



DESERT SPORTSMAN'S RIFLE & PISTOL CLUB, INC.

188 IBLA 339

Decided September 27, 2016



United States Department of the Interior  
Office of Hearings and Appeals

Interior Board of Land Appeals  
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DESERT SPORTSMAN'S RIFLE & PISTOL CLUB, INC.

IBLA 2014-88

Decided September 27, 2016

Appeal from a decision of the Bureau of Land Management denying an application for approval of a third party use on a portion of lands patented under the Recreation and Public Purposes Act. N-1114.

Set aside and remanded.

1. Administrative Procedure: Decisions;  
Appeals: Burden of Proof;  
Recreation and Public Purposes Act

A BLM decision must have a rational basis that is stated in the decision and supported by facts of record demonstrating that it is not arbitrary, capricious, or an abuse of discretion. 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 its decision is not supported by a record showing it gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

2. Administrative Procedure: Decisions;  
Appeals: Burden of Proof;  
Recreation and Public Purposes Act

BLM guidance and directives on how to determine what constitutes an appropriate third party use on lands patented under the Recreation and Public Purposes Act are not binding on the Board or the regulated community, but the Board may properly consider whether BLM failed to follow or misapplied them in deciding whether the decision on appeal is arbitrary, capricious, an abuse of discretion, or lacks a rational basis supported by the record.

APPEARANCES: Roni D. Jackson, Esq., General Counsel, InSite Wireless Group, LLC, Newport Beach, California, and Robert Barbera, President, Desert Sportsman's Rifle & Pistol Club, Inc., Henderson, Nevada, for Desert Sportsman's Rifle & Pistol Club, Inc.; Kevin Tanaka, Esq., U.S. Department of the Interior, Office of the Solicitor, Pacific Southwest Region, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Desert Sportsman's Rifle & Pistol Club, Inc. (Desert Sportsman or Club), appeals from a December 19, 2013, decision by the Red Rock/Sloan (Nevada) Field Office, Bureau of Land Management (BLM), which denied its request to add a cell tower on lands patented to Desert Sportsman under the Recreation and Public Purposes (R&PP) Act.<sup>1</sup> BLM officials are bound by directives contained in BLM Manuals and Instruction Memoranda, but they were not followed and/or misapplied in this case. We conclude BLM's decision is not adequately supported in law or fact and, therefore, set it aside and remand for further action by BLM.

*Legal Background*

The R&PP Act authorizes the Secretary of the Interior to sell or lease public lands to states, counties, municipalities, and their political subdivisions for any public purposes or "to a nonprofit corporation or nonprofit association for any recreational or public purpose."<sup>2</sup> It states that if the holder of an R&PP patent "attempts to transfer title to or control over these lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the Secretary, title to the lands shall revert to the United States."<sup>3</sup> The Secretary could not transfer public lands to corporations or associations or authorize any change in their patented use under the 1926 Act, but these limitations were removed when the R&PP Act was amended in 1954.<sup>4</sup> Shortly thereafter, the Secretary issued implementing rules, which are substantially the same as those now found in 43 C.F.R. Part 2740 (R&PP Act).<sup>5</sup>

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<sup>1</sup> See 43 U.S.C. §§ 869 through 869-4 (2012).

<sup>2</sup> 43 U.S.C. § 869(a) (2012).

<sup>3</sup> 43 U.S.C. § 869-2(a) (2012).

<sup>4</sup> Compare 44 Stat. 741, 741-42 (June 14, 1926), codified at 43 U.S.C. § 869 (1940), with 68 Stat. 173, 175 (June 4, 1954), codified at 43 U.S.C. § 869 (1958).

<sup>5</sup> See 19 Fed. Reg. 8835, 9120 (Dec. 23, 1954); 43 C.F.R. Part 254 (1954).

BLM rules largely mirror the R&PP Act and require patents issued thereunder to include a provision for title to revert to the United States if, “without the approval of the authorized officer,” such patented lands are “devoted to a use other than that for which the lands were conveyed.”<sup>6</sup> They also include a procedure for obtaining “permission to add to or change the use specified in a patent,” which is to submit an application under 43 C.F.R. 2741.4.<sup>7</sup> Pursuant to BLM’s application rule, patentees must describe their proposed use and present a “detailed plan and schedule for development of the project and a management plan which includes a description of how any revenues will be used.”<sup>8</sup> BLM has issued detailed guidance for implementing its R&PP rules, which include BLM Manual 2740, Recreation and Public Purposes, dated July 1, 1988 (BLM Manual), and Instruction Memorandum (IM) 2011-162, dated August 8, 2011.

The BLM Manual specifies what uses do and do not support issuance of an R&PP patent or lease.<sup>9</sup> It also addresses how and under what circumstances there can be an addition to or change in the permitted use for which R&PP lands were patented, which

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<sup>6</sup> 43 C.F.R. § 2741.9(a)(3); *cf.* 43 C.F.R. § 254.10(c) (1954).

