



NORTH AMERICAN EAGLE

192 IBLA 25

Decided November 15, 2017



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

703-235-3750

703-235-8349 (fax)

NORTH AMERICAN EAGLE

IBLA 2015-119

Decided November 15, 2017

Appeal from a Bureau of Land Management decision rejecting a special recreation permit application to test the stability and control of a jet-powered racecar on the Alvord Desert Playa. DOI-BLM-OR-B060-2012.

Affirmed.

1. Appeals: Burden of Proof;
Public Lands: Special Use Permits

In exercising its discretion to grant, deny, or cancel a special recreation permit, BLM must state a rational basis for so acting in its decision, which must be supported by facts of record. An appellant challenging such a decision has the burden 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 showing 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. An appellant does not satisfy this burden simply by conclusory allegations of error or expressions of disagreement with BLM's analysis and conclusions.

2. Appeals: Burden of Proof;
Public Lands: Special Use Permits

In making decisions BLM is entitled to rely on the professional opinion of its experts on matters within the realm of their expertise that are reasonable and supported by the evidence. An appellant challenging such

reliance must show more than that BLM's expert analysis and conclusions could be in error; it must show they are, in fact, erroneous.

APPEARANCES: Ed Shadle, Owner/Driver, North American Eagle, Spanaway, Washington; Michael A. Schoessler, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

North American Eagle (NAE or Appellant) appeals from a January 29, 2015, decision by the Burns (Oregon) District Office, Bureau of Land Management (BLM), that rejected its application for a special recreation permit (SRP) to test the stability and control of a jet-powered racecar on the Alvord Desert Playa in BLM's Andrews Resource Area during the period from April 26 to May 8, 2015.

Summary

In exercising its discretion to grant, deny, or cancel SRPs, BLM must have a rational basis that is stated in its decision and supported by facts of record. An appellant challenging such a decision has the burden to demonstrate, 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 showing it gave due consideration to relevant factors and acted on the basis of a rational connection between the facts found and the choice made. Here, BLM found a sensitive species – the inland population of the Snowy Plover – would be present in the area at the time of Appellant's proposed jet car testing (April to May) and that noise from this testing would cause the plovers to abandon their nests and reduce their productivity. Consequently, BLM rejected this application for testing in April and May. Since NAE has not shown BLM erred in the decision on appeal by a preponderance of the evidence and its disagreement with BLM's findings is insufficient to carry its burden on appeal, we affirm this BLM decision.

Background

NAE first applied for an SRP to test a jet-powered vehicle on the Alvord Desert Playa during September and October of 2011, but BLM denied it as untimely.¹ NAE timely applied for an SRP for the period from June 15 to

¹ See SRP Application filed June 27, 2011, Administrative Record (AR) Tab 52; BLM Decision dated July 20, 2011, AR Tab 48; 43 C.F.R. § 2932.22(a) (“[Y]ou must

October 30, 2012, which precipitated BLM's preparation of the North American Eagle Alvord Desert Speed Trials Environmental Assessment (EA), pursuant to the National Environmental Policy Act of 1969 (NEPA).²

The permit area identified by NAE provides features uniquely suited to the proposed action, including an area of sufficient length for vehicle runs that could reach speeds in excess of 600 miles per hour.³ However, the EA states that the inland population of the Western Snowy Plover, a BLM-identified special status species, starts arriving on its breeding grounds in southeastern Oregon in early to mid-April, begins nesting as early as May, and migrates from the area by late September.⁴ Citing snowy plover surveys from 2004 to 2007, the EA found plover nesting habitat had expanded as "water inundated much of the Playa during 2005-06."⁵ Depending on the proximity of the NAE test course to snowy plover nesting sites, BLM determined there would be a disturbance that would cause plovers to abandon their nests, resulting in reduced productivity for that year.⁶ The test vehicle is equipped with a jet engine that produces 120 decibels at full power, which would last for less than 20 seconds during each test run.⁷ BLM found that at full power this vehicle would produce 79 decibels of noise one mile away, which is the same as if standing 45 feet from a freight train or near a garbage disposal, 73 decibels at two miles, and 70 decibels at three miles, which is the same as a vacuum cleaner or TV.⁸ Based on its EA and to avoid impacts to the plover, BLM issued SRPs for vehicle testing between September 15 and November 30, 2013, and from September 15 through October 31, 2014.⁹

NAE submitted SRP renewal applications on January 15, 2015. One was for the period from September 20 to October 3, 2015, which was later approved by BLM.¹⁰ The other was for testing between April 26 and May 8, 2015.¹¹ In the

apply to the local BLM office at least 180 days before you intend your use to begin.").

² See SRP Application filed Nov. 30, 2011, AR Tab 46; EA (issued July 2012) at 1, AR Tab 38.

