

NEVADA PACIFIC CONSORTIUM

IBLA 97-147

Decided December 31, 2002

Appeal from a decision of the Assistant District Manager, Las Vegas District Office, Bureau of Land Management, rejecting an application for a Recreation and Public Purposes lease and an application for a commercial lease. N-61336 and N-58941.

Affirmed.

1. Applications and Entries: Generally--Public Lands:
Disposals of: Generally--Recreation and Public
Purposes Act

The Recreation and Public Purposes Act authorizes the Secretary, in his discretion, to sell or lease tracts of public lands for recreational or public purposes under certain conditions. A Recreation and Public Purpose lease/purchase application properly may be rejected by BLM on the basis that the lands sought are not identified for disposal in the applicable management plan.

2. Administrative Practice--Administrative Procedure--
Federal Land Policy and Management Act of 1976: Leases

Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), authorizes the Secretary to issue leases for various uses of the public lands. Authorized uses encompass "[a]ny use not specifically authorized by other laws or regulations and not specifically forbidden by law" and include "residential, agricultural, industrial, and commercial" uses. 43 CFR 2920.1-1. BLM has discretion to reject a proposal for use of public lands if it conflicts with BLM objectives, responsibilities, or programs for management of the public lands involved.

APPEARANCES: William A. Fisher, Secretary, Nevada Pacific Consortium, Las Vegas, Nevada, for appellant; Mark T. Morse, Field Manager, Las Vegas Field Office, Bureau of Land Management, U.S. Department of the Interior, Las Vegas, Nevada, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Nevada Pacific Consortium (NPC) has appealed from a decision of the Assistant District Manager, Las Vegas District Office, Bureau of Land Management (BLM), dated December 5, 1996, which rejected both NPC's application for a Recreation and Public Purposes (R&PP) lease, N-61336, filed pursuant to the R&PP Act, as amended, 43 U.S.C. §§ 869 to 869-4 (2000), and its application for a commercial lease, N-58941, filed pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2000). Both applications had been submitted for the purpose of acquiring lands to develop a public shooting sports and safety training complex.

On June 13, 1994, NPC filed an R&PP application with BLM seeking a 20-year lease with an option to purchase approximately 2,720 acres of land in T. 24 S., Rs. 60 and 61 E., Mt. Diablo Meridian, which is situated some 23 miles south of Las Vegas, Nevada, in an area known as Hidden Valley. About six months later, on January 19, 1995, NPC also filed a "Land Use Application and Permit," pursuant to section 302(b) of FLPMA, seeking a 10-year commercial lease for the same lands included in the R&PP application. It is apparent that there was originally some confusion generated by the simultaneously-pending requests for the same land under two different applications, since, as eventually serialized, the R&PP application, while earlier in time, was assigned the later serial number. This confusion was, however, eventually sorted out and BLM ultimately analyzed the two applications under their respective statutory and regulatory provisions. It should be noted that, while one of NPC's applications sought a section 302 lease, it is undisputed that, due to the level of anticipated investment, NPC desired to enter into a lease/purchase arrangement which would enable it to ultimately obtain title to the lands being leased. 1/

Notwithstanding the fact that NPC had filed two discrete applications, the proposed development was the same under both applications. Under the development envisioned by NPC, eight shooting ranges and an assortment of safety training buildings would be constructed at a total estimated cost of 3.5 million dollars. NPC noted that, at the time it filed its applications,

1/ In a letter from NPC to BLM, dated Apr. 6, 1995, NPC stated:

"Our application for this site was submitted under the Recreation and Public Purposes Act which allows us to purchase the site after demonstrating our ability to develop and manage the facility in the public interest. However, given its capital intensity, its scope and the park's permanent nature, BLM requested that we allow BLM to consider our application under a different section of the law, [sec. 302(b) of PL 94-579, October 21, 1976, 43 USC 1732] and suggested a ten year lease with a renewal option. NPC concurred, however, given the size of the project, the option to purchase the site after meeting BLM requirements is vital."

