



JERAMY FRICK d/b/a BRUSH CANYON OUTFITTERS

185 IBLA 276

Decided April 17, 2015



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

JERAMY FRICK d/b/a BRUSH CANYON OUTFITTERS

IBLA 2013-24

Decided April 17, 2015

Appeal from a decision of the Assistant Field Manager, Casper (Wyoming) Field Office, Bureau of Land Management, suspending a commercial Special Recreation Permit, for big game hunting/guiding/outfitting on public lands southeast of Casper, Wyoming. WY-060-RU2-12.

Affirmed.

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

An exercise of the Secretary's discretionary authority to administer SRPs 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. If a decision imposing sanctions for violating the terms of an SRP has *any* rational basis, it will not be held arbitrary and capricious. An appellant bears the burden of proof to show, 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.

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

BLM's decision to suspend a Special Recreation Permit for conducting big game hunting services on public lands, will be affirmed, as modified, when the alleged facts underlying two bases for BLM's decision are not supported in the record, but the alleged facts underlying the third basis for BLM's action, *i.e.*, a gunshot incident, are supported in the record and independently

provide a rational basis for the decision, and appellant has not preponderated in showing that BLM committed a material error in its analysis of the third basis, or failed to give due consideration to relevant factors and act on the basis of a rational connection between the facts found and the choice made.

APPEARANCES: Karen Budd-Falen, Esq., and Brandon L. Jensen, Esq., Cheyenne, Wyoming, for appellant; Kristen C. Guerriero, Esq., Office of the Regional Solicitor Rocky Mountain Region, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Jeremy Frick d/b/a Brush Canyon Outfitters, LLC, has appealed from an October 12, 2012, decision of the Assistant Field Manager (Field Manager), Casper (Wyoming) Field Office (Field Office), Bureau of Land Management (BLM), suspending his commercial Special Recreation Permit (SRP), WY-060-RU2-12, for big game hunting/guiding/outfitting on public lands southeast of Casper, Wyoming, citing three alleged incidents. The record demonstrates that Frick, through the action of his employee, violated the terms and conditions of his SRP with respect to one of the named incidents, thus providing a rational basis for the decision, which, accordingly, we affirm as modified.

*Background*¹

On February 1, 2012, Jeremy Frick submitted an SRP application for commercial use of public land for hunting deer, antelope, and/or elk.² With his application, Frick submitted a U.S. Geological Survey quadrangle map indicating that he intended to guide hunters in the vicinity of “Little Bates Hole Ranch,” which is

¹ In view of the limited factual evidence in the record, pertaining to the first two alleged incidents, as discussed below in the Board’s findings, analysis and disposition, we recite background facts pertaining only to the third of three incidents alleged in BLM’s Decision, except to the extent the Board reports the allegations stated in BLM’s Decision.

² The record reveals an apparent discrepancy as to the term of the SRP. On the Form 2930-1, at # 14, Frick identified the dates of proposed use as beginning “Jan 1, 2012” and ending “Dec 31 2012.” BLM’s Aug. 9, 2012, “Categorical Exclusion Decision [SRP DOI Field Office]” (Aug. 9, 2012, SRP Cat. Ex. Decision) states that the SRP is authorized “from the date of signature until February 15, 2016.” Aug. 9, 2012, SRP Cat. Ex. Decision at unpaginated (unp.) 2.

accessed via State Highway 487 and Natrona County roads, in hunt areas 66 (deer), 19 (elk), and 32 (antelope), located in T. 30 N., Rs. 79 and 80 W., Sixth Principal Meridian. The area contains both deeded and BLM lands. By letter dated March 1, 2012, BLM requested additional information needed to process Frick's application. BLM approved Frick's SRP application on August 9, 2012, subject to certain conditions, special stipulations, and all applicable provisions of Departmental regulations pertaining to permits for recreation on the public lands.³

