

Editor's note: Reconsideration denied by Order dated June 18, 1991

JOYCE AND TONY PADILLA

IBLA 90-540

Decided March 25, 1991

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying protest against direct sale. COC-51078.

Set aside and remanded.

1. Administrative Procedure: Generally--Bureau of Land Management--Federal Land Policy and Management Act of 1976: Public Participation--Federal Land Policy and Management Act of 1976: Sales--Rules of Practice: Protests

BLM is required to fully adjudicate a protest against a proposed land sale where it raises reasonable doubt about the correctness of BLM's proposed action. BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so.

2. Federal Land Policy and Management Act of 1976: Sales

Under sec. 203(a)(3) of FLPMA and 43 CFR 2710.0-3(a)(2), BLM is authorized to sell a tract of public lands where, as a result of land-use planning, it determines that disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values. A decision to proceed with a sale to a county of public lands abutting its existing solid waste disposal facility will be set aside and the case remanded for further consideration where there is a comparably sized parcel of private land for sale that also abuts the existing facility, and where BLM has made no showing that the expansion of the county's facility could not be achieved prudently or feasibly by its acquiring the private land.

3. Federal Land Policy and Management Act of 1976:
Land-Use Planning--Federal Land Policy and Management
Act of 1976: Sales

A tract of public land may be sold only where, as a result of land use planning under 43 U.S.C. § 1712 (1988), the Secretary determines that the sale meets one of the criteria of 43 U.S.C. § 1713(a) (1988). When a tract is nominated to be offered for sale under 43 CFR 2710.0-6(b) but the proposed sale does not conform to the existing land-use planning document, the proposed sale must be considered in accordance with either plan amendment or planning analysis procedures.

APPEARANCES: Joyce and Tony Padilla, pro sese; Tom Walker, Associate State Director, Colorado State Office, Bureau of Land Management; John James McFarland et al., for the Board of County Commissioners of Chaffee County, Colorado.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Joyce and Tony Padilla (appellants) appeal from the August 6, 1990, decision of the Colorado State Office, Bureau of Land Management (BLM), rejecting their protest against a proposed direct sale of Federal lands to Chaffee County, Colorado (the County), for use as a solid waste disposal site.

The record reveals that the County is operating a solid waste disposal site in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of sec. 21, T. 51 N., R. 8 E., New Mexico Principal Meridian, under lease C-18270, issued to the County on February 1, 1974, under the Recreation and Public Purposes Act (R&PP), 43 U.S.C. § 869 (1988). On March 1, 1990, the County, through its administrator, wrote to the Royal Gorge, Colorado, Resource Area Office, BLM, stating as follows:

At its regular meeting on February 27, 1990, the Chaffee County Board of Commissioners voted to purchase land adjacent to the County's present lease, under the provisions of Section 203 of the Federal Land Policy and Management Act of 1976 [(FLPMA), 43 U.S.C. § 1713(a)(3) (1988)].

At the present time, the Board [of Commissioners] is interested in purchasing the entire 120 acres that is available; however, cost will be a factor in its decision. Does this present a problem? If so, please advise.

Although not styled as such, BLM evidently treated this letter as the County's "nomination" or "request" to have this specific tract of public lands offered for sale under 43 CFR 2710.0-6(b).

On March 5, 1990, the Area Office received a letter of protest from appellant Joyce Padilla, responding to a local news report of the proposed

sale. Appellants also apparently sent a second letter to BLM, not contained in the record, concerning alleged burying of wood preservative products at the site and their status as hazardous material.

The record contains a County property proof listing showing that appellants own a triangular 3.85-acre parcel of land (No. 353321200061) in the E½ NW¼ of sec. 21 east of Highway 285. 1/ Appellants' property abuts not only the lands sought for purchase, but also those subject to R&PP lease C-18270.

