of possible air safety problems, yet has not acted to deter the flight test operations, the permit is properly granted despite the objections relating to air safety raised by the military, which holds restricted airspace adjacent to and above 20,000 feet directly over the lands in question.

2. Special Use Permits--Rules of Practice: Appeals: Hearings

Where the Bureau of Land Management has dismissed a protest to the issuance of a special land use permit and on appeal the protestant requests an evidentiary hearing, such request will be denied

when no evidence is proffered by protestant which would engender the belief that the development of further facts would require a different result.

APPEARANCES: Stephen E. Katz, Esq., Office of the General Counsel, Naval Weapons Center, China Lake, California, for the Department of the Navy; Robert H. Goon, Esq., Spensley, Horn, Jubas & Lubitz, Los Angeles, California, for Flight Systems, Inc.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The Department of the Navy, Naval Weapons Center (NWC), China Lake, California, has appealed from a decision of the Bakersfield, California, District Office, Bureau of Land Management (BLM), dated July 27, 1976, dismissing NWC's protest of the issuance of a special land use permit to Flight Systems, Inc. (FSI) to use certain public lands in the northern portion of the Panamint Valley, California, as an impact area for inert ordnance.

In May 1974, FSI filed an application with BLM seeking renewal of a special land use permit for use as an impact area. By decision dated August 1, 1974, BLM rejected FSI's application stating "that the granting of the requested permit could result in undue risk to the health and safety of the public \* \* \*." The rejection was premised on a misunderstanding concerning the exact nature of the testing FSI had conducted and intended to conduct in the Panamint Valley. FSI appealed to this Board and by decision dated February 25, 1975, Flight Systems, Inc., 19 IBLA 58 (1975), we remanded the case to BLM for preparation of an environmental analysis record (EAR) and consideration of conditions which might be imposed to avoid undue risks to public health and safety.

The EAR for the Panamint Valley usage, dated April 7, 1976, stated as follows:

Flight Systems, Inc. has requested use of a portion of the north end of the Panamint Valley as a test range for air drops of various inert devices. Their request was a renewal of SLUP Application 0401-1718 which previously permitted two years of use of this area by FSI. A post lease inspection of the valley by BLM personnel revealed that FSI had fulfilled their agreement to keep the area clean and that no degradation of the area was noted after FSI's two-year usage.

All FSI's work is of a research and development nature which has proven extremely valuable to the national defense

effort. Range usage occurred less than 2 days per month throughout the duration of FSI's original 2-year lease.

BLM and FSI personnel have researched the use of other areas for FSI's use. Military ranges in the area were considered. FSI currently uses military ranges when explosive drops are to be made. Negotiations for use of these ranges are long and difficult and result in time constrained range assignments not flexible enough for FSI's purposes. This lack of flexibility in the use of military ranges precludes their use for developmental research and development testing except in the most extenuating circumstances.

FSI previously had a SLUP for the Koehn Lake area but gave it up at BLM request because of increasing public use.

In conclusion the EAR stated:

In summary, there will be no irreversible or irretrievable impacts of any kind on either the land or the sparse wildlife. Each test is a separate entity and one week after each test, there are no indications of any kind that the test was conducted.

On April 9, 1975, FSI resubmitted its request for a SLUP to BLM. The area applied for by FSI embraced 8,320 acres, a substantial reduction from the over 14,000 acres originally under application by FSI. The April application acreage was subsequently reduced to 6,032.32 acres by amended application filed January 12, 1976.

Following completion of the EAR by BLM, comments were solicited. Questions were raised by NWC and the Department of Air Force's Flight Test Center, Edwards Air Force Base, as to encroachments on military air space and the potential for air traffic safety hazards. In addition, the National Park Service expressed concern over noise level problems over the Death Valley National Monument.

On February 20, 1976, the Acting District Manager, Bakersfield, responded by letter to the above-mentioned in an attempt to alleviate their concern over the granting of the special land use permit. On February 25, 1976, BLM issued the special land use permit for a period of 2 years with an attached list of 18 stipulations.