<sup>7</sup> 43 C.F.R. § 2741.6(a); *cf.* 43 C.F.R. § 254.11(b) (1954).

<sup>8</sup> 43 C.F.R. § 2741.4(b); *cf.* 43 C.F.R. § 254.7(a)(1) (1954).

<sup>9</sup> BLM Manual 2740.21, Uses Permitted, states:

The ultimate or end use of the land and applicant qualifications are the dominant considerations in determining whether a lease or conveyance is appropriate under the act. The R&PP Act shall not be employed where the principal use is to be residential, agricultural, commercial, or industrial. Exceptions may be made where development and use are collateral and supportive to the primary recreation or public purpose use, such as a park ranger residence, prison industry facility, or marina. Where the principal developer/user cannot qualify under the act, and/or the use would basically provide only secondary or indirect benefits to the public-at-large, e.g., increased employment or lease revenues, lease or conveyance shall not be authorized.

*See* BLM Manual 2740.06(H) (“Lands shall not be leased or conveyed under the R&PP Act for uses that are aimed predominately at producing revenue; or uses that convey with it some possible speculative, remote, and incidental secondary benefits to the community or public-at large. For example, a government-entity proposal to acquire lands to facilitate industrial development for the economic betterment of the community could not be allowed based solely on the speculative, secondary economic benefits that may accrue from such a project.”).

BLM identifies as “supplemental” or “subsidiary” uses.<sup>10</sup> The BLM Manual makes clear that whenever a third party facility is involved in the proposed use, the patentee or third party must request permission from BLM, which will respond with a written “determination, stating whether the proposed third party facility is appropriate” and how the third party is to proceed.<sup>11</sup> Moreover, it identifies criteria for determining whether a third party use/facility is “appropriate”:

1. Whether the proposed third party facility will conflict with the purpose(s) for which the lands were leased or conveyed.
2. If a lease, whether the lessee opposes the proposed facility.
3. Whether the proposed third party facility involves a change in use from that for which the lands were leased or conveyed, or a transfer of control over some or all of the lands to the third party.
4. Whether the proposed third party facility is in furtherance of public purpose, or provides speculative, remote, and incidental secondary public benefits.
5. Whether the proposed use is one generally recognized as a responsibility and function of the third party versus the patentee or lessee.<sup>[12]</sup>

In order to apply these criteria as intended, BLM issued supplemental guidance that is now found in IM 2011-162.<sup>13</sup>

IM 2011-162 defines third party use as any improvements “owned or controlled by any party other than the lessee or patentee,” and it defines control as a “right granted by the patentee that makes the granted right superior to the patentee right” (e.g., a permanent easement but not a lease, right of way, or “other type of noncontrolling document.”).<sup>14</sup> It recognizes that determining what third party uses

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<sup>10</sup> BLM Manual 2740.22, Supplemental or Subsidiary Uses; *see also* BLM Manual 2740.22.A (Complementary or Minimum Impact Uses Which Do Not Involve a Third Party Facility) (“[Written BLM permission may not be required for proposed uses that do involve a third party and require only “little or modest land improvement, construction, or investment,” provided such use “(1) would serve or facilitate the use for which the patent or lease was issued; (2) is consistent with and does not adversely impact use of the lands for the purpose(s) for which the patent or lease was issued; or (3) would be a minor expansion of existing facilities.”]).

<sup>11</sup> BLM Manual 2740.22.B (Response to Requests for a Third Party Facility).

<sup>12</sup> BLM Manual 2740.22.C (Evaluation Criteria).

<sup>13</sup> *See* IM 2011-162 at 1 (“This Instruction Memorandum (IM) provides guidance on third party uses on Recreation and Public Purposes (R&PP) patents and leases to supplement the guidance found in [BLM] Manual 2740-22.”).

<sup>14</sup> IM 2011-162 at 1.

are appropriate is fundamentally different from deciding whether to grant a R&PP patent (e.g., for-profit corporations can own third party facilities that do not, themselves, provide a public benefit): “The third party need not be an entity that would qualify by itself for R&PP use, nor must the proposed use be a normally accepted type of R&PP use. However, the proposed use must provide some sort of direct or indirect support or benefit to the R&PP lands or be in furtherance of a public purpose.”<sup>15</sup> The IM uses examples to illustrate these concepts. Thus, a third party use is permissible and appropriate if it: (1) provides direct support or benefits to R&PP lands (e.g., a water pipeline across R&PP lands with taps for patentee water fountains or a new road on R&PP lands); (2) provides indirect support or benefits to R&PP lands (e.g., a cell phone antenna providing cell phone coverage on R&PP lands); or (3) furthers a public purpose (e.g., a new commercial radio tower that will be part of the emergency broadcasting system).<sup>16</sup> Echoing the Manual’s Evaluation Criteria, the IM notes that under each of its examples “there is no change in the use of the R&PP land, no interference with the purpose for which the R&PP was issued, and no passing of control.”<sup>17</sup>