On March 9, 1990, BLM responded to appellants' letters, indicating that their concern about the burial of wood preservatives at the existing site was being investigated by the Hazardous Materials and Waste Management Division, Colorado State Department of Health. As to their objections to the proposed sale, BLM advised appellants that it would be issuing a public Notice of Realty Action (NORA) and that they would have 45 days to comment and/or protest the sale.

On March 22, 1990, the Royal Gorge Resource Area Office published the NORA concerning the direct sale to the County under section 203(a) of FLPMA. 55 FR 10697 (Mar. 22, 1990). The NORA stated as follows:

The County of Chaffee has requested a direct sale COC-51078 for the purpose of acquiring land for public purposes, specifically, landfill expansion. The proposal is to include conveyance of mineral interest in the sale. The sale will be completed subject to valid existing rights. * * * [T]he land is hereby segregated from appropriation under the public land laws, including the mining laws, pending decision and action on the sale proposal for 2 years or until patent is issued.

The NORA provided 45 days, until May 7, 1990, for concerned parties to file comments. No mention was made of amendment of the existing land-use plan to allow for sale of the parcel.

By letter dated March 21, 1990, and filed after the publication of the NORA, appellants again voiced their opposition to the sale. By letter dated March 31, 1990, they once again protested the proposed sale. 2/ These letters vary only slightly, stating (quoting from the March 31 letter, evidently authored by appellant Joyce Padilla):

Since I own the property adjacent to the [property proposed for sale to the County, this] sale would adversely affect me. My

1/ The record variously describes the highway as "State Highway 285" and "U.S. Highway 285." We shall refer to it simply as "Highway 285."

2/ The first letter was addressed to a realty specialist and was written prior to the issuance of the NORA. The second letter was evidently in response to the NORA.

husband is disabled and unable to work, which [means] we cannot move. I had my property appraised March 14, 1990. Due to the scarcity of small acreages available in the area and what the property value of estimate is and variance permits availability, it is quite unlikely that I could move to another area.

There is 240 acres that borders South of the landfill that is for sale. It would be more suitable for landfill.

Appellants also asserted that the chosen property is not suitable for landfill, citing a U.S. Department of Agriculture Conservation Service description of the land as "severely eroded sediments." Referring to unidentified regulations pertaining to solid waste disposal and facilities, they expressed their concern that the land is a low-lying area that drains into the Arkansas River and that solid waste could be flooded into that river. Appellants referred to the effects that a solid waste disposal site would have on the use and value of surrounding properties, as well as on wind and climatic conditions. Appellants also asserted that the County had not complied with minimum standards at the existing facility.

The lands referred to by appellants as bordering south of the landfill are privately owned and are described in BLM's May 15, 1990, preliminary estimate appraisal of the lands covered by the County's application to purchase:

Three hundred acres immediately south of the subject property is currently on the market. It lists for \$300,000 (\$1,000/acre), and has been on the market for two years. It has one share in Bowen Ditch, a small year round stream, high-way frontage, all mineral rights, fencing, and borders BLM on the east. The only offer has been on a 35-acre parcel within the 300 acres, but the owner refused to split up the total property.

This parcel is enumerated on the County proof listing as No. 353321400062 and is shown to contain 310.70 acres. It is depicted on an accompanying County plat as abutting the existing landfill site across its southern border.

On August 6, 1990, the Associate State Director, Colorado State Office, BLM, denied appellants' protest, holding:

In your letter dated March 21, 1990, and in your protest dated March 31, 1990, you present numerous facts and opinions concerning the suitability of the public lands for use as a landfill. Chaffee County has determined that extending the present landfill onto the public land is desirable and that the land is probably suitable for that use. The State Health Department will require a thorough analysis of land suitability

for use as a landfill and a complete engineering and operation plan before approval.

Our consideration at this time is whether the land is suitable for disposal out of federal ownership, or whether the land should be retained. You have not presented any substantive reason why the sale of this property to Chaffee County should not occur. Therefore, it is our conclusion that this land is suitable for sale to the county.

BLM concluded that the NORA would stand as published. The Padillas appealed from the denial of their protest.

