MOAB HALF MARATHON, INC.

193 IBLA 366 Decided November 27, 2018
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IBLA 2016-32 Decided November 27, 2018

Appeal from a decision of the Field Manager, Moab (Utah) Field Office, Bureau of Land Management, denying an application for a land use permit and a request for a waiver of a special recreation permit, and approving an amendment of an existing special recreation permit. UTU-91431 and MFO-Y010-14-063R.

Affirmed.


BLM regulations require a special recreation permit for commercial or competitive recreational uses of the public lands. A recreational use is commercial if an organization makes or attempts to make a profit or collects a fee, there is paid public advertising to seek participants, or participants pay for a duty of care or an expectation of safety. A recreational use is competitive if two or more contestants compete, and either the participants register for the event or the event has a predetermined course or area.


An appellant challenging a BLM decision to grant or deny an application for a land use or special recreation permit has the burden to demonstrate, by a preponderance of the evidence, that BLM's decision was in error. This burden can be met by showing 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.

3. Estoppel

A party seeking to apply estoppel must establish the four elements of estoppel: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. Estoppel must also be based upon affirmative misconduct. Estoppel will not lie where to do so would grant the party a right not authorized by law.


OPINION BY ADMINISTRATIVE JUDGE SOSIN

Moab Half Marathon, Inc. (MHM), appealed from and petitioned for a stay of the effect of an October 15, 2015, decision issued by the Field Manager, Moab (Utah) Field Office (MFO), Canyon Country District, Bureau of Land Management (BLM). In the decision, the Field Manager denied MHM’s application for a land use permit (LUP) and request for a waiver of a special recreation permit (SRP) authorizing the use of public lands near Moab, Utah, in connection with the Canyonlands Half Marathon, Five Mile Race, and The Other Half Marathon. In the decision, the Field Manager also approved an amendment of an existing SRP issued to MHM for the Thelma & Louise Half Marathon to authorize the use of public lands in connection with the three races.

SUMMARY

Under BLM’s regulations, a competitive or commercial recreational use of the public lands requires an SRP. Here, there is no dispute that the Canyonlands Half Marathon Races and The Other Half Marathon are competitive and commercial recreational uses of public lands, but MHM argues that it should not be required to obtain an SRP for a variety of reasons, including that its races occur primarily on a State Highway and pre-date the SRP regulations; MHM has held LUPs permitting the races in
the past and BLM is estopped from now requiring an SRP; the fees associated with an SRP are excessive; and other BLM offices do not require SRPs for similar events. Because we conclude that the regulations require an SRP and none of MHM's arguments demonstrates any error in BLM's decision, we affirm BLM's decision.

BACKGROUND

A. History of the Canyonlands Half Marathon Races and The Other Half Marathon and MHM's LUP Application

MHM, a for-profit corporation founded in 2006, organizes and operates the Canyonlands Half Marathon and Five-Mile Race (together, the Canyonlands Half Marathon Races) and The Other Half Marathon in and around the Moab, Utah area. The races occur yearly: The Canyonlands Half Marathon Races occur in the spring, and The Other Half Marathon is held in the fall. The race courses are “entirely on paved roadways,” primarily Utah State Highway 128, and the races also use public lands along the roadway for parking and staging.

The State of Utah Department of Transportation (DOT) has a right-of-way (ROW) for State Highway 128, issued to it in 2006 by the Federal Highway Administration (FHWA). FHWA issued the ROW grant after BLM agreed to the appropriation and transfer of the public lands underlying Highway 128 to the FHWA under 23 U.S.C. § 317 (2012). In accordance with BLM’s agreement to transfer the public lands underlying State Highway 128, and the ROW grant issued to the State, BLM retained jurisdiction “to use, or authorize use on, any portion of the [ROW] for non-highway purposes, provided such use would not interfere with the free flow of traffic, impair the full use and safety of the highway, or be inconsistent with Federal law.”

1 Statement of Reasons (SOR) at 1; Answer at 2.
2 Answer at 2.
3 SOR at 1-2; see Answer at 2 (“Each of these events takes place on a portion of the State Highway 128 right-of-way, which crosses federal public lands managed by BLM, and also uses adjacent public lands.”).
4 Letter from BLM to FHWA (June 8, 2005) (Exhibit A to SOR and Administrative Record (AR) Doc. No. 20, Attachment 12).
5 Id. at 1; Highway Easement Deed, Project No. S0344 (1) (UTU-80831) (Mar. 13, 2006) (terms and conditions) (Exhibit B to SOR) (Highway Easement Deed).
The Canyonlands Half Marathon first occurred in 1976 and the Five Mile Race was added in 1977; The Other Half Marathon was first run in 2004. BLM did not authorize the races until 2006, when it issued to MHM a 3-year LUP. The LUP "covered the off highway areas being utilized by the races . . ." BLM issued similar LUPs to MHM for 2009-2012 and 2012-2015; the most recent LUP expired on March 22, 2015.

In the summer of 2015, BLM and MHM began discussing how BLM would authorize future races. According to BLM, "[i]n reviewing the situation, BLM realized that . . . because the events are commercial and competitive recreational uses, it should have been authorizing the events under the [SRP] regulations . . . ." BLM states that at a meeting in July 2015, it told MHM that future races would need to be authorized by an SRP and suggested that the races could be added to MHM's existing SRP for the Thelma & Louise Half Marathon. Additional communications between BLM and MHM occurred in August and September 2015. MHM objected to obtaining an SRP for its races because an SRP would require an 11,000% increase in fees over the fees associated with an LUP.