#### *Factual Background and Decision on Appeal*

BLM issued a R&PP lease to Desert Sportsman, effective March 1, 1969, based on its proposed plan of development (POD) for a shooting range, which it constructed and has continuously operated and maintained ever since. Desert Sportsman exercised its option to purchase these leased lands and was granted patent to 480 acres for use as a recreational shooting range on August 26, 1986. BLM approved several POD amendments to improve and expand the shooting range during the 1990s, and on June 13, 2013, Desert Sportsman requested approval for a POD amendment to add electrical power and a third party use on its patented lands.<sup>18</sup>

Desert Sportsman described its proposed third party use as a cell tower with equipment shelter(s) to be constructed on a 3,600 sq. ft. site, operated and maintained

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<sup>15</sup> *Id.*

<sup>16</sup> *See id.* at 1-2.

<sup>17</sup> *Id.* at 1; *see id.* at 2 (“A proposed third party use must not in any way interfere with the use for which the patent was issued.”) (“Any revenue collected by the patentee for a third party use must be used on the R&PP lands.”); *see also id.* (Solar and wind power facilities permissible only if all power “is used only to serve the purpose of the R&PP,” including any energy credits “if the power generation exceeds the power used.”).

<sup>18</sup> *See* Letter Application from Desert Sportsman filed on June 13, 2013 (Application), at unpaginated (unp.) 1; Decision at unp. 1.

by InSite Towers, LLC (InSite).<sup>19</sup> In exchange, InSite would make electrical and phone service available to the shooting range, improve, pave, and maintain its unimproved access road from Highway 159, and pay rent that could only be used “to operate, maintain or improve Club facilities on the patented land.”<sup>20</sup> As the Club explained to BLM:

The Gun Club currently operates without power, water or telephone utilities. Water is hauled to the site, power is supplied by portable generators, and phone service is unavailable. To date, it has not been economically feasible for the Club to pay for those services to be extended given our distance from existing utilities. The high cost of bringing electrical power to the site has been a particular problem.<sup>[21]</sup>

InSite would provide space for wireless carriers on the cell tower, which would provide cell phone coverage to the shooting range, to visitors and BLM employees on adjacent public lands, including the Red Rock National Conservation Area (RRNCA or Red Rock NCA), and to law enforcement, search and rescue teams, and police and fire personnel in areas that do not currently have cell phone service.<sup>22</sup> According to Desert Sportsman, its proposed use was consistent with BLM guidance because the “electrical service, road improvements, cell phone coverage and rental payments would provide direct benefits and support to the R&PP lands” and because “expanded cell phone coverage would also provide public purpose benefits.”<sup>23</sup> Desert Sportsman represented that this proposed third party use “would not interfere with Club operations” and that under its proposed lease with InSite, “the Club retains responsibility for and control of all uses on the R&PP patented land,” including the 3,600 sq. ft. fenced area to be occupied by InSite.<sup>24</sup>

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<sup>19</sup> See Application at 1.

<sup>20</sup> Application at 1.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 1-2; SOR at 3 (“[InSite will provide tower space to] wireless communication providers (thereby making cell service available for Club management and users), in addition to providing space on the tower free of charge to [BLM] and other federal, state, and local public service and law enforcement entities.”).

<sup>23</sup> Application at 2.

<sup>24</sup> *Id.*; see SOR at 8 (“The proposed third party use would be authorized under a non-controlling document as defined by the IM, and would occupy less than one-tenth (1/10<sup>th</sup>) of an acre within the 480 acre patent.”) (citing IM 2011-162 at 1).

BLM denied Desert Sportsman's request because it determined "the Club's proposal is not an acceptable public purpose or use of R&PP Act land."<sup>25</sup> Its determination is based on three findings (or decision rationales): (1) the principal use of the proposed cell tower and equipment building are primarily commercial in nature; (2) the public may benefit from expanded cell phone service, but any such benefits would provide only incidental or secondary public benefits; and (3) fencing a 60' X 60' area on these R&PP lands would change and be in conflict with the permitted use of that fenced area as a shooting range and result in a transfer of control over "that portion of the R&PP Act lands where the communication facilities would be located."<sup>26</sup>

Desert Sportsman filed a timely appeal from the Decision, along with its SOR.<sup>27</sup> BLM filed a response (Answer), which Desert Sportsman replied to (Reply). This matter is now ripe for decision.

### *Discussion*

[1] The Board has resolved multiple appeals involving applications for a patent or lease under the R&PP Act,<sup>28</sup> but we could find no Board precedent involving a patentee's request for approval of a third party use on its patented lands. However, as with any decision, including those under the R&PP Act, the decision on appeal must have a rational basis that is stated in the decision and supported by facts of record demonstrating that it is not arbitrary, capricious, or an abuse of discretion; 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 its decision is not supported by a record showing it gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.<sup>29</sup>

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<sup>25</sup> Decision at unpag. 1.