On October 11, 2012, Kenneth Lacko,⁴ a BLM Law Enforcement Ranger based in the Buffalo (Wyoming) Field Office, BLM, and Patrick Juancorena, a BLM Range Management Specialist based at CFO, engaged, in their private time, in a recreational hunting expedition in T. 30 N., R. 79 W. Answer at 10, n.5; Answer, Ex. A (Declaration of Kenneth Lacko) (Lacko Declaration), at unp. 2; Answer, Ex. C, at 1-2. At about 9:30 a.m., the two heard a gunshot and a man shouting "don't move." *Id.*, Ex. A, at unp. 2; Answer, Ex. C, at 1. Lacko saw a man standing about 100 yards away. He and Juancorena placed their rifles and gear on the ground. *Id.*

Anthony Kiser^{5,6} walked toward them, carrying a gray semi-automatic handgun in a holster on his belt. Kiser alleged that Lacko and Juancorena were presently on and had been traversing private land; the two showed Kiser maps and global positioning system information to the contrary, and objected to his having fired a gun

³ The SRP conditions and stipulations are included in the record as follows: the conditions are attached to Frick's approved SRP, and the Special Stipulations are identified in the Aug. 9, 2012, Cat. Ex. Decision, Attachment ("Categorical Exclusion Documentation for Special Recreation Permits, [CFO]"). For ease of reference in the Board's decision, we simply will cite to the specific conditions and stipulations by their numbers, without reference to their locations in the record.

⁴ In his professional capacity, Lacko "deals with mapping almost every day," is familiar with Land Status Mapping Systems, and runs a computer in his vehicle that uses a Garmin satellite. Answer, Ex. C (Natrona County Sheriff's Office Details of Investigation, Case Number 12-071608 and 12-078249 (Sheriff's Report)), at 1.

⁵ Record references to Frick's employee spell his name as "Kaiser" (Answer, Ex. C, at 1-6), and "Kiser" (BLM's Notice of Supplemental Information, Exhibit (Ex. A); Second Notice of Supplemental Information, Ex. A. The Board's disposition employs the latter spelling.

⁶ In his SOR and Affidavit of Jeramy Frick in Support of Appeal (Frick Affidavit), Frick acknowledges that Kiser is his employee. Statement of Reasons (SOR) at 2; Frick Affidavit, at 3.

and ordered them not to move. Answer, Ex. A, at unp. 2; Answer, Ex. B (Declaration of Patrick Juancorena), at unp. 2-3; Answer, Ex. C, at 1-2. Lacko attested to having been detained and harassed. Answer, Ex. A, at unp. 2; Answer, Ex. C, at 2.

On October 12, 2012, the day after the incident, Investigator Aaron R. Shatto, Natrona County Sheriff's Office, interviewed Lacko and Juancorena. Answer, Ex. C, at 1-4. In describing the event, each reported hearing a gunshot and seeing a man, they identified from photographs as Kiser, approximately 100 yards away yelling, "Don't move." *Id.* at 1, 3. Juancorena stated that, upon hearing the command, he and Lacko "dropped their packs and rifle." *Id.* at 3. Lacko reported having told Kiser that Kiser had shot at him, and that, in doing so, Kiser had "detained" him. *Id.* at 2. Lacko also reported that he and Juancorena "felt violated and harassed," and that "[a]t first," he "did not feel free to leave after they heard the shot and [were] told 'Don't move.'" *Id.*

That afternoon, Investigator Shatto and Game Warden Aaron Kerr interviewed Kiser, who provided his description of the event. Answer, Ex. C, at 4-5. In his interview, the only shot Kiser acknowledged firing around the time of the incident was at a coyote, which Kiser reported seeing as he was walking towards Lacko and Juancorena, when he was about 800 to 1000 yards away from them. *Id.* at 4.⁷ Kiser stated that, when he "saw the two males he hollered at them 'hey,'" and "[t]he guys stopped." *Id.* As he approached, "the guys put their guns down." *Id.* Kiser "recalled the guys told him they were worried about the shot," and also that he "didn't say anything about it." *Id.* at 5. Kiser denied having shot at the two hunters. *Id.*