³ See EA at 1.

⁴ *Id.* at 14.

⁵ *Id.*

⁶ *Id.* at 16.

⁷ *Id.* at 6, 16.

⁸ *Id.*

⁹ See SRP issued Aug. 14, 2014, AR Tab 12; SRP issued July 22, 2013, AR Tab 27; Answer at 2-4; see also SRP issued Oct. 21, 2012, AR Tab 32.

¹⁰ See SRP Application filed Jan. 15, 2015, AR Tab 9; Answer at 2, note 3.

¹¹ See SRP Application filed Jan. 15, 2015, AR Tab 10.

January 29, 2015, decision now on appeal (BLM Decision), BLM rejected this application based on its determination in the EA that testing should be restricted and permitted only “from mid-September to [the] end of November to protect nesting snowy plover.”¹² BLM therefore rejected NAE’s April/May 2015 SRP application because it would “not be in the best interest of nesting plovers or conducive to maintaining a steady, healthy population.”¹³ This appeal timely followed.

Standard of Review

[1] BLM issues SRPs under the general authority of the Secretary of the Interior to administer use of the public lands under Section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA) and its implementing regulations.¹⁴ In exercising its discretion to grant, deny, or cancel an SRP, BLM must state a rational basis for so acting in its decision, which must be supported by facts of record.¹⁵ An appellant challenging such a decision has the burden 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 BLM gave due consideration to relevant factors and acted on the basis of a rational connection between the facts found and the choice made.”¹⁶ An appellant does not satisfy this burden simply by conclusory allegations of error or expressions of disagreement with BLM’s analysis and conclusions.¹⁷

NAE did not Meet its Burden to Show Error in the BLM Decision

NAE contends BLM erred in rejecting its April/May SRP application, claiming its operations are not a hindrance to local wildlife and that thunderstorms and recreational vehicle usage in the area are more damaging to the nesting habits of migratory birds around the Alvord Dry Lake.¹⁸ NAE asserts that the Snowy Plover is a coastal wetlands bird, not normally disposed to living in a desert

¹² BLM Decision at unpaginated (unp.) 1.

¹³ *Id.*

¹⁴ FLPMA, 43 U.S.C. § 1732(b) (2012); 43 C.F.R. Subpart 2932.

¹⁵ *See, e.g., James R. Stacy*, 188 IBLA 134, 137-38 (2016); *Jeremy Frick d/b/a Brush Canyon Outfitters, LLC (Frick)*, 185 IBLA 276, 284 (2015); *Ernie P. Jablonsky d/b/a Montana Big Game Pursuits (Jablonsky)*, 184 IBLA 334, 337-38 (2014)).

¹⁶ *Frick*, 185 IBLA at 284-85 (quoting *Jablonsky*, 184 IBLA at 338); *accord Stacy*, 188 IBLA at 138.

¹⁷ *See Stacy*, 188 IBLA at 138 (citing *Jablonsky*, 184 IBLA at 338).

¹⁸ *See Statement of Reasons (SOR) at unpaginated (unp.) 1.*

environment.¹⁹ Referencing the U.S. Fish and Wildlife Service (USFWS) website, NAE claims the Snowy Plover has not been counted anywhere on this BLM-managed lakebed.²⁰ NAE also claims “[t]here is no clear proof that the Snowy Plover bird will abandon its[] nesting site due to noise,” and that if the Snowy Plover is prone to laying eggs in nests along the shoreline of a dry lake as suggested by BLM, they and their eggs would be a food source for rattlesnakes, coyotes, and foxes, which would soon cause them to disappear from the area.²¹ In addition, NAE theorizes that high-speed, low-altitude flyovers of the Alvord Desert by military aircraft, as well as frequent thunderstorms, should have already driven the Snowy Plover away from the area so there could be no adverse impacts on that species from its activities.²² We are unpersuaded.

The website NAE cites refers specifically to a Pacific coast population of snowy plovers, yet there are, in fact, two distinct populations: a Pacific coast population that is listed as a threatened species under the Endangered Species Act; and an interior population that is an Oregon State threatened species and also a BLM-designated sensitive species.²³ More important for our resolution of this appeal, the facts of record show Snowy Plovers that are part of the interior population are present in the area of appellant’s proposed activities, and NAE has provided no evidence to the contrary.²⁴ We therefore conclude that NAE has not carried its burden to show that BLM erred in finding that this sensitive species is present in the area.

[2] NAE next asserts there is “no clear proof that the Snowy Plover will abandon its[] nesting site due to noise.”²⁵ But the burden is on appellant to show a material error in BLM’s factual analysis, that BLM’s decision is not supported by the record, or that the record does not show BLM gave due consideration to relevant factors and acted on the basis of a rational connection between the facts found and

¹⁹ See *id.* at unpag. 2.