<sup>26</sup> *Id.* at unpag. 2.

<sup>27</sup> See also Letter of Authorization for InSite to represent Desert Sportsman in this appeal, filed Feb. 27, 2014.

<sup>28</sup> See, e.g., *Maricopa Express Youth Railway, Inc.*, 173 IBLA 380 (2008); *Lamina Animal Association Club*, 153 IBLA 126 (2000); *Mary Coles*, 132 IBLA 398 (1995); *Clark County, Nevada*, 123 IBLA 150 (1992); *City of Chico*, 119 IBLA 136 (1991).

<sup>29</sup> See *City of Chico*, 119 IBLA at 138-39 (setting aside decision to reject R&PP patent application because it lacked a rational basis supported in the record); see, e.g., *James R. Stacy*, 188 IBLA 134, 138 (2016), and cases cited; *Mark Patrick Heath*, 175 IBLA 167, 176 (2008), and cases cited; *Michael Lederhause*, 174 IBLA 188, 192 (2008), and cases cited; *Wyoming Outdoor Council*, 170 IBLA 130, 144 (2006), and cases cited ("BLM must ensure that its decision is supported by a rational basis, which must be

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[2] BLM has issued a considerable body of guidance and directives for determining what constitutes an appropriate third party use on R&PP lands. Its guidance and directives are not binding on the Board or the regulated community, but since BLM employees “are obliged by the conditions of their employment to abide by the policies and to follow the instructions handed down by their Director,” we have held it proper for the Board to consider such guidance and directives in deciding whether “the decision on appeal is arbitrary, capricious, or an abuse of discretion.”<sup>30</sup> Moreover and as a result, BLM guidance and directives necessarily constrain the scope of its permissible discretion. The Board will therefore set aside a BLM decision if we conclude it is arbitrary, capricious, an abuse of discretion, or lacks a rational basis supported in the record, as may be shown if BLM failed to follow or misapplied applicable guidance or directives in making the decision on appeal.

Desert Sportsman challenges each of the Decision’s three findings. It counters BLM’s first finding, claiming “BLM policy does not require a ‘primary public purpose’ in the evaluation of a proposed third party use,” BLM Manual 2740.22 and IM 2011-162 do “not prohibit commercial use but, rather, describe[] how such commercial use can be authorized,” and its proposed third party use “would not change the principal use of the patented lands as a ‘recreational shooting range with a picnic area and restroom facilities.’”<sup>31</sup> Desert Sportsman challenges BLM’s second finding because it “failed to analyze and appropriately recognize the direct and indirect public benefit and support derived from the Club’s proposal.”<sup>32</sup> As to BLM’s

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stated in the decision as well as being demonstrated in the administrative record accompanying the decision.”); *Stove Creek Oil, Inc.*, 162 IBLA 97, 106 (2004).

<sup>30</sup> *Center for Native Ecosystems*, 182 IBLA 37, 53 (2012) (quoting *Joe B. Fallini, Jr. v. BLM*, 162 IBLA 10, 38 (2004)); see *Petan Co. of Nevada v. BLM*, 186 IBLA 81, 97 (2015) (“The Board [will] properly uphold[] BLM’s compliance with its policy direction, unless doing so is unreasonable or contradicted by statute or regulation.”), and cases cited; *Wyoming Outdoor Council*, 171 IBLA 153, 166-68 (2007); *Beard Oil Co.*, 111 IBLA 191, 194 (1989); *U.S. v. Kaycee Bentonite Corp.*, 64 IBLA 183, 214, 89 I.D. 262, 279 (1982); cf. *Clark County, Nevada*, 123 IBLA at 154-55 (affirming decision to amend R&PP lease because action consistent with R&PP solid waste guidance, IM 87-477).

<sup>31</sup> SOR at 3 (citing BLM Manual 2740.22 – Supplemental or Subsidiary Uses), 4 (quoting IM 2011-162), 10; see *id.* at 3 (“IM 2011-162 is intended to describe how BLM should authorize commercial uses of R&PP lands, and includes examples of acceptable commercial uses such as utilities, roads and cellular phone antennas.”); Reply at 2 (“The prohibition against a commercial use applies to an R&PP patent applicant, not to a third party use. BLM NV has applied the wrong standard.”).