In addition to describing the substance of the three interviews, the Sheriff's Report provides additional information. It indicates that, following the interview with Kiser, Investigator Shatto issued Kiser two citations for "False Reporting," and Game Warden Kerr issued Kiser two citations for "Hunter Harasament." Answer, Ex. C, at 5.⁸ It states that, on the same day, Investigator

⁷ On appeal, Frick makes no mention of a coyote incident, and quotes, without disputing, the statement of fact in BLM's Decision that Kiser "fired a shot from [a] rifle to get the attention of the two hunters." Statement of Reasons (SOR) at 12-13. As discussed below, Frick focuses on whether such a shot constitutes harassment under 43 C.F.R. § 2932.57(a)(6). *Id.*

⁸ The Sheriff's Report states that, at an unspecified time, Investigator Shatto was contacted by counsel for Kiser, who told him that "the citations had been dismissed [at an unspecified time] due to the fact Investigator Shatto and Game Warden Kerr issued the citations for a date the Circuit Court was closed." Answer, Ex. C, at 5.

Shatto collected a semi-automatic pistol, black holster, and gun magazine with ammunition from Kiser's residence, all of which were logged into evidence at the Natrona County Sheriff's Office. *Id.*

BLM later informed the Board that, on November 6, 2012, Kiser was issued two citations for False Imprisonment and two for Hunter Harassment, prohibited by Wyo. Stat. Ann. §§ 6-2-203 (False Imprisonment) and 23-3-405(a) (Interference with Lawful Taking of Wildlife), respectively, and was ordered to appear in Natrona County, Wyoming, Circuit Court on December 21, 2012.⁹ BLM's Second Notice of Supplemental Information at 1-2; *id.*, Ex. A. BLM further advised the Board that, by Judgment and Sentence Order dated June 3, 2013, Kiser was convicted in the Circuit Court of the Seventh Judicial District, Natrona County, Wyoming, of all four counts of misdemeanor. *Id.*

On October 12, 2012, the day of the Natrona County Sheriff's Office interviews and Investigator Shatto's and Game Warden Kerr's first issuance of State citations to Kiser, with respect to the gunshot incident, the Field Manager issued the Decision, notifying Frick that his SRP was modified to "Unacceptable" and suspended, and that it would remain suspended "until these issues are fully resolved." Decision at unp. 2. BLM based the Decision, on three alleged incidents. *Id.* ("The circumstances associated with these allegations are serious and warrant immediate action.")¹⁰

First, the Field Manager reports the allegation that Frick had placed posts and old power-line poles on BLM lands and obstructed a road, in violation of SRP Condition # 8. Decision at unp. 1.

The Field Manager then describes a second allegation, a conversation between Frick and BLM personnel, in which Frick allegedly threatened to interfere with public

⁹ Wyo. Stat. Ann. § 6-2-203 provides: "A person is guilty of false imprisonment if he knowingly and unlawfully restrains another so as to interfere substantially with his liberty," and is a misdemeanor punishable by imprisonment up to one year and a fine of up to \$1,000. Section 23-3-405(a) provides: "No person shall with the intent to prevent or hinder the lawful taking of any wildlife: (i) Interfere with the lawful taking of or the process of lawfully taking any wildlife; (ii) Engage in any activity intended to threaten or otherwise affect the behavior of any wildlife." That conduct is punishable by "[u]p to one thousand dollars (\$1,000.00) to which may be added imprisonment up to six (6) months when the offense is a low misdemeanor." Wyo. Stat. Ann. § 23-6-202(a)(v).