NPC also requested that "this site be declared for disposal under BLM's master plan." Id.

there were no full-service shooting ranges open to the public and no comprehensive firearms or safety training facilities in southern Nevada. NPC argued that its proposal would meet the need for a shooting facility, have a positive impact on tourism, encourage the safe use of firearms, meet the needs of local citizens, and reduce the illegal use of firearms in the Las Vegas valley and surrounding areas.

On February 2, 1995, BLM published a notice of realty action (NORA) relating to the proposed section 302 lease application in the Federal Register, which noted, inter alia, that the land had been classified as suitable for leasing under section 302 of FLPMA and that "the lease is consistent with current Bureau planning for this area and would be in the public interest." See 60 FR 6551 (Feb. 2, 1995). This NORA served to segregate the land from entry under the public land laws, including the mining laws. Id.

Pursuant to a memorandum of understanding signed on April 10, 1995, NPC obligated itself to contract with a third party for the preparation of an environmental assessment (EA). A draft EA was transmitted to BLM on October 23, 1995. A number of BLM employees, representing disciplines such as wildlife biology, botany, archaeology, and range conservation, were critical of this draft. Typical were the comments from the BLM District Botanist, who, after first noting her strong support for a target shooting facility "somewhere near Las Vegas," questioned the selection of the Hidden Valley site:

I have real problems with this proposal, with the quality of the EA, and with the way that this area was chosen without additional coordination with BLM resource specialists other than lands. The EA lacks sufficient analysis and is not objective in the analysis it provides. Although Hidden Valley appears to be little used, it has a high number of multiple-use activities that were not very thoroughly analyzed in the EA, such as grazing and off-road recreation.

(Memorandum dated November 2, 1995, from the District Botanist to the Supervisory Realty Specialist at 1.)

Based on some of these comments, a revised EA was prepared and submitted to BLM on August 12, 1996. While there was a general consensus among the BLM specialists that the EA had been significantly improved, criticism of the advisability of proceeding with the proposal, particularly as it related to Hidden Valley, remained strong. Some of the particular issues which generated comments were possible effects on the desert tortoise, the effect of fragmentation of wildlife habitat caused by increased roads in the area, and changes occasioned by increased visitor usage of the areas of Hidden Valley beyond the shooting complex, including impacts on the white-margined penstemon, a special status plant found in Hidden Valley at two sites, one of which contained the largest known population of this species. Of particular note were questions raised whether either the section 302 application or the R&PP application was in conformity with the Management Framework Plan (MFP) for Clark County. See, e.g., Undated

Comments of BLM employee, Dave Wolf, at 1 ("Both possible lands actions are disposals. The area is not open to disposal in the MFP. Not in conformance with MFP. Reject Application.")

On December 5, 1996, BLM issued the decision which is the subject of this appeal. In that decision, BLM rejected both the R&PP application and the section 302 application on the ground that they were incompatible with the Clark County MFP. Insofar as the R&PP application was concerned, the decision recounted that, in BLM's view, because of the possibility of lead contamination from spent shells, R&PP applications to obtain use of Federal land for shooting range purposes should be entertained as requests to obtain title to the land rather than merely as applications to authorize use of the land for such purposes. See 43 CFR 2743.2. BLM noted, however, that the lands in question were not identified as available for disposal under the MFP. Thus, patent could not properly issue for the land consistent with the MFP and NPC's R&PP request was denied on this basis.

With respect to the FLPMA section 302 lease application, BLM held that approval of this application would also violate the MFP. Thus, BLM noted that the MFP provided that short-term leases (*i.e.*, leases not to exceed 10 years) of land to private groups and individuals would be allowed so long as five criteria were met. As set forth in the MFP, those criteria were:

1. The parcel is adjacent to or in proximity to private lands, unless an overriding need is documented.
2. Local government approves of the lease.
3. No BLM resource management program would be adversely affected.
4. Leasing is preferable to sale because of the anticipation that the land will be appropriately returned to the pool of open public lands at a later date.
5. Disposal by sale is not appropriate.