<sup>32</sup> SOR at 4; see *id.* at 4-8; Reply at 3-4.

third finding, Desert Sportsman asserts its ground lease with InSite “clearly meets the IM definition of a non-controlling document,” Club officials will have access to the site under the lease, and the site “would be fenced for safety reasons and in compliance with the design standards of the Clark County Development Code Section 30.44.”<sup>33</sup>

BLM defends its first finding by claiming it has discretion to deny a third party use if its “primary purpose . . . is commercial and not in furtherance of a true public purpose.”<sup>34</sup> As to the second finding and its discounting of direct and indirect benefits to R&PP lands, BLM responds similarly: “While InSite will provide some benefits to the Club, those benefits are incidental or secondary to the primary purpose of the proposal, which is to construct and operate a commercial telecommunications facility.”<sup>35</sup> BLM defends its third finding by claiming there will be a “transfer of control over the area that will be fenced and dedicated to InSite’s telecommunication facilities,”<sup>36</sup> a “change in use from a shooting range to a commercial telecommunication facility,” and a conflict with the Club’s use of its land because the area beneath the cell tower and equipment sheds “could not be used as a shooting range, picnic area, or restroom.”<sup>37</sup> BLM claims safety and security fencing is permissible only if the third party use is “a necessary component” of the purpose for which the lands were patented under the R&PP.<sup>38</sup>

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<sup>33</sup> SOR at 8 (citing Proposed Lease); *see* Reply at 2 (“BLM simply ignores the IM on this point [and] does not even analyze the lease itself which give the Club access to the leased area and full control over access to others in the leased area.”).

<sup>34</sup> Answer at 6; *see id.* at 10 (“The primary purpose of the Club’s proposal is to allow InSite to construct and operate a wireless telecommunications facility for a profit.”); *but see* Proposed Lease at 1 (“[InSite]’s primary business is the leasing, subleasing, and licensing portions of the Telecommunications Facilities to its Customers”; Desert Sportsman’s “primary purpose by entering into this Agreement is to [provide a dust-free access road[,] electrical power[,] [and] wireless communications coverage on the Patented Property and surrounding area] available [to Desert Sportsman] and the members of the general public who utilize the R&PP Lands.”).

<sup>35</sup> Answer at 6; *see id.* at 9-10, 15.

<sup>36</sup> *Id.* at 8; *see id.* at 9 (“Given that Club officials currently enjoy unbridled access to, and both physical and managerial control of, the area proposed for InSite’s telecommunications facility, there will be a transfer of control from the Club to InSite and others.”).

<sup>37</sup> *Id.* at 7; *see id.* at 7-8 (“The Club could not allow gunfire, archery, or any other type of shooting to take place within or near the area once the telecommunications facility is built.”).

<sup>38</sup> *Id.* at 9.

The BLM Manual and IM provide direction and guidance for reviewing applications “to add to or change the use specified in a patent” and for determining whether a proposed third party use is permissible and appropriate.<sup>39</sup> For ease of analysis, we will first address each of the Decision’s three findings or decision rationales, especially the degree to which they followed, ignored, or misapplied BLM Manual 2740.22.C (Evaluation Criteria) and supplemental guidance in IM 2011-162. We conclude by addressing BLM’s claim that cell towers are not an appropriate use for R&PP lands because they would provide expanded coverage and wireless service to the public beyond the boundaries of those lands.

*1. Whether BLM properly denied Desert Sportsman’s request because the primary purpose of its proposed third party use was commercial in nature.*

BLM’s first decision rationale is based on a view that the “principal use” of a third party facility cannot be for “commercial purposes” unless it is “necessary” or “integral” to its permitted use under the R&PP Act.<sup>40</sup> While these principles apply when BLM is deciding whether to patent or lease R&PP lands, they do not apply in determining whether a third party use is appropriate or permissible under the BLM Manual and IM 2011-162, particularly since these R&PP lands were patented over 30 years ago. As Desert Sportsman correctly points out, its proposed third party use is a “supplemental or subsidiary use” under BLM Manual 2740.22, not a change in the principal use of these R&PP lands as a “recreational shooting range with a picnic area and restroom facilities,” which could be considered under BLM Manual 2740.21.<sup>41</sup>

Desert Sportsman claims “BLM policy does not require a ‘primary public purpose’ in the evaluation of a proposed third party use” and that BLM Manual 2740.22 and IM 2011-162 do “not prohibit commercial use but, rather, describe[] how such commercial use can be authorized.”<sup>42</sup> We agree. Since BLM’s decision

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<sup>39</sup> 43 C.F.R. § 2741.6(a).

<sup>40</sup> Decision at unp. 2; Answer at 12; *see* BLM Manual 2740.21 (“[R&PP patents and leases shall not issue] where the principle use is to be residential, agricultural, commercial, or industrial. Exceptions may be made where development and use are collateral and supportive to the primary recreation of public purpose use, such as a park ranger residence, prison industry facility, or marina.”).

<sup>41</sup> SOR at 3.

<sup>42</sup> *Id.* (citing BLM Manual 2740.22 – Supplemental or Subsidiary Uses), 4 (quoting IM 2011-162), 10; *see id.* at 3 (“IM 2011-162 is intended to describe how BLM should authorize commercial uses of R&PP lands, and includes examples of acceptable commercial uses such as utilities, roads and cellular phone antennas.”); Reply at 2

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rationale is not consistent with or supported by BLM Manual 2740.22 or IM 2011-62, we reject BLM's using a criterion or standard that would determine a third party use not to be appropriate if its "primary purpose" is commercial in nature or intended to make a profit.