¹⁰ BLM's Decision makes no mention of State law enforcement activities, reported in the Sheriff's Report, such as the issuance of citations to Kiser or the confiscation of property. See Decision; Answer, Ex. C, at 5.

and users. Decision at unp. 1. The Decision quotes Special Stipulation # 7, informing Frick that “[i]ssuance of a permit by BLM does not guarantee the permittee’s use of specific public land areas, nor does it grant the exclusive use of any area by the permittee.” *Id.* The Decision describes this second alleged activity as a violation of Frick’s SRP Condition # 6 (“Permittee must observe all Federal, State, and local laws and regulations applicable to the premises”), citing the regulation at 43 C.F.R. § 2932.57(a)(6), which states that permittees must not “[o]bstruct or impede pedestrians or vehicles, or harass visitors or other persons with physical contact while engaged in activities covered under a permit.” *Id.* at unp. 1-2. The Decision also finds “the permittee’s performance,” with respect to the second alleged incident, “unsatisfactory,” under Special Stipulation # 13, which states, “[i]f the permittee’s performance is found to be unsatisfactory, the authorized officer can modify or revoke the permit at any time.” *Id.*

With respect to the third alleged incident, the Field Manager’s Decision describes Kiser’s “altercation” with the two hunters, involving the gunshot and order to stop, and states: “This type of intimidating behavior is unprofessional and unacceptable and is in direct violation of the law mentioned above as well as the conditions and special stipulations of your SRP.” Decision at unp. 2. It notes, as advised in Special Stipulation # 9, that Frick, as the permittee, is responsible for all actions of his employees and guests on the public lands, and determines that Kiser’s actions in this incident justify suspension of Frick’s SRP:

The circumstances associated with these allegations are serious and warrant immediate action. Therefore, it is my desion to modify your SRP rating to “Unacceptable” and suspend your SRP . . . immediately. This suspension is an interim decision while more information is gathered. However, it also means you are no longer allowed to carry out operations under your SRP on public lands This suspension will continue until these issues are fully resolved. The outcome of further discussions and investigations will determine whether this suspension will eventually result in a cancellation or a reinstatement of your privileges under the SRP.

Id.

Arguments of the Parties

In his SOR, Frick first asserts that BLM’s decision lacks “a rational basis supported by facts of record,” and consequently is “arbitrary, capricious, or an abuse of discretion.” SOR at 1. Frick claims BLM neither justifies its conclusion that he failed to comply with the terms and conditions of his permit, nor establishes either that the allegations against him “constitute an immediate and continuing threat to the safety of the public at large, or that suspension of the permit was ‘necessary’ to ensure that safety.” *Id.* Frick argues BLM should have considered whether a “lesser

sanction, such as probation, was justified.” *Id.* at 2. He then addresses each of BLM’s allegations, pointing out where he believes BLM failed to support its conclusions with “facts of record.” *Id.* at 5-15.

Addressing the gunshot incident, Frick “concede[s]” that he is responsible for the actions of his employees, that Kiser was carrying a handgun on the day in question, and that Frick was misinformed regarding the exact location of the boundary between public and private lands. Frick Affidavit at 3. In his SOR, Frick acknowledges that Kiser fired a gunshot, which he states was fired in the air to get the attention of the two hunters. SOR at 12-13.

Throughout the SOR, Frick argues that BLM has neither provided evidence that his employee’s actions violated applicable laws, regulations, SRP terms and conditions, or policy, nor demonstrated that the agency appropriately tailored the sanction to fit the circumstances. Frick claims that BLM failed to identify any SRP term or condition, which he violated. *Id.* at 11-12. Frick volunteers that “[t]he only possible term and condition which might be relevant to these circumstances is Condition # 6, which requires that all permittees ‘must observe all Federal, State and local laws and regulations applicable to the premises.’” *Id.* at 12 n.5. He then cites one Departmental regulatory provision, 43 C.F.R. § 2932.57(a)(6), which states that it is a prohibited act to “[o]bstruct, or impede pedestrians or vehicles, or harass visitors or other persons with physical contact while engaged in activities covered under a permit or other authorization,” and asserts the absence of facts of record sufficient to support BLM’s allegation that Kiser engaged in “harassment,” as prohibited by the rule, since Kiser had not “harassed visitors or other persons *with physical contact*,” or persistently annoyed the hunters. *Id.* at 12 (emphasis added) (quoting 43 C.F.R. § 2932.57(a)(6)). According to Frick, “it is neither intimidation nor harassment to fire a single shot into the air in order to get the attention of individuals who are located beyond shouting distance.” *Id.* at 12-13. Moreover, Frick argues, although BLM’s decision states that Kiser had “attempted to intimidate” the two hunters, BLM has not shown how Kiser’s actions constitute intimidation under the rule, since the two hunters were armed with hunting rifles, and Kiser was armed only with a handgun or small pistol, and was not accused of using vulgar, threatening, abusive, or obscene language,” or of having “engaged in any physical or violent confrontation with the hunters.” *Id.* at 13 (quoting Decision at unp. 2).