²⁰ See *id.* at unpag. 1 (citing <http://www.fws.gov/arcata/es/birds/WSP/plover.html>, last visited Nov. 14, 2017).

²¹ *Id.*; see *id.* at unpag. 1 (“Nowhere in the various websites[,] both private and public government[,] does it indicate that the Snowy Plover bird will abandon its nest if disturbed by noise.”) (citing [ref. www.snowyploverbird.org](http://www.snowyploverbird.org)), unpag. 2.

²² See *id.* at unpag. 2.

²³ See *supra* note 17; Answer at 8.

²⁴ See EA at 14; Snowy Plover Survey 2007 at 4, 8 (counting the number of Snowy Plovers in the Alvord Desert), AR Tab 55; Snowy Plover Survey 2006 at 3, 8 (counting the number of Snowy Plovers in Alvord Desert), AR Tab 56,

²⁵ SOR at unpag. 1.

the choice made.²⁶ The EA was prepared by an interdisciplinary team that included a Wildlife Biologist with a specialization in wildlife and special status wildlife species,²⁷ who opined that Snowy Plover nesting would be disturbed by jet-powered vehicle testing during the period identified in this SRP application.²⁸ It is well established that BLM is entitled to rely on the opinion of its experts on matters within the realm of their expertise that is reasonable and supported by the record.²⁹ In order to successfully challenge such reliance, an appellant must demonstrate, by a preponderance of the evidence, that “BLM erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion, and not simply that a different course of action or interpretation is available and supported by the evidence.”³⁰ In other words, an appellant must not just show “BLM’s analysis and conclusions ‘*could be* in error, but that they *are* erroneous.”³¹ NAE has not provided any evidence that contradicts BLM’s conclusions about the impacts of noise on plovers, and therefore has not carried its burden to show that BLM erred in relying on the professional opinion of its experts to reject this SRP application.

NAE also maintains that noise generated by its jet-powered vehicle will be less than the level envisioned by BLM due to a “sound shadow” in the Alvord Desert, which it claims is supported by a recent study performed by an NAE engineer.³² But NAE did not provide this study to BLM when it applied for the SRP or before BLM issued the decision denying its application on January 29, 2015. Rather, NAE attached the study to its notice of appeal, and BLM had no

²⁶ See *supra* note 16.

²⁷ See EA at 25.

²⁸ See *id.* at 15-16 (“Depending on the proximity of the NAE course to [wet areas near Alvord Hot Springs] and snowy plover nesting sites, there would be disturbance that would cause plovers to abandon their nests and would reduce productivity for that year. The closer snowy plover nesting habitat is to the course, the more likely plovers would abandon their nests with several test runs over a two-week period.”) (“If snowy plovers were present near the course due to high water levels on the playa [after September 15], both parents and chick plovers would move away from the disturbance.”).

²⁹ See, e.g., *Clayton Valley Minerals, LLC*, 186 IBLA 1, 15 (2015); *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998).

³⁰ *Western Watersheds Project*, 188 IBLA 277, 284 (2016) (quoting *West Cow Creek*, 142 IBLA at 238).

³¹ *Paul T. Barnes, Jr.*, 191 IBLA 277, 282 (2017) (quoting *West Cow Creek*, 142 IBLA at 238).

³² SOR at unp. 2 (citing study using data collected by NAE during its vehicle testing in September 2014); see *id.*, Attachment (Noise Propagation Study by Seven G. Wallace, Engineer, NAE).

opportunity to review or respond to this information before it made its decision. We could consider this late-filed study but decline to do so here.³³ Rather, we believe the better course is to allow BLM to review and respond to the technical merits of this study in a future decision, if and as appropriate. Once BLM utilizes its technical expertise to decide whether to consider and, if so, what weight to give this study in any future EA, its decision will then be subject to appeal to this Board.³⁴ We need not and, therefore, do not consider the NAE study in this case.

In sum, we conclude that NAE has not met its burden to show BLM erred in denying its SRP application for jet-powered vehicle testing on the Alvord Desert Playa from April 26 thru May 8, 2015.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,³⁵ we affirm BLM's decision dated June 29, 2015.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Amy B. Sosin
Administrative Judge

³³ See *Southern Utah Wilderness Alliance*, 191 IBLA 37, 45 (2017).

³⁴ Cf. *Pennaco Energy, Inc. v. United States Department of the Interior*, 377 F.3d 1147, 1150-51 (10th Cir. 2004) (“Courts have upheld the use of non-NEPA procedures ‘for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or [Environmental Impact Statement.]’”) (quoting *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000)).

³⁵ 43 C.F.R. § 4.1.