On June 10, 1976, NWC filed a formal protest of the issuance of the special land use permit. By decision dated July 27, 1976, BLM dismissed the protest and NWC filed this appeal and requested an evidentiary hearing.

[1] NWC's primary concern is apparently air safety. NWC states that use of the unrestricted airspace (below 20,000 feet) over the subject land by FSI would interfere with the military's restricted airspace R-2508 directly over the lands (20,000 feet to infinity) and with adjacent restricted airspace R-2505. NWC cites the increased potential for midair collisions as a reason for cancellation of the permit.

As pointed out by BLM in its decision:

The responsibility for regulating airspace and air traffic operations ultimately lies with the Federal Aviation Administration. The Bureau of Land Management has no power to control, prohibit, or in any manner, regulate the operation of private aircraft in civilian or military airspace.

NWC states on appeal that safety and operational improvements within the R-2508 airspace complex are being "vigorously pursued by the Services and the Federal Aviation Administration." NWC indicated that the "necessary paperwork" has been submitted to FAA in order to lower the floor of R-2508 and that a plan was in progress to place "gap-filler" radars in selected critical areas. Such statements by NWC are merely informational and do not constitute a ground for canceling the special land use permit. The statements made by NWC indicate that FAA has been apprised of the possible problems involving air safety in the unrestricted airspace above the lands in question. The record reveals that FSI was granted an indicated air speed of 250 knots below 10,000 feet MSL to the extent necessary for flight test activities within 15 miles of the Mojave East Range and the Panamint Range. The waiver was effective from August 20, 1976, to August 31, 1977.

Even assuming BLM were to cancel the permit, there is no assurance that such cancellation would alleviate the potential air safety problems which are the concern of the NWC. In fact, FSI has stated that such would not necessarily be the case. In FSI's response to NWC's statement of reasons, FSI stated:

\* \* \* Similarly, the majority of FSI's flight operations (e.g., inertial navigator tests, radar tests, banner towing, etc.) do not require a ground test range. These flight activities are carried out, for the most part, in unrestricted airspace virtually all of which underlies R2508. This includes the Panamint Valley. Thus, denial of FSI's use of the FSI Panamint Valley Range would not in any event stop FSI's flight operations in the subject unrestricted airspace.

NWC states that it has encouraged FSI to avail itself of existing military restricted land and airspace areas in order to conduct its tests. However, the military cannot offer FSI the flexibility that it has when it operates independently on land it either owns or leases. Military requirements concerning coordination activities, documentation, and military support personnel would tend to make utilization of the military restricted land and airspace burdensome and ultimately more costly to the customers of FSI.

NWC argues that use of the Panamint Valley as a testing range would not be in the best interest of anyone; however, it is clear that such a use is beneficial to FSI and its customers in view of the restrictions and prohibitive costs associated with use of military restricted land and airspace.

While BLM's authority is limited to management of natural resource lands, the granting of a SLUP is discretionary and BLM should consider the public interest in issuance of a SLUP. In discharging its duties concerning FSI's application for a special land use permit, BLM compiled an EAR and determined that any impact on the environment due to a granting of the permit would be minimal. In addition, FAA is aware of the possible safety problems, yet it has authorized the use of higher speeds by FSI, and FAA has not acted to deter FSI's flight test operations. It was proper for BLM to defer to FAA in the air safety field.

BLM adequately assessed the public interest and we find no error in the issuance of the permit.

The stipulations attached to the permit issued to FSI are specifically designed to preserve the environmental integrity of the land. In addition, stipulation #2 requires FSI to notify NWC 48 hours in advance of any testing activities to provide coordination and insure air traffic safety.

[2] NWC has requested an evidentiary hearing, however, it has proffered no evidence which would lead us to believe that development of further facts concerning this case would require a different result. Therefore, NWC's request for a hearing is denied.

Accordingly, 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.

Frederick Fishman

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Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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Martin Ritvo  
Administrative Judge