Frick also refers to BLM’s Recreation Permit Administration Handbook, H-2930-1 (2006) (BLM Recreation Handbook),¹¹ which provides that BLM issues an

¹¹ <http://search.usa.gov/search?affiliate=blm.gov&query=H-2930-1> (last visited Apr. 16, 2015).

“unacceptable performance” rating¹² when the “permittee has not operated in accordance with the terms and conditions of the permit and cannot be allowed to continue.” SOR at 3-4 (quoting BLM Recreation Handbook at 48). Frick contends that Kiser’s conduct in the gunshot incident was not so objectionable as to warrant an “unacceptable performance” rating, under BLM’s policy, because “BLM failed to establish that the alleged isolated incident constituted a threat to the safety of the public at large, or that suspension of the permit was ‘necessary’ to ensure that safety.” *Id.* Moreover, Frick argues, BLM’s policy allows for discretion in fashioning sanctions, as “appropriate” to the circumstances, and suspension of the SRP was not appropriate in this case.¹³ *Id.* (quoting BLM Recreation Handbook at 48). Frick states that his employee “has not been convicted of violating any Federal or State law or regulation concerning the conservation or protection of natural resources, the environment, endangered species, or antiquities,” and “[d]ue to the relative

¹² The BLM Recreation Handbook identifies three levels of performance: “acceptable performance,” “probationary performance,” and “unacceptable performance.” BLM Recreation Handbook at 47-48. It describes “unacceptable performance” as follows:

Unacceptable Performance means that the permittee has not operated in accordance with the terms and conditions of the permit and cannot be allowed to continue. The level of performance is a threat to the safety of guests or others or involves a serious violation of law, significant resource damage, or major violation of administrative or financial obligations. Examples include failure to obtain necessary licenses or registration; recurrent or serious violations of fish and game laws, outfitter-guide laws and regulations; failure to pay fees, failure to comply with insurance requirements, falsification of records, and public endangerment.

An unacceptable performance rating will result in suspension, termination, or revocation of permit privileges as appropriate to the circumstances.

Id. at 48.

¹³ The BLM Recreation Handbook provides the following guidance regarding sanctions:

Depending upon the severity of the violation and/or the permittee’s ability to rectify the violation, the authorized officer reserves the discretionary authority to impose specific penalties upon the permittee, including, but not limited to: permit privilege denial, probation, suspension, or revocation, in whole or in part, and without compensation.

BLM Recreation Handbook at 50.

non-severity of the allegations” against him, “the chosen remedy was unreasonable under the circumstances.” *Id.* at 14-15 (citing 43 C.F.R. § 2932.56(b)).

Challenging the premises underlying appellant’s arguments, BLM points out that, pursuant to the regulation at 43 C.F.R. § 2932.56(b)(1), BLM’s authority to revoke or suspend an SRP for violations of its terms is not conditioned on it first establishing “an immediate, continuing threat to the safety of the public at large,” as Frick suggests. Answer at 6. BLM also objects to Frick’s denial that Kiser’s actions constitute “harassment” under 43 C.F.R. § 2932.57(a)(6), stating:

Frick attempts to diminish the seriousness of this event proclaiming that this is not harassment since no physical contact occurred. Frick also maintains that since there is no allegation that Frick’s guide fired at the hunters or in their direction, this cannot be threats, intimidation, or harassment. This assessment of the event grossly undermines the seriousness of it BLM properly determined that this incident was not appropriate behavior and warranted further investigation. Indeed, the local District Attorney has charged Frick’s employee with interfering with the lawful take of wild animals.