On September 21, 2015, MHM filed an application with BLM for a three-year LUP for the use of public lands in connection with the Canyonlands Half Marathon Races and The Other Half Marathon. In its application, MHM asked for a new LUP covering the portions of the races located outside the Highway 128 ROW. MHM also requested a waiver of the SRP requirements for the use of public lands in connection with the races.

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6 SOR at 2.  
7 Id.; see Memorandum from Jennifer Jones, Outdoor Recreation Planner, to the Field Manager, MFO (Oct. 8, 2015) (AR Doc. No. 17) (Jones Memorandum) at 1 ("[T]he Canyonlands Half Marathon was first run in 1976 . . . though the first authorization from the BLM was not issued until 2006 . . . ").  
8 Jones Memorandum at 1.  
9 Id. at 1-2.  
10 Answer at 3.  
11 Id.; Jones Memorandum at 10.  
12 See Decision at 1-2; SOR at 6 (stating that it hired counsel, "who unsuccessfully attempted to negotiate a resolution with BLM recreation staff in the Fall of 2015").  
13 See SOR at 6.  
14 Decision at 2.  
15 Id.
B. BLM's October 15, 2015, Decision and MHM's Appeal

In the decision now on appeal, BLM denied MHM's application for an LUP and its request for a waiver of the SRP requirements.

BLM first explained that although the Bureau has previously issued LUPs for the races, an LUP "would not provide the necessary authorization for the entire activity occurring on BLM-managed public lands (including both the areas within and outside of the highway ROW)." BLM explained that the races take place on Highway 128, which is located "primarily on public lands managed by the BLM." BLM also stated that "race participants utilize portable toilets, BLM vault toilets, aid stations, and live entertainment during the race that are located outside the ROW for Highway 128," and that the parking/staging areas are on public lands outside of the ROW. Any permit would have to cover all of these activities occurring on public lands.

BLM next stated that its LUP regulations (found in 43 C.F.R. Subpart 2920) specify that "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law may be authorized" by an LUP. Because the Canyonlands Half Marathon Races and The Other Half Marathon are "both commercial and competitive recreational uses" of the public lands, the Field Manager explained that they are "specifically authorized" by the SRP regulations (found in 43 C.F.R. Subpart 2932), which apply to "Commercial Use, Competitive Events, Organized Groups, and Recreation Use in Special Areas." And because the races are specifically authorized by these regulations, they cannot be authorized under an LUP "and may be authorized only under an SRP issued pursuant to 43 C.F.R. Subpart 2932." She therefore denied MHM's application for an LUP.

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16 Id.
17 Id.
18 Id. at 2-3.
19 Id. at 3 ("BLM has jurisdiction and permitting authority over the areas within and outside the highway ROW that are necessary for the Canyonlands Half Marathon (including five-mile race) and The Other Half race.").
20 Id.
21 Id.
22 Id.
23 Id.
In addition to being required by the regulations, the Field Manager also concluded that requiring MHM to obtain an SRP was consistent with BLM guidance.\textsuperscript{24} BLM's Recreation Permit and Fee Administration Handbook\textsuperscript{25} directs that "BLM may require an SRP when there are potential impacts to public lands, in order to protect public land resources, ensure public health and safety, and avoid conflicts with other public land users."\textsuperscript{26} Here, the Field Manager stated that "[g]iven the sheer volume of people involved with these races," an SRP was "necessary" to comply with this direction.\textsuperscript{27} Further, the Handbook specifies that BLM “must require” an SRP if an event involves monitoring, and the Field Manager noted that BLM “has historically had an involvement and presence related to the races, including involvement/monitoring by BLM campground hosts, BLM staff . . ., and BLM law enforcement.”\textsuperscript{28}

The Field Manager also denied MHM's application for a waiver of the SRP permit requirements.\textsuperscript{29} Under the regulation at 43 C.F.R. § 2932.12, BLM may waive the requirement to obtain an SRP in certain circumstances: (1) if the use begins and ends on non-public lands or related waters, traverses less than 1 mile of public lands or 1 shoreline mile, and poses no threat of appreciable damage to public land or water resource values; (2) if BLM sponsors or co-sponsors the use; (3) if the use is a competitive event that is not commercial, does not award cash prizes, is not publicly advertised; poses no appreciable risk for damage to public land or related water resource values; and requires no specific management or monitoring; or (4) if the use is an organized group activity or event that is not commercial, is not publicly advertised, poses no appreciable risk for damage to public land or related water resource values; and requires no specific management or monitoring.\textsuperscript{30} The Field Manager found that none of these conditions was satisfied by the races. For example, she found that the first condition was not met because the races start on BLM-managed lands; they traverse more than one mile of BLM-managed lands; and they pose a threat of appreciable damage to public land or water resource values “given the number of participants, supporters, volunteers, races staff, onlookers, and others involved in the activities . . .”\textsuperscript{31}

\textsuperscript{24} \textit{Id.} at 6.
\textsuperscript{26} Decision at 5 (quoting Handbook at 1-7).
\textsuperscript{27} \textit{Id.} at 6 (noting that over 4,000 people competed in 2013 and roughly 2,000 people competed in 2014).
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.} at 5.
\textsuperscript{30} \textit{Id.} at 3-4; 43 C.F.R. § 2932.12(a)-(d).
\textsuperscript{31} Decision at 4.
The Field Manager further found that the second condition was not met because BLM is not a sponsor or co-sponsor of the races, and the third and fourth conditions were not met because the races are commercial uses of the public lands that are publicly advertised.\textsuperscript{32}