2. *Whether BLM properly denied Desert Sportsman's request because its proposed use would provide only incidental or secondary public benefits.*

To be appropriate, the IM states the "proposed use must provide some sort of direct or indirect support or benefit to the R&PP lands or be in furtherance of a public purpose," and if it is to further a public purpose, the third party use must do more than provide "an incidental or secondary public benefit."<sup>43</sup> BLM describes what is in furtherance of a public purpose and what constitutes an incidental or secondary public benefit by using the example of "a new tower for a radio station":

Although a radio station may be considered to be a public benefit, it does not normally provide direct or even indirect support to the R&PP land. Even if the patentee received income in the form of rental from the radio station, this would be considered a secondary public benefit. However, if the radio station was part of the emergency broadcast system, it would meet the part of the public purpose definition in BLM Manual 2740 related to safety.<sup>[44]</sup>

BLM's Decision ignores this example and Desert Sportsman's representation that its third party use would have "public purpose benefits" because it would expand cell phone coverage "for public land visitors and BLM employees on the adjoining Red Rock NCA and to law enforcement, search and rescue[,] and emergency services personnel in areas currently without cell phone service."<sup>45</sup> Moreover, according to the Club, this proposed use would provide a public safety benefit "by making cellular, [personal communication service], and broad band service available to the over one million members of the public-at-large who visit adjacent public land (RRNCA) and use adjacent public highways each year," to "federal and local law enforcement agencies who train at Club facilities and patrol adjacent public lands," and to search and rescue teams, BLM law enforcement and fire personnel, local law enforcement and fire

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("The prohibition against a commercial use applies to an R&PP patent applicant, not to a third party use. BLM NV has applied the wrong standard.")

<sup>43</sup> IM 2011-162 at 1, 2.

<sup>44</sup> *Id.* at 2.

<sup>45</sup> Application at 2; *see* SOR at 5-6.

personnel, and Red Rock NCA staff by having access to “wireless coverage which is not now available in RRNCA.”<sup>46</sup>

BLM does not deny that public purpose and safety benefits would be realized by this proposed use, but it suggests they are irrelevant because expanded cellular coverage need not be provided by these R&PP lands (*i.e.*, other communication sites may be available elsewhere).<sup>47</sup> We are unpersuaded. Since it is uncontroverted that this proposed use would make cell phone service newly available in the area to first responders, emergency service personnel, law enforcement, and search and rescue teams on public and private lands, this use would be like the emergency broadcast service that caused the new radio tower for a radio station to be in furtherance of a public purpose and more than merely an incidental or secondary public benefit. We do not find BLM’s second finding/rationale to be consistent with or supported by BLM Manual 2740.22 or IM 2011-62.

BLM also ignored whether this proposed use is also appropriate because it provides a “direct or indirect support or benefit to the R&PP lands,” which the IM defines by way of example:

An example of direct support would be a water pipeline right-of-way across R&PP lands to reach a new housing subdivision, and as part of the construction, water taps were provided to the R&PP patentee for drinking fountains and a sprinkler system to enhance a city park. Another example would be a new road that crosses R&PP lands and would provide public access to a part of the patent that did not have adequate access. An example of an indirect benefit would be the placement of an antenna on a light pole that would provide cellular service to a portion of the city. If the city used cellular phones to communicate with their personnel, cell coverage now available in the R&PP area would be an indirect benefit to the city.<sup>[48]</sup>

The direct benefit to R&PP lands from water taps in the pipeline example is similar to the electrical service to be provided by InSite, as in each case, the R&PP lands receive a direct benefit that is secondary to the proposed third party use (*i.e.*, providing water to a new housing development or providing cell service to lands outside of the R&PP patent). There is also a direct benefit to these R&PP lands from paving its access road

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<sup>46</sup> SOR at 5, 6.

<sup>47</sup> See Answer at 13-14.

<sup>48</sup> IM 2011-162 at 1; see Reply at 2-4.

to make it “dust free” and reduce fugitive dust in this desert environment and an indirect benefit to these R&PP lands from their having cellular and internet service.

BLM responds on appeal by claiming these benefits are “secondary or incidental” and not “necessary or integral” to the use of these R&PP lands as a shooting range,<sup>49</sup> which may be useful concepts for deciding whether to issue patent for a particular use under BLM Manual 2740.21. However, we do not find any support for using them to determine whether a proposed third party use is appropriate under BLM Manual 2740.22 or IM 2011-162. BLM also disregards the direct benefit the Club would receive from having electrical service and dust-free access in this desert environment, claiming the Club can continue to use a diesel generator for its electrical power (and emit greenhouse gases) and that a paved, dust free access road is “not needed for Club officials and its members to have reasonable access to the Club.”<sup>50</sup> BLM’s claims miss the point and do not address whether a proposed third party use will provide “direct or indirect support or benefit to the R&PP lands” under IM 2011-162. In sum, we do not find BLM’s second finding/rationale to be consistent with or supported by BLM Manual 2740.22 or IM 2011-62.