Id. at 10 (citing Ex. C, and noting possible State trial dates). BLM concludes that Frick has not carried his burden on appeal. *Id.* at 6, 11.

Discussion

[1] SRPs are issued under the general authority of the Secretary of the Interior to administer use of the public lands, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2012). BLM has authority to impose administrative sanctions for violations of its permit program or permit provisions. *Jess Rankin d/b/a West Tex-New Mex Hunting Services*, 176 IBLA 162, 165 (2008) (citing *The Board of Regents of the University of Oklahoma*, 165 IBLA 231, 239-40 (2005)).

An exercise of the Secretary’s discretionary authority to administer SRPs 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. *Ernie P. Jablonsky d/b/a Montana Big Game Pursuits*, 184 IBLA 331, 337-38 (2014); *Rankin*, 176 IBLA at 165. Where the responsibility for making such judgments has been exercised by a duly-authorized officer, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal. *Jablonsky*, 184 IBLA at 337-38. If a decision imposing sanctions for violating the terms of an SRP has *any* rational basis, it will not be held arbitrary and capricious. *Triumph Expeditions*, 156 IBLA 201, 204-05 (2002). An appellant bears the burden of proof to show, 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.” *Jablonsky*, 184 IBLA at 338; *see Rankin*, 176 IBLA at 165; *Larry Amos d/b/a Winterhawk Outfitters, Inc.*, 163 IBLA 181, 188, 190 (2004). In the case at hand, appellant has not fully met that burden.

The First and Second Alleged Incidents

Examining the record before us, we find it insufficient to support the allegations, which BLM’s Decision identified as the first alleged incident--appellant’s purported attempt to block a public road. Frick denies that the post is on BLM land, and denies placing a power pole on BLM lands, averring that it has been in the same place for years, predating his leasing of the private property for hunting. SOR at 6; Frick Affidavit at 2. Record documents, provided by BLM, lack factual clarity necessary to determine a reasonable connection between the facts found and the Decision. An internal BLM memorandum in the record from “John” (presumably Weiner, BLM, Law Enforcement Ranger) to “Rhen” (presumably Etzelmiller, Field Manager), reflects Weiner’s uncertainty as to whether the lands at issue are public land, and makes no representations as to the identity of the person(s) responsible for the alleged attempt to block off a road. Memorandum dated Aug. 14, 2012, from John Weiner to Rhen Etzelmiller. We also find the attached photographs provide inconclusive evidence of the facts alleged in the Decision.

Similarly, the record contains no evidence to support BLM’s second allegation of fact, concerning appellant’s reported threat to interfere with public land users. In his affidavit, Frick acknowledges engaging in a reciprocal heated exchange with BLM personnel, but avers that, rather than threatening interference with other public land users, he was informing BLM that the public’s use of privately-owned property would constitute trespass and may be prosecuted as such. Frick Affidavit at 3.

[2] Though final and appealable, the Decision to suspend the SRP was explicitly and necessarily described by the Field Manager as an “interim decision,” made “while more information is gathered,” and until the “issues” raised in the allegations “are fully resolved.” Decision at unp. 2. We expect, therefore, that the record may not be as complete as it would be following further investigation, and any subsequent decision to cancel or reinstate the SRP.

Nevertheless, even at this stage, the exercise of the Secretary’s discretionary authority to suspend the SRP must have a rational basis and be supported by facts of record. *Jablonsky*, 184 IBLA at 338; *Rankin*, 176 IBLA at 165. Here, the record does not contain evidence corroborating BLM’s allegations of fact, nor does the Decision explain how such alleged facts constitute actions violative of the regulations and SRP terms and conditions, cited in the Decision. On the record before us, we cannot conclude that, to the extent BLM predicated its Decision, in part, on its

allegations concerning the first two identified incidents, BLM gave due consideration to relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

Having determined that the record provides insufficient evidence to support the Decision to suspend the SRP based on the first two alleged incidents, we now determine whether, considering only the third alleged incident, the Decision has a rational basis, supported by the record, or whether Frick has preponderated in showing that BLM's Decision to suspend his SRP based on the third incident violated any applicable law, regulation, or policy, or that BLM abused its discretion or made a clear error of law or a demonstrable error of fact.