Finally, the Field Manager amended MHM's existing SRP for the Thelma & Louise Half Marathon to authorize the use of public lands associated with the Canyonlands Half Marathon Races and The Other Half Marathon.\textsuperscript{33} She explained that because MHM's previous LUP had expired in March 2015 and because the races were to occur in the near future (The Other Half Marathon was scheduled for October 18, 2015, and the Canyonlands Half Marathon Races were scheduled for March 12, 2016), her action was necessary to allow the races to proceed.\textsuperscript{34}

MHM timely appealed and petitioned for a stay of the effect of BLM's decision. While MHM did not object to having a permit for the races or paying fees for the use of public lands, it appealed BLM's decision that an SRP is "the correct mechanism for such permitting."\textsuperscript{35} MHM sought a stay of BLM's decision based on the fees that MHM would be required to pay under an SRP.\textsuperscript{36} We denied MHM's petition for a stay by order dated December 28, 2015, and we denied a subsequent motion by MHM for expedited consideration of its appeal by order dated March 11, 2016. We now resolve MHM's appeal.

DISCUSSION

A. The Regulations Governing LUPs and SRPs

BLM issues and administers LUPs and SRPs under the general authority of the Secretary of the Interior to administer the use of the public lands under section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA).\textsuperscript{37} BLM's implementing regulations for LUPs are found in 43 C.F.R. Part 2920 (Leases, Permits and Easements), and BLM's implementing regulations for SRPs are found in 43 C.F.R. Subpart 2932.

\textsuperscript{32} Id.
\textsuperscript{33} Id. at 7, 8.
\textsuperscript{34} Id. at 7.
\textsuperscript{35} Notice of Appeal (NOA) at 1.
\textsuperscript{36} Petition for Stay at 1; see id. at 2 ("[T]he Appellant would be damaged by an increase of fees of almost 11,000").
\textsuperscript{37} 43 U.S.C. § 1732(b) (2012); Pete Mott, d/b/a Trout Trickers, 192 IBLA 313, 317 (2018); James R. Stacy, 188 IBLA 134, 137 (2016).
(Special Recreation Permits for Commercial Use, Competitive Events, Organized Groups, and Recreation Use in Special Areas).

The LUP regulations specify that they are applicable to "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law." Uses that may be authorized by an LUP include "residential, agricultural, industrial, and commercial" uses. The regulations specify that permits may not exceed three years and must authorize uses that "involve either little or no land improvement, construction, or investment . . . ."

[1] The SRP regulations provide that an SRP is required for commercial or competitive recreational use of the public lands. The regulations define "commercial use" as the "recreational use of public lands and related waters for business or financial gain." They further explain that a use is commercial if, among other things, an organization "makes or attempts to make a profit" or "collects a fee," there is "paid public advertising to seek participants," or participants "pay for a duty of care or an expectation of safety." A competitive use is defined in the regulations as an organized use "in which 2 or more contestants compete," and either the participants "register, enter, or complete an application for the event" or "[a] predetermined course or area is designated . . . ."

B. MHM's Burden of Proof is to Demonstrate Error in BLM's Decision

[2] An appellant challenging a BLM decision in which the Bureau exercises its discretion to grant or deny an application for an LUP or SRP has the burden to demonstrate, by a preponderance of the evidence, that BLM's decision was in error. An appellant may do so by showing 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

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38 43 C.F.R. § 2920.1-1.
39 Id.
40 Id. § 2920.1-1(b).
41 Id. § 2932.11(a)(1), (2).
42 Id. § 2932.5.
43 Id.
44 Id.
45 James R. Stacy, 188 IBLA at 138; Bookcliff Rattlers Motorcycle Club, 171 IBLA 6, 13 (2006).
the facts found and the choice made.\textsuperscript{46} This burden is not satisfied simply by conclusory allegations of error or expressions of disagreement with BLM's analysis and conclusions.\textsuperscript{47}

C. **MHM Does Not Meet Its Burden to Show Error in BLM's Decision Requiring an SRP for the Canyonlands Half Marathon Races and The Other Half Marathon**

MHM makes 8 arguments challenging BLM's October 15, 2015, decision:

(1) BLM's decision is inconsistent with the Utah DOT's ROW for State Highway 128;
(2) BLM failed to coordinate with and defer to the Utah DOT;
(3) Requiring an SRP for the races is contrary to the "[s]pirit and intent of the SRP Program";
(4) MHM's races are "grandfathered uses" that pre-date and are exempt from the SRP regulations;
(5) BLM has "waived its right" to require an SRP because it did not require an SRP for many years;
(6) BLM is equitably estopped from requiring an SRP because MHM detrimentally relied on BLM promises that no SRP would be required;
(7) The fees for an SRP are excessive and not proportional to MHM's use of the public lands; and
(8) Other BLM offices do not require SRPs for road races.\textsuperscript{48}

We address each argument below.