(Clark County MFP, Lands Recommendation 1.4.) According to BLM, except for the support which NPC had received from local governmental entities, NPC's application violated all of these criteria. Accordingly, BLM rejected NPC's section 302 application as well. This appeal followed.

Together with its notice of appeal and statement of reasons in support thereof, NPC filed a request that the Board stay implementation of the decision pending ultimate adjudication of its appeal. NPC based its stay request on its expectation that "during the stay, a frank discussion of the issues between the Applicant and the Las Vegas office of the BLM would lead to * * * a resolution agreeable to the Applicant and the Las Vegas office of the BLM." (Statement of Reasons (SOR) at 3.)

By Order dated February 14, 1997, the Board denied the request for a stay but noted that nothing in its actions "preclude[d] BIM and appellant from entering into negotiations during the pendency of any appeal with an eye to reaching a mutually acceptable compromise." (Order of February 14, 1997, at 2.) Indeed, the Board explained that it encouraged such settlement negotiations. Id.

By Order dated April 11, 2002, the Board recounted much of the foregoing and noted that, since issuance of its February 14, 1997, Order, a considerable period of time had elapsed during which the Board has heard nothing further from the parties. The Board requested that the parties inform it whether the issues involved in the appeal were still the subject of active controversy between them.

On May 9, 2002, NPC filed a supplemental statement of reasons with the Board, noting that the matter remained in controversy. This document provided an amplification of the reasons why appellant believed BIM's actions in this matter had been erroneous. By instrument dated May 20, 2002, BIM agreed that the matter continued to be in controversy and further advised the Board that, in its view, not only had appellant's applications not been in conformance with the Clark County MFP, they were also not in conformance with the Las Vegas Resource Management Plan (RMP), which had been adopted in October 1998, subsequent to the filing of the instant appeal. In light of the clear showing by both sides to this controversy that a mutually-agreed upon resolution will not be forthcoming, it is appropriate to decide the appeal herein.

In its supplemental SOR, NPC challenges BIM's conclusion that the possibility of lead contamination precluded issuance of an R&PP lease for the land sought. See Supplemental SOR at 2-3. In support of its contention, NPC submits a document entitled "PRO-ACT Factsheet on Lead Contamination in Soil at Small Arms Firing Ranges," which, it asserts, enunciates standards for firing ranges which NPC intends to implement and which will systematically remove all lead from the land used for range purposes. Id. at 9-10. Thus, appellant argues that "lead contamination is not a problem." Id. at 3.

Appellant also objects to BIM's seemingly rejecting both its R&PP and section 302 applications on the ground that leasing (as opposed to sale and purchase) is an inappropriate method for obtaining the land for the desired use. Appellant notes that its original R&PP proposal was for a lease/purchase and that "the NPC proposal was, from inception, for a land purchase." Id. And, notwithstanding the fact that its section 302 application was for a lease, NPC noted that "in subsequent discussions with BIM Las Vegas office personnel, NPC made clear that following improvements being made on the land, it was NPC's clearly stated intention to purchase the land outright." Id.

While it is clear that BIM made a number of mistakes in its consideration of NPC's applications, the nub of the controversy relates to the last statement of NPC quoted above. It is obvious from a review of the record that, considering the anticipated scope of its investment, NPC

desired to ultimately acquire title to the lands involved, if for no other reason than to protect its substantial investment. The problem, however, is that the land in Hidden Valley which NPC desired was not, either at the time the application was filed or today, identified as suitable for disposal and was, therefore, simply not available as a practical and legal matter for appellant's purposes notwithstanding the fact that the NORA published on February 2, 1995, indicated that issuance of a section 302 lease for the land as envisioned in NPC's application was "consistent with current Bureau planning" for the area. 60 FR 6551 (Feb. 2, 1995). That statement was demonstrably incorrect.

Insofar as the R&PP application was concerned, appellant's application, on its face, indicated that appellant desired a 20-year lease with an option to purchase. However, the application was inconsistent with the MFP, because the lands had not been identified in the MFP as available for disposal under the R&PP Act. See generally, Clark County MFP at 1.1, 1.2, 1.3, and 1.4.