The Third Alleged Incident – the Gunshot

Recounting Kiser's gunshot, order to stop, and mistaken accusations that Lacko and Juancorena were trespassing on private land, the Field Manager's Decision states that "[t]his type of intimidating behavior is unprofessional and unacceptable and is in direct violation of the law mentioned above as well as the conditions and special stipulations of your SRP." Decision at unp. 2. BLM states that the alleged facts of Kiser's conduct violated "the law mentioned above," and Frick's SRP, and that these circumstances, along with the first two alleged incidents, justify its suspension Decision. *Id.* BLM states that this is an interim measure, and that this alleged incident, along with the other cited allegations, are serious and warrant "further discussions and investigation," necessary "to determine whether this suspension will eventually result in a cancellation or a re-instatement of [Frick's] privileges under the SRP." *Id.* Accordingly, the agency "invite[s Frick] to respond to us about them." *Id.* at unp. 1.

Departmental regulations at 43 C.F.R. § 2930, set forth Frick's responsibilities as permittee and BLM's authority to amend, suspend, or cancel his SRP. Potentially relevant to this appeal are the following provisions of the regulations at 43 C.F.R. § 2932.56, which address the question: "When will BLM amend, suspend, or cancel my permit?"

- (a) BLM may amend, suspend, or cancel your [SRP] if necessary to protect public health, public safety, or the environment.
- (b) BLM may suspend or cancel your [SRP] if you
 - (1) Violate permit stipulations

43 C.F.R. § 2932.56(a), (b)(1).

The regulation at 43 C.F.R. § 2932.57(a) identifies several "Prohibited acts

and penalties.” In part, it advises permittees that they must not:

(2) Violate the stipulations or conditions of a permit issued under this subpart;

. . . .

(6) Obstruct or impede pedestrians or vehicles, or harass visitors or other persons with physical contact while engaged in activities covered under a permit or other authorization

43 C.F.R. § 2932.57(a)(2), (6).¹⁴

We assume that, in citing to “the law mentioned above,” BLM refers to the Departmental rule at 43 C.F.R. § 2932.57(a)(6), the only statutory or regulatory provision cited earlier in the Decision. BLM does not specify whether it considers that Kiser’s “intimidating,” “unprofessional and unacceptable” “behavior” violated the rule at 43 C.F.R. § 2932.57(a)(6), because Kiser “obstruct[ed] or impeded pedestrians” and/or because he “harass[ed] visitors or other persons with physical contact while engaged in activities covered under a permit or other authorization.”

As noted

above, Frick focuses on the second part of the provision, contending that his employee’s conduct does not constitute harassment, since he engaged in no physical contact and/or persistent and annoying behavior.

We focus on 43 C.F.R. § 2932.56(a) and (b)(1), and the first portion of the rule at 43 C.F.R. § 2932.57(a)(6). BLM’s Decision recognizes the seriousness of the allegations and the need for “immediate action.” Decision at unpag. 2 (“The circumstances associated with these allegations are serious and warrant immediate action.”). Although BLM’s statement followed its description of all three incidents, two of which we discounted as unsupported in the record and therefore unreasonable bases for the Decision, we think the seriousness and significance of the third allegation and the strength of the record evidence reasonably support a BLM decision to suspend the SRP, pursuant to 43 C.F.R. § 2932.56(a), as necessary “to protect public safety.” The Sheriff’s Report, Frick’s affidavit, and those of the two hunters provide sufficient evidence to warrant the further investigation, which BLM promised,