1. **BLM's Decision is not Inconsistent with the Utah DOT's ROW for State Highway 128**

MHM argues that both BLM's June 8, 2005, letter agreeing to the appropriation and transfer of public lands to the FHWA and the Easement Deed granting the ROW to the Utah DOT prohibit BLM from authorizing the use of State Highway 128 for the Canyonlands Half Marathon Races and The Other Half Marathon.\textsuperscript{49} MHM states that these documents reserved to BLM the right to authorize use of the ROW for non-highway

\textsuperscript{46} James R. Stacy, 188 IBLA at 138; Jeramy Frick, 185 IBLA 276, 284-85 (2015).
\textsuperscript{47} James R. Stacy, 188 IBLA at 138; Ernie P. Jablonsky, d/b/a Montana Big Game Pursuits, 184 IBLA 331, 338 (2014).
\textsuperscript{48} See SOR at 8-21.
\textsuperscript{49} Id. at 8.
purposes that “would not interfere with the free flow of traffic or impair the full use of the highway,” but that the races do both.50 According to MHM, the Easement Deed instead requires that the Utah DOT must authorize any use that would interfere with traffic and use of the roadway.51

But the Easement Deed does not cede regulation of MHM’s races as MHM contends. First, the Easement Deed specifies that the State’s use of the ROW is limited to “highway purposes,” a term that refers to providing travel routes for motor vehicles.52 The Easement Deed therefore did not convey authority to the Utah DOT to authorize any use of State Highway 128 for non-highway purposes, such as the recreational road races at issue in this appeal. Rather, the Easement Deed expressly reserved to BLM the right to authorize uses for non-highway purposes. And as the United States Supreme Court has explained, “the established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.”53

Moreover, while MHM is correct that the Easement Deed specifies that BLM’s authorization of use of the ROW for non-highway purposes cannot interfere with the free flow of traffic or impair the full use and safety of the highway, BLM’s authorization of the Canyonlands Half Marathon Races and The Other Half Marathon does not do so. Before each race, Utah DOT closes State Highway 128. MHM acknowledges this, stating that each year the Utah DOT “stops traffic completely on State Highway 128 for several hours on race day” and “does not permit any ingress or egress over the closed roadway during certain hours on race day . . . .”54 So any interference with the free flow of traffic is by Utah DOT, not BLM. The authorized use of the road for the races as authorized by BLM – when the roadway has been closed to normal vehicular traffic by the Utah DOT – does not run afoul of the Easement Deed’s restriction that BLM authorize only non-highway uses that will not interfere with the free flow of traffic or impair the full use and safety of the highway. We therefore reject MHM’s argument that BLM’s decision was somehow inconsistent with the ROW for State Highway 128.

50 Id.
51 Id. at 9; see Reply at 9 (“[T]he BLM does not have, and has never had, primary jurisdiction for permitting or managing uses which interfere with traffic . . . .”).
52 Highway Easement Deed; see also Jones Memorandum at 4 (“Highway purposes are focused on travel routes for motor vehicles.”).
54 SOR at 8; see Answer at 12 (“[O]n relevant race days, it is UDOT and not the SRP holder that temporarily closes Highway 128 to traffic, or reroutes traffic.”).
BLM characterizes MHM's arguments as an attempt to enforce the Easement Deed and argues that MHM is not entitled to do so because it is not a third-party beneficiary to the Deed.\textsuperscript{55} BLM states "there is nothing in the plain and unambiguous language demonstrating an intent by its signatories, FHWA and UDOT, to confer any benefit and/or enforceable rights on MHM, or any entity like MHM."\textsuperscript{56} MHM disagrees, arguing that it qualifies as a third-party beneficiary of the Easement Deed because the Deed specifies that the State's use of the ROW is "subject to valid existing rights"; "the public has had valid existing rights to use the roadway for transportation, vehicular traffic, and recreation since at least 1902, and MHM for competitive and commercial road races since May 1, 1976"; and MHM is a "responsible representative of the public that can assert the public rights under the Easement Deed."\textsuperscript{57} We need not reach the merits of this issue, however, since we have already concluded that the Easement Deed does not preclude BLM from authorizing the races.

2. BLM was not Required Either to Defer to or Coordinate with the Utah DOT in Authorizing the Canyonlands Half Marathon Races and The Other Half Marathon

MHM next argues that BLM failed to comply with various requirements to coordinate with and defer to the Utah DOT.\textsuperscript{58}

MHM first argues that the Easement Deed "require[s] UDOT to act as the primary permitting agency on those segments of the Races affecting State Highway 128 and its right-of-way."\textsuperscript{59} But we have already concluded that the Utah DOT has no authority under the Easement Deed to permit a non-highway use on State Highway 128. In addition, and as discussed later in this decision, allowing the Utah DOT to permit the races, rather than BLM, would be in direct contravention of the SRP regulations, which specify that MHM must obtain an SRP from BLM for the commercial and competitive use of public lands.\textsuperscript{60} There is therefore no basis for MHM's averment that the Utah DOT has "primary" authority for permitting those portions of the races affecting State Highway 128, or that the Easement Deed requires that BLM "defer" to the Utah DOT.

\textsuperscript{55} Answer at 10.
\textsuperscript{56} Id. at 11.
\textsuperscript{57} Reply at 2, 5-6.
\textsuperscript{58} SOR at 9-11.
\textsuperscript{59} Id. at 9; see id. ("[A]pproximately 85\% of the Canyonlands Half Marathon races courses and 100\% of the Other Half race course are located on State Highway 128 and within its 200-foot right-of-way.").
\textsuperscript{60} See 43 C.F.R. § 2932.11.
MHM also argues that BLM “rules and regulations” require that BLM coordinate with other agencies “where a recreation event occurs in more than one jurisdiction,” which is the case for the Canyonlands Half Marathon Races and The Other Half Marathon, which cross the jurisdictional boundaries not only of BLM and the State of Utah, but also the State of Utah School and Institutional Trust Lands Administration, Grand County, and the City of Moab. But other than a vague reference in its notice of appeal to “the SRP’s coordination and joint permit standards,” MHM cites to no regulation that requires such coordination. Nor does MHM specify what these joint permit standards are, and we find no such coordination requirement in the SRP regulations.