3. *Whether BLM properly denied Desert Sportsman’s proposed use because there would be a transfer of control over its fenced area and also a change to and conflict with the permitted use of that area as a shooting range.*

BLM’s third rationale is premised on the proposed cell tower and its equipment being operated and maintained in a fenced enclosure with limited access by Club members, from which BLM concludes: “[InSite] would control that portion of the R&PP Act lands where the communication facilities would be located.”<sup>51</sup> Desert Sportsman represents that the 60’ X 60’ fenced enclosure for the cell tower and equipment sheds is for safety reasons, to comply with Clark County, NV Development Code Section 30.33, and to protect Club members, visitors, and other users of its shooting ranges. Nonetheless, BLM claims there would be a transfer of control to 3,600 sq. ft. of the Club’s 480 acre patent (20,908,800 sq. ft.): “Given that Club officials currently enjoy unbridled access to, and both physical and managerial control of the area proposed for InSite’s telecommunications facility, there will be a transfer of control from the Club to InSite and others.”<sup>52</sup>

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<sup>49</sup> Answer at 15.

<sup>50</sup> Answer at 10; *but see Lloyd Heger*, 121 IBLA 321, 326 (1991) (amendment of a shooting range POD was needed to require mitigation and monitoring of excessive dust generated by an access road built to serve the range).

<sup>51</sup> Decision at unpag. 2.

<sup>52</sup> Answer at 9.

IM 2011-162 addresses transfer of ownership and control over R&PP lands, recognizes that a title transfer is an easily identified, definitive process, but that a transfer of control is much less so. It then states:

[C]ontrol is defined as any right granted by the patentee that makes the granted right superior to the patentee right. An example would be an easement. Most easements are a permanent encumbrance on the title and usually make the grantor's rights subservient to the grantee's rights. When this happens, control has passed from the patentee to the easement holder.<sup>[53]</sup>

InSite will have quiet enjoyment of its leased premises and be able to exclude the public from its leased area for safety and security reasons, as required by the Development Code.<sup>54</sup> However, a lease right to quiet enjoyment and the fencing of R&PP lands for safety and security reasons does not render Desert Sportsman's rights subservient to those of InSite under the Proposed Lease. We do not find BLM's finding there was a transfer of control in this case consistent with or supported by BLM Manual 2740.22.C.3 or IM 2011-62.

The Evaluation Criteria include whether the proposed third party facility will conflict with or change the permitted use of the R&PP lands.<sup>55</sup> BLM takes the view there is a conflict and change in use to the extent the proposed use and permitted use cannot both occupy the same land at the same time. According to BLM, fencing a 3,600 sq. ft. area on these 480 patented acres "conflicts with the purpose for which the BLM issued patent" because "a telecommunications facility forecloses the use of that land as a shooting range."<sup>56</sup> It also claims: "While the rest of the patented land would still be available for such use, the land needed to construct and operate the

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<sup>53</sup> BLM Manual 2740.22.C.3; IM 2011-162 at 1; *see id.* ("If a third party use is to be allowed on R&PP patented land, it has to be in a form such as a right-of-way, lease, agreement, or other type of noncontrolling document."); Proposed Lease at 1 ("[T]his Agreement does not transfer ownership or control of the Patented Property to [InSite]."); Application at 2 ("The proposed use would not interfere with Club operations and the agreement between the Club and InSite would be in the form of lease by which the Club retains responsibility for and control of all uses on the R&PP patented land.").

<sup>54</sup> *See* Proposed Lease, Article 16. Quiet Enjoyment, Title and Authority.

<sup>55</sup> BLM Manual 2740.22.C.1, 3.

<sup>56</sup> Answer at 8.

telecommunications facility would necessarily change in use from a shooting range to a commercial telecommunications facility.”<sup>57</sup>

The record shows the proposed cell tower in this case would be overlooking a public highway less than 200 yards away in an area that could not be used as shooting range due to safety and noise concerns.<sup>58</sup> As such, the record does not support a BLM finding that this ground lease of 3,600 sq. ft. would conflict with or change the permitted use of these patented lands as a shooting range, which has existed for nearly 50 years on its other 20,905,200 sq. ft.<sup>59</sup> In addition, we reject BLM’s claim that security and safety fencing can never be used at a third party facility unless it is integral and necessary to the purpose for which the lands were patented, which is just another way of saying all third party uses must themselves be a use permitted by BLM Manual 2740.21, notwithstanding express guidance in the IM.<sup>60</sup>

4. *Whether BLM properly determined a cell tower was not an appropriate use for R&PP land because it would provide cellular and wireless internet service beyond the patent or leasehold.*

The proposed third party use in this case has obvious parallels to the IM’s cellular antenna example (for identifying indirect benefits to R&PP lands from cell service) and to its radio tower example (for identifying what is needed for that use to further a public benefit and be more than an incidental or secondary public benefit). Rather than use these examples to find this proposed use appropriate, as discussed above, or explain why they are inapplicable under the facts of this case, BLM ignores

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<sup>57</sup> *Id.* at 7.