¹⁴ Permittees are further advised that, if “convicted of any act prohibited by paragraphs (a)(2) through (a)(7) of this section . . . , you may be subject to a sentence of a fine or imprisonment or both for a Class A misdemeanor in accordance with 18 U.S.C. § 3571 and § 3581 *et seq.* under [FLPMA] (43 U.S.C. § 1733(a)).” 43 C.F.R. § 2932.57(b).

and to support the initial determination that sufficient evidence exists to support the allegations that Kiser fired a gun, ordered hunters not to move, and accosted them with false accusations of trespass--all constituting the act of obstructing or impeding pedestrians, prohibited under 43 C.F.R. § 2932.57(a)(6).

Moreover, a violation of the Federal regulations applicable to SRP's, including 43 C.F.R. § 2932.57(a)(6), is a violation of the terms and conditions of Frick's SRP. Under 43 C.F.R. § 2932.56(b)(1), BLM may suspend an SRP if the permittee "[v]iolate[s] permit stipulations." SRP Condition # 2 explicitly notifies Frick that the SRP is "subject to all applicable provisions of the regulations (43 CFR Group 2930)," and Condition # 6 is clear that permittees "must observe all Federal, State, and local laws and regulations applicable to the premises." Obstructing and impeding two hunters, lawfully engaged in their own hunting expedition on public lands, is prohibited by Federal regulation under 43 C.F.R. § 2932.57(a)(6), and, as such, violates Conditions ## 2 and 6.¹⁵

Finally, we think that creating a public safety issue and obstructing and impeding two hunters reasonably support a determination by BLM that "the permittee's performance is found to be unsatisfactory," justifying modification¹⁶ or revocation of the SRP, under Special Stipulation # 13. As a violation of the terms and conditions of the SRP, Kiser's actions also justified BLM's decision to suspend appellant's SRP under 43 C.F.R. § 2932.56(b)(1).

Conclusion

As discussed, we find the record insufficient to support the Decision to suspend Frick's SRP based on the first two alleged incidents. We will not affirm a decision on factual grounds not established in the record. See *Jablonsky*, 184 IBLA at 341 (citing *Michael Voegele*, 174 IBLA 313, 318 (2008); *Obsidian Serv., Inc.*, 155 IBLA 239, 248 (2001)).

¹⁵ Moreover, although the date of the Decision, Oct. 12, 2012, predates issuance of the citations for which Kiser would later be tried, we note again that Kiser's actions at issue in the third incident described in BLM's Decision have been judged to violate Wyoming law.

¹⁶ In this case, BLM's modification of the SRP was the change in designation of Frick's SRP rating to "Unsatisfactory," leading to suspension. Decision at unp. 2 ("Therefore, it is my decision to modify your SRP rating to 'Unacceptable' and suspend your SRP . . . effective immediately.").

However, our analysis of the third set of alleged circumstances--the gunshot incident--determined that, to the extent BLM's decision is predicated on this solitary basis, it is rational and well-supported by the record. 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. *Triumph Expeditions*, 156 IBLA at 204-05. Such is the case here.

In light of our analysis and conclusions, we will affirm the Decision, as modified, to rely only on this third basis for suspension of Frick's SRP permit, pursuant to the legal authorities cited and discussed above. See *Rankin*, 176 IBLA at 166-67 (the Board will affirm, as modified, BLM's cancellation of an SRP, pursuant to 43 C.F.R. § 2932.56(b), when the basis for BLM's action does not support cancellation under that regulation, but other facts in the record do); *Amos*, 163 IBLA at 189 (the Board will affirm, as modified, a decision denying renewal of an SRP on the basis of only those facts relied upon in BLM's decision, which we can "verify" in the record). Frick has not shown that BLM's Decision to suspend his SRP based on the third incident violated any applicable law, regulation, or policy, nor has he established that BLM abused its discretion or made a clear error of law or a demonstrable error of fact with respect to this incident.

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 as modified.

/s/

Christina S. Kalavritinos
Administrative Judge

I concur:

/s/

Eileen Jones
Chief Administrative Judge