In its Reply, MHM cites to section 202(c) of FLPMA as a law supporting its argument that BLM must coordinate with the Utah DOT in permitting the races. But that section of FLPMA relates to the development of land use plans, and requires the Secretary of the Interior to coordinate this process, “to the extent consistent with the laws governing the administration of the public lands, . . . with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located . . .” It is not applicable to BLM’s issuance of LUPs or SRPs, which occurs under the authority of section 302(b) of FLPMA.

MHM further cites to two BLM guidance documents: BLM’s Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners and BLM’s Recreation Permit and Fee Administration Handbook. But neither document supports MHM’s argument that BLM is required to coordinate with or defer to the Utah DOT in permitting the races.

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61 SOR at 10.
62 See NOA at 2 (stating that these “standards . . . require the BLM to defer to UDOT to issue necessary permits”).
63 Reply at 7.
66 SOR at 10; Reply at 8.

193 IBLA 377
The Desk Guide addresses coordination, during the land use planning process, between BLM and any agency formally designated as a “cooperating agency” under the National Environmental Policy Act for the development of an environmental impact statement supporting a land use plan. MHM acknowledges that the document is not directly applicable to BLM’s issuance of LUPs or SRPs. Instead, MHM relies on the Desk Guide’s statement that collaboration with local governments and Federal agencies “should also be standard practice . . . for all land use planning and related implementation activities.” That statement, however, does not constitute a requirement that BLM violated in its decision denying MHM’s application for an LUP. At most, the statement is an aspirational goal to coordinate with other agencies.

We similarly reject MHM’s reliance on BLM’s Recreation Permit and Fee Administration Handbook. The Handbook provides that permitted recreation activities occurring in more than one jurisdiction may require the development of joint permits. But the Handbook specifies that such joint permits are those jointly issued by multiple BLM offices or by BLM and other Federal agencies. The Handbook states that permits required by local or state governing bodies are “separate permits or authorizations.” Nothing in the Handbook sets out a requirement that BLM coordinate with or defer to the Utah DOT in permitting the Canyonlands Half Marathon Races and The Other Half Marathon.

3. BLM’s Decision Requiring an SRP for the Canyonlands Half Marathon Races and The Other Half Marathon Is Not Contrary to the “Spirit and Intent” of the SRP Program

FLPMA provides the Secretary of the Interior with broad discretion to manage the use of the public lands and promulgate regulations governing that use. In accordance with this authority, BLM promulgated its LUP and SRP regulations. And under the plain

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67 See 40 C.F.R. §§ 1501.6, 1508.5.
68 Reply at 8.
69 Id. (quoting Desk Guide at 1).
70 Handbook at 1-57.
71 Id. at 1-57 – 1-58.
72 Id. at 1-57.
73 43 U.S.C. § 1732(b) (2102) (“In managing the public lands, the Secretary shall . . . regulate, through easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands . . . .”).
language of these regulations, the appropriate permitting mechanism for MHM's races is an SRP.

As we note above, the LUP regulations specify that they are applicable only if an activity is not specifically authorized by other regulations. And BLM's SRP regulations specifically require an SRP for the commercial or competitive use of the public lands. The Canyonlands Half Marathon Races and The Other Half Marathon meet the regulatory definitions for both commercial and competitive uses of the public lands. The races are a commercial use because they are a recreational use “for business or financial gain.” MHM, which is a for-profit corporation, advertises its races and collects a fee from race participants. The races are a competitive use because they are organized races in which more than two people compete, the participants “register, enter, or complete an application for the event,” and the races occur on a “predetermined course.” Because the races fall squarely within these definitions, BLM is required by its regulations to authorize the races, if at all, through an SRP.

MHM does not dispute that its races constitute commercial and competitive uses under the regulations but argues instead that BLM's authorization of the races through an SRP is contrary to the “[s]pirit and intent of the SRP Program.” MHM states that “the clear public policy underlying the SRP program is to preserve and protect” what it calls “traditional public lands” – i.e., trails and backcountry areas.

In support of its argument MHM cites first to one of the policy statements in FLPMA, which directs the Secretary of the Interior to manage the public lands in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

74 43 C.F.R. § 2920.1-1.
75 Id. § 2932.11(a)(1), (2).
76 Id. § 2932.5.
77 See id.
78 Id.
79 SOR at 11.
80 Id.
81 Id. (quoting 43 U.S.C. § 1701(a)(8) (2012)).
According to MHM, this policy statement relates to “our traditional public lands . . . not paved roadways and their rights-of-way managed by departments of transportation.”

MHM further points to Board case law addressing SRPs, stating that because these cases addressed SRPs related to “traditional public lands,” they “serve as evidence that the SRP program is intended to regulate use of events that are off-road, on trails, and in backcountry areas.”

MHM similarly notes that because BLM’s Recreation and Permit Fee Administration Handbook provides examples related to SRPs on “traditional public lands,” this, too, reflects an intent that SRPs are to permit only those activities on “dirt, trails, or backcountry areas.”