[1] The R&PP Act authorizes the Secretary, in his discretion, to sell or lease tracts of public lands for recreational or public purposes under certain conditions. 43 U.S.C. §§ 869, 869-1 (2000); 43 CFR 2740.0-3(a); Lamina Animal Association Club, 153 IBLA 126, 129 (2000); The Town of Chico, 119 IBLA 136, 138 (1991). Under 43 CFR 2741.5, applications are not to be approved "unless and until it has been determined that disposal under the act would serve the national interest following the planning requirements of the Federal Land Policy and Management Act (43 U.S.C. 1712)." Section 202 of FLPMA, 43 U.S.C. § 1712 (2000), requires the Secretary to develop, maintain, and, when appropriate, revise land use management plans. In this case, BLM has offered as the basis for rejecting NPC's R&PP application the fact that the MFP did not indicate that the lands in question were available for disposal. Under the applicable regulation, resource management authorizations must conform with approved MFPs or RMPs. 43 CFR 1610.5-3(a); Uintah Mountain Club, 112 IBLA 287, 289 (1990); Southern Utah Wilderness Alliance, 111 IBLA 207, 212 (1989). 2/ The record shows that granting the R&PP application in this case would not have been in conformance with the MFP in effect at the time the decision issued. Moreover, granting the application would not be in conformance with the current RMP approved in 1998. 3/

In an effort to show inconsistency in BLM's treatment of R&PP applicants, NPC cites to R&PP lease N-57882 issued to Clark County in September 1998 for a public park in sec. 26, T. 24 S., R. 58 E., Mount Diablo Meridian, which NPC describes as a 40-acre park in Goodsprings,

2/ "All future resource management authorizations * * * shall conform to the approved plan." 43 CFR 1610.5-3(a). "Resource management plans are designed to guide and control future management actions * * *." 43 CFR 1610.0-2.

3/ It is unclear from the record why BLM did not inform NPC of the unavailability of the land due to the conformance problem at an earlier date rather than continue to process the application, given NPC's expressed desire to purchase the land. Pre-adjudication should include a review of the relevant planning document to determine conformance.

Nevada. (Supplemental SOR at 4, Ex. B.) NPC states that the Goodsprings Park and the land in question herein are separated by about ten miles. While the proximity of the areas is not in dispute, a review of Map #2-3 of the RMP, showing public lands identified for disposal, specifies 915 acres in T. 24 S., R. 58 E., as the "Good Springs disposal area." Thus, the granting of an R&PP lease in that area would be in conformance with the RMP.

Given the fact that BLM's decision must be sustained because the MFP did not identify the lands in question for disposal, we need not resolve any issue concerning the possibility of lead contamination of soils from spent shells.

[2] We turn now to NPC's section 302 application. Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), authorizes the Secretary to issue leases for various uses of the public lands. Authorized uses encompass "[a]ny use not specifically authorized by other laws or regulations and not specifically forbidden by law" and include "residential, agricultural, industrial, and commercial" uses. 43 CFR 2920.1-1. See Regina B. Perry, 142 IBLA 278, 280-81 (1998); C Bar C Ranch Partnership, 132 IBLA 261, 267 (1995); Sierra Production Service, 118 IBLA 259, 262 (1991). Under 43 CFR 2920.0-6(a), land use authorizations are to be issued only at fair market value and only for uses that conform with BLM plans, policy, objectives, and resource management programs. That regulation also provides that "[c]onformance with land use authorizations will be determined through the planning process and procedures provided in part 1600 of this title."

BLM has discretion to reject a proposal for use of public lands if it conflicts with BLM objectives, responsibilities, or programs for management of the public lands involved. Perfect Ten Industries, 134 IBLA 118, 119 (1995). In this case, review of the criteria established in the MFP for issuance of a section 302 lease shows that issuance of such a lease to NPC would not be in conformance with the MFP.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James F. Roberts
Administrative Judge