<sup>58</sup> See SOR at 3, 8 (“The proposed site is within an effective noise buffer area between the Club ranges and Highway 159, and, as such, is not viable for use by other Club facilities.”); SOR, Exs. D, Proposed InSite Site Plan (site less than 200 yards from Highway 159), H, Proposed InSite Cell Tower (artist rendering of cell tower and Highway 159), and I (aerial photo of site and Highway 159); *cf.* *Mary Coles*, 132 IBLA 398 (decision to lease R&PP lands for a shooting range reversed because its environmental assessment failed adequately to consider noise impacts on neighbors).

<sup>59</sup> See BLM Manual 2740.22.C. 1, 3; Proposed Lease, Article 6, Interference (“[InSite] shall not use the Leased Premises in any way which interferes with the uses of the Property by [Desert Sportsman].”); see also Proposed Lease at 1 (“[InSite use] authorized by this Agreement does not adversely impact [Desert Sportsman]’s use of the Patented Property pursuant to the terms of the Patent.”).

<sup>60</sup> See IM 2011-162 at 1 (“[The proposed third party use] need not be . . . a normally accepted type of R&PP use.”); BLM Manual 2740.21, Uses Permitted.

them. BLM relies instead on a discussion of solar and wind power generating facilities that was added to the IM in 2011.

IM 2011-162 includes a discussion of when and under what circumstances solar and wind power facilities can be permitted on R&PP lands:

A recent occurrence that has taken place on some R&PP patents is the proposed construction of solar energy facilities on the lands administered by the patentee. This scenario could also occur if a patentee wishes to construct a wind energy generating facility. The BLM has determined that such uses are not in violation of the terms and conditions of the R&PP patent, as long as the power generation facilities do not become a primary purpose or use of the R&PP lands and the power generated is used only to serve the purpose of the R&PP lands. It is also allowable for the patentee to build credits for power generation if the power generation exceeds the power used, provided that the power credits would also only be used to support the purpose of the R&PP. However, facilities proposed for power generation are not allowable if the excess generation capacity is used to either support another private entity, other facilities, or sold on the open market.<sup>[61]</sup>

This discussion addresses the unique circumstances of solar and wind power facilities and prohibits their selling or using excess power off-site. In this case, BLM applied that prohibition to this proposed cell tower because “excess [wireless] capacity will be sold on the open market (to wireless carriers).”<sup>62</sup> However, extending this IM language to cell phone towers ignores fundamental differences between solar/wind power generation and cell phone towers. Solar and wind power facilities can be built for homes and used only on the patent/leasehold, which is the use permitted under the IM. Citizen band radio antennas are similar, but cell phone towers are not. Expanded cellular service from a cell tower does not respect property boundaries, which BLM mischaracterizes as “excess wireless capacity” in order to force-fit its decision under this IM language.

Potentially more important to our resolution of this appeal, the Decision appears to establish a policy of prohibiting cell phone towers on R&PP lands, not just InSite’s. However, nowhere in the decision or on appeal does BLM explain why the Decision did not use the above-described cellular antenna and radio tower examples from the IM,

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<sup>61</sup> IM 2011-262; *see* Decision at unp. 2; Answer at 16-17; *compare* IM 2011-162 with IM 99-179, dated Aug. 25, 1999 (no discussion of solar or wind power).

<sup>62</sup> Decision at unp. 2; *see* Answer at 16-17.

which have been in place since 1999, or why they do not apply to cell phone towers. But if BLM believes they and the principles they illustrated were eclipsed by this solar/wind power language, it fails to explain why these examples and illustrations were retained, as the cellular antenna served more than just city employees on R&PP lands and the new radio tower on R&PP lands transmitted more than just emergency broadcasts. Had BLM intended to prohibit cell and radio towers on R&PP lands based on language added in 2011 for solar and wind power facilities, it could have easily said so, but BLM did not.

We reject BLM's claim that it established a broad, new policy in 2011 and find it failed to follow IM 2011-162 for the proposed third party use at issue in this case.

Desert Sportsman met its burden to demonstrate that the Decision is not supported by a record showing BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. In addition, BLM failed to follow BLM Manual 2740.22, its Evaluation Criteria, and supplemental guidance in IM 2011-262 in determining whether this proposed use is appropriate or permissible for these R&PP lands. We therefore conclude the Decision is arbitrary, capricious, an abuse of discretion, and/or lacks a rational basis based on the record presented and because BLM failed to follow or misapplied BLM Manual 2740.22 and IM 2011-162.

Accordingly, pursuant to the Board's delegated authority under 43 C.F.R. § 4.1, the decision on appeal is set aside and the matter remanded to BLM for further consideration.

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/s/  
James K. Jackson  
Administrative Judge

I concur:

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/s/  
Christina S. Kalavritinos  
Administrative Judge