MHM contrasts this with LUPs, which MHM states are more appropriate for permitting the Canyonlands Half Marathon Races and The Other Half Marathon because they are short-term authorizations for events that “involve either little or no land improvement, construction, or investment.”

But there is nothing in FLPMA, BLM’s implementing regulations, Board case law, or BLM’s own guidance that makes a distinction between what MHM calls “traditional public lands” and other public lands. Indeed, FLPMA defines “public lands” broadly, as “any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the [BLM] . . .”

There is no question that the lands underlying State Highway 128 constitute public lands. And there is nothing in the SRP regulations that distinguishes between events on “traditional” versus non-traditional public lands. Moreover, the cases cited by MHM do not support MHM’s assertion that “traditional public lands” are to be regulated differently from other public lands. Although the cases relate to issuance of SRPs for the use of trails and backcountry areas, this does not mean that only this type of public lands is subject to the SRP requirements. Similarly, the fact that BLM’s Recreation Permit and Fee Administration Handbook uses examples of SRPs that involve the use of trails and backcountry areas does not mean that other public lands are not also subject to the SRP requirements.

MHM specifically notes that the Handbook provides that events occurring “entirely on county or state roads generally do not require an SRP.” But the Canyonlands Half Marathon Races and The Other Half Marathon do not occur “entirely” on a state road; they occur on a Utah DOT ROW crossing over public lands, and they

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82 Id.
83 Id. at 11-12 (citing cases).
84 Id. at 12, 13.
85 Id. at 13 (quoting 43 C.F.R. § 2920.1-1(b)).
87 SOR at 13 (quoting Handbook at 1-7).
have components occurring on public lands outside of the ROW. The fact that State Highway 128 is a paved road does not change the fact that the lands underlying and adjacent to the roadway are public lands. Moreover, after the language quoted by MHM, the Handbook goes on to state that “[w]hen the roads are located on, or adjacent to, public lands, . . . the BLM may require an SRP when there are potential impacts to public lands, in order to protect public land resources, ensure public health and safety, and avoid conflicts with other public land users.” 88 The Handbook further provides that an SRP is required “if the event will involve monitoring, insurance, or bonding or if it will include other permit stipulations.” 89 As reflected in BLM’s October 15, 2015, decision, the Bureau determined that an SRP was required because the races “pose an appreciable risk of damage to public lands . . . and related water resource values, and require both management (including, but not limited to, through permit stipulations) and monitoring . . . .” 90

We conclude there is nothing in law or policy that distinguishes between different types of public lands or requires BLM to treat “traditional public lands” differently from other public lands. The SRP regulations apply to MHM’s races, which are commercial and competitive events occurring on public lands. We therefore find that BLM’s decision to require an SRP for the races is not contrary to the “spirit and intent” of the SRP program.

4. The Canyonlands Half Marathon Races and The Other Half Marathon Do Not Have “Grandfathered” Status

MHM next argues that the SRP regulations do not apply to its road races because the races have been occurring since May 1, 1976, prior to the enactment of FLPMA and BLM’s promulgation of its SRP regulations. 91 MHM states that FLPMA “routinely protects such ‘grandfathered uses’ as exempt or excluded from new regulation.” 92

While it is true that the first Canyonlands Half Marathon race occurred prior to FLPMA’s enactment, this does not afford that race, or the other races, “grandfathered” status that excludes them from regulation, and there is no law that supports MHM’s

88 Handbook at 1-7 – 1-8.
89 Id. at 1-8.
90 Decision at 5-6.
91 SOR at 15.
92 Id. (citing Rocky Mountain Oil & Gas Ass’n v. Watt, 696 F.2d 734 (10th Cir. 1982); Zenda Gold Corp., 155 IBLA 64 (2001); Southern Utah Wilderness Alliance, 125 IBLA 175 (1993)).
position. The cases cited by MHM all involved section 603(c) of FLPMA, which relates to BLM's management of Wilderness Study Areas (WSAs). That section of FLPMA directs BLM to manage lands within WSAs "so as not to impair the suitability of such areas for preservation as wilderness," but subject "to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted" at the time FLPMA was enacted. The Department of the Interior deemed this provision of the statute the "grandfather clause" because it protected certain existing uses. There is, however, no statutory directive similar to FLPMA's "grandfather clause" for WSAs that applies to a permit, such as an SRP, that BLM issues in its discretion. MHM's argument is therefore without merit.

5 & 6. BLM Has Neither "Waived Its Right" to Require an SRP, Nor is BLM Equitably Estopped from Requiring an SRP

MHM's next two arguments are related and we address them together. MHM first argues that BLM has "waived" its ability to now require MHM to apply for and obtain an SRP because it did not require an SRP from 1978, when it first promulgated SRP regulations, until 2015. MHM states: "For the first thirty (30) years, from 1976 through 2006, BLM did not require permitting for the Races," and between 2006 and 2015, BLM authorized the races through an LUP. MHM states that it has relied on the lower costs associated with an LUP compared to an SRP in planning its races and setting "registration fees at an affordable price." MHM next argues that its detrimental reliance on BLM "promises" that no SRP would be required for the Canyonlands Half Marathon Races and The Other Half Marathon dictates that BLM be equitably estopped from requiring an SRP.

We reject MHM's argument that BLM has, by its failure to require SRPs in the past, "waived" its ability to do so now. The fact that BLM has not issued SRPs in the past

94 Id.
96 SOR at 16-17.
97 Id. at 5.
98 Id. at 17; see id. (stating that the fees associated with an SRP for its races would be more than 11,000% higher than the fees associated with an LUP).
99 Id. at 18.
does not prevent the United States from now requiring SRPs in accordance with its regulations.  

[3] We also reject MHM's argument that BLM is equitably estopped from requiring an SRP to authorize the races. The doctrine of equitable estoppel is an extraordinary remedy when applied against the United States. The party seeking to apply estoppel must first establish that the four basic elements of estoppel have been met: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. In addition, estoppel must be based upon affirmative misconduct, such as an affirmative misrepresentation – which must be in writing – or concealment of material facts by a Federal agency, upon which the party asserting estoppel detrimentally relied. Finally, estoppel is not justified when its application would grant the party a right not authorized by law.

Here, MHM states that BLM “promised” that it would not require an SRP for the Canyonlands Half Marathon Races and The Other Half Marathon. MHM states that this “promise” was made in two ways: First, by BLM's failure for years to require an SRP, and second, through a statement made by a BLM employee to MHM's president that the races “were grandfathered in,” and that if MHM agreed to have an SRP for its Thelma & Louise Half Marathon, BLM “would not require an SRP for the Races at issue here.” MHM further states that it detrimentally relied on these promises.

While MHM may have relied upon BLM's past practice or a statement made by a BLM employee, the elements of estoppel have not been met. Estoppel requires an

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100 See United States v. Weber Oil Co., 68 IBLA 37, 60 (1982) (“The doctrine of waiver does not apply to bar the Department from enforcing the public land laws . . . .”).
103 Priority Energy, 186 IBLA at 387; see also Santa Fe Minerals, 145 IBLA 317, 324 (1998) (“Erroneous advice upon which reliance is predicated must be in the form of a crucial misstatement in an official decision.”).
104 Priority Energy, 186 IBLA at 387 (citing 43 C.F.R. § 1810.3(b), (c); Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60-63 (1984)).
105 SOR at 18.
106 Id.; see id. (“The promise was verbal, in-person, and clear.”).
107 Id.
affirmative misrepresentation or concealment of a material fact – i.e., that MHM is properly required, as a matter of regulation, to have an SRP authorizing the races, or that a BLM employee lacks authority to waive the SRP regulations. Here there is neither.

The record includes details of discussions between BLM and MHM regarding the Thelma & Louise Half Marathon and reflect BLM’s statements that the Canyonlands Half Marathon Races and The Other Half Marathon could be added to MHM’s SRP for the Thelma & Louise Half Marathon. But there is nothing in the record to support MHM’s statement that BLM “promised” or affirmatively misrepresented to MHM that it would not be required to obtain an SRP for the Canyonlands Half Marathon Races and The Other Half Marathon. Nor is there any evidence that BLM represented to MHM, in writing, that MHM was not required to obtain an SRP. Further, because we have concluded that the SRP regulations apply to MHM’s races, to estop BLM from requiring an SRP would grant MHM a right not authorized by law. Finally, MHM cannot establish estoppel based on BLM’s past failure to require an SRP. BLM’s regulations specifically provide that “[t]he authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.”

We therefore conclude that BLM neither has waived its right to require an SRP nor is estopped from requiring an SRP.

7. The Amount of the SRP Fees Does Not Demonstrate Error in BLM’s Decision to Require an SRP

MHM argues that the fees associated with an SRP for its road races are “shocking.” MHM states that the fees for an SRP would amount to approximately

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108 See Jones Memorandum at 10; id., Attachment 16 (Letter from BLM to MHM (Aug. 21, 2015) (“The Canyonlands Half Marathon & Five Mile Run and the Other Half 13.1 Mile Race would be added to the existing permit . . . ”)).
110 43 C.F.R. § 1810.3(a); see Rogue River Outfitters Association, 83 IBLA 151, 154 (1984) (“[A] legal obligation cannot be vitiated by delayed or uneven enforcement of the obligation by officials of the Department.”).
111 SOR at 19.
$25,000 per year or $75,000 for a three-year SRP, which is an 11,000% increase over the fees BLM charged under its LUP regulations.\textsuperscript{112}

There is no question that MHM will be charged greater fees under an SRP than it was charged under its previous LUPs. BLM’s LUP regulations provide that holders of an LUP must pay an annual rent “based either upon the fair market value of the rights authorized . . . or as determined by competitive bidding.”\textsuperscript{113} In contrast, SRP fees are based on the “direct and indirect cost to the government,” the “types of services or facilities provided,” and “comparable recreation fees charged by other Federal agencies, non-Federal public agencies, and the private sector located within the service area.”\textsuperscript{114} The regulations specify that the BLM Director establishes, and may periodically adjust, SRP fees, and will publish fees in the Federal Register.\textsuperscript{115} At the time of BLM’s October 15, 2015, decision, the minimum fee for competitive events was $5 per person per day.\textsuperscript{116}

MHM attempts to challenge the fees it would be charged under the SRP program, arguing that they are excessive because “[t]here is little or no real cost to the government,” and “BLM does not provide any service to the racers or Appellant under the permit.”\textsuperscript{117} MHM states that it or the Utah DOT “has always been entirely responsible for cleaning the right-of-way both before and after the race, grading gravel areas used within the right-of-way not managed by BLM, blocking access to the road to motorists, placing signs notifying motorists of the blockage . . ., and providing portable potties.”\textsuperscript{118} MHM also argues that the fees charged by the Utah DOT in connection with the races are far less.\textsuperscript{119}

But the fees associated with an SRP are not before us; what is on appeal is BLM’s decision to require an SRP in the first instance. Once an SRP is required, the applicant

\textsuperscript{112} Id.; see id. at 14 (“[U]nder the Appellant’s LUP permit UTU-89023 (2012-2015), Appellant paid the $25 processing fee plus $50 per incidental location per race per year. The fees totaled . . . approximately $625 per 3-Year LUP permit.”).
\textsuperscript{113} 43 C.F.R. § 2920.8(a).
\textsuperscript{114} Id. § 2932.31(b).
\textsuperscript{115} Id. § 2932.31(b), (c).
\textsuperscript{116} 79 Fed. Reg. 11819 (Mar. 3, 2014) (establishing a minimum fee for competitive and organized group activities or events at $5 per person per day).
\textsuperscript{117} SOR at 19.
\textsuperscript{118} Id. at 19-20.
\textsuperscript{119} Id. at 20 (stating that beginning in the fall of 2016, Utah DOT will charge MHM $300 per permit).
must pay the established fees, and MHM's complaints about the increase in the fees it will be charged are not a basis for demonstrating error in BLM's decision requiring an SRP.

8. The Practices of Other BLM Offices Does Not Demonstrate Error in BLM's Decision

MHM's final argument is that BLM's decision is inconsistent with how other BLM offices have managed similar events. MHM states it “could not find another instance of a BLM Field Office in the West, other than the Moab Field Office, permitting running road races with similar facts,” and that “the large majority if not all other Field Offices in the West uniformly waive application of the SRP program to road races.” BLM disputes this statement, and MHM provides no other information supporting its assertion.

But even if other BLM Offices have waived the SRP permitting requirements for road races, those decisions cannot provide a legal basis for a waiver here. Under the regulation authorizing BLM to waive the requirement for an SRP, BLM must determine whether a waiver is appropriate on a case-by-case basis, based on the criteria listed in the regulation. And here, as discussed more fully below, BLM reasonably determined that MHM's road races did not qualify for a waiver.

\[\text{SOR at 20; NOA at 2.}\]
\[\text{Jones Memorandum at 11 (stating MHM's assertion that the Moab Field Office is the only office that requires SRPs for events held on paved roads "is not correct").}\]
\[\text{Decision at 3-4.}\]
D. MHM Does Not Meet Its Burden to Show Error in BLM's Decision Denying a Waiver from the SRP Requirements for the Canyonlands Half Marathon Races and The Other Half Marathon

In its appeal, MHM also challenges BLM's rejection of its application for a waiver from the SRP requirements. MHM, however, makes no argument that it qualifies for a waiver under the regulatory criteria at 43 C.F.R. § 2932.12. As noted above, it argues only that other BLM Offices have waived the SRP requirements for similar road races.

In rejecting MHM's application for a waiver, the Field Manager applied each of the regulatory criteria and found that none was satisfied. We find no error in the Field Manager's decision.

As explained above, under the regulations, an SRP may be waived if the use begins and ends on non-public lands, traverses less than one mile, and poses no threat of appreciable damage to public land or water resource values (43 C.F.R. § 2932.12(a)); BLM sponsors or co-sponsors the use (43 C.F.R. § 2932.12(b)); the use is a competitive event that is not commercial, does not award cash prizes, is not publicly advertised, poses no appreciable risk for damage to public land or related water resource values, and requires no specific management or monitoring (43 C.F.R. § 2932.12(c)); or the use is an organized activity or event that is not commercial, not publicly advertised, poses no appreciable risk for damage to public land or water resource values, and requires no specific management or monitoring (43 C.F.R. § 2932.12(d)).

Here, there is no question that the races are competitive and commercial events. They are publicly advertised, begin on BLM-managed lands, and traverse more than one mile over those lands. There also is no question that BLM neither sponsors nor co-sponsors the races, which are organized and operated by MHM. With respect to whether the races pose an appreciable risk for damage to public land or water resource values, the Field Manager specifically found that

given the number of participants, supporters, volunteers, races staff, onlookers, and others involved in the activities, there is risk of appreciable damage to public lands (including developed recreation sites, such as campgrounds and vault toilet facilities), and the potential for human waste issues in close proximity to an important water resource (the Colorado River).\[127\]

\[126\] Id. at 3-5.

\[127\] Id. at 4.

193 IBLA 387
We find this conclusion reasonable, particularly in light of the large number of people documented at these events. For example, as stated by the Field Manager in her decision, there were over 4,000 competitors in the 2013 Canyonlands Half Marathon Races, and over 2,000 competitors in The Other Half Marathon in 2014.\textsuperscript{128} We therefore find no error in the Field Manager’s decision to reject MHM’s application for a waiver of the SRP requirements for the races.

CONCLUSION

MHM has not met its burden to show error in BLM’s decision denying its application for an LUP, denying its request for a waiver of the SRP requirements, and approving an amendment of an existing SRP.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,\textsuperscript{129} we affirm BLM’s October 15, 2015, decision.

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/s/
Amy B. Sosin
Administrative Judge
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I concur:

\begin{flushright}
/s/
James F. Roberts
Acting Chief Administrative Judge
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\textsuperscript{128} \textit{Id.} at 6.
\textsuperscript{129} 43 C.F.R. § 4.1.