On August 29, 1990, the Associate District Manager, Canon City, Colorado, District Office, BLM, approved a joint Environmental Assessment (EA) and Land Report (LR) concerning the proposed sale. This document, not referred to by the Associate State Director in his decision dismissing appellants' protest, contains the substantive basis supporting BLM's decision to approve the land sale and concludes that there will be no significant impact on the human environment from the proposed sale.

The only references to land use planning in the record appear in BLM's EA/LR. The EA quotes Objective 1 of the Royal Gorge Management Framework Plan (MFP) dated October 25, 1979, stating that BLM will "satisfy local government needs for land for public purposes as needs are identified" (EA at 1; see also LR at 1). Although the sale of land to the County for use as a landfill may be serve a public purpose, there is no evidence that the MFP expressly included these lands as suitable for sale. Indeed, since the EA says the area is leased for grazing and the lessee has agreed to relinquish his lease, it may be presumed that the MFP treats the area as suitable for grazing.

The EA weighs the benefits and drawbacks of the proposed sale, noting the "general public benefits by being able to continue disposing of wastes at an operated site," so that "indiscriminate dumping" is less likely to occur at unauthorized and unregulated dumps. The lands are described in the EA as having moderate scenic quality, but high visual sensitivity. While tacitly recognizing that use of the lands for a solid waste disposal site would destroy their scenic quality, the EA notes that the visual intrusion of unauthorized dumps that would appear if the land is not sold would have a more adverse affect on visual resources in the area. Id.

In the EA, BLM found the location of the present site to be ideal, being between the two major population centers of Salida and Buena Vista and near Highway 285 (EA at 2). It was also found that changing the location of the dump would require expensive long distance hauling (EA at 4).

As to water quality, the EA/LR noted that "the area is an exposed aquifer of quaternary valley fill and glacial deposits. There is no known water movement through or over the site except for occasionally down a dry

wash that crosses the NE¼ NE¼. No effect [is] expected" (EA at 4). The lands were found not to be in a flood plain (EA at 3).

As to erosion at the site, the EA noted that, without erosion control structures, runoff could be severe occasionally, but with proper design, the problem could be minimized (EA at 4). Further, BLM made the point in the EA that indiscriminate dumping, which would likely increase if the sale were not made, frequently occurs away from main roads, so that offroad travel can initiate vegetative loss and erosion (EA at 5).

BLM has requested that we grant expedited consideration to this appeal, owing to the necessity of having the status of the County's waste disposal system clarified by January 30, 1992, when its present facility will be "cut off." The County has appeared making a similar request. By the issuance of this decision, these requests are granted.

[1] We first consider BLM's handling of appellants' protest. In his August 6, 1990, decision, the Associate State Director ruled that appellants had not presented any substantive reason why the sale should not occur. We disagree. Appellants' challenge to BLM's decision to sell the property did raise substantive questions that must be resolved prior to the approval of the sale. Specifically, they assert that the sale should not proceed because: (1) transfer of the lands will harm them; (2) the lands in question are not suitable for landfill; (3) there is other land in the area that is more suitable for use as landfill; (4) use of the land for landfill will result in pollution of the Arkansas River, as well as two springs and two irrigation ditches running through the area; and (5) the County has violated governing standards for landfill operation in the past.

BLM is required to fully adjudicate a protest where it raises reasonable doubt about the correctness of BLM's proposed action. In such case, it may be appropriate for BLM to investigate the grounds of the protest and/or direct the protestant to provide additional information. Patricia C. Alker, 62 IBLA 150 (1982); Lee S. Bielski, 39 IBLA 211, 86 I.D. 80 (1979). At the least, we hold, BLM should specifically address the substantive questions in its decision ruling on the protest and, if it decides to reject them, should explain its reasons for doing so. The Associate State Director's decision failed to meet this obligation and therefore was not sufficient. 3/

[2] Section 203(a)(3) of FLPMA provides:

A tract of the public lands * * * may be sold under this Act where, as a result of land use planning required under section 1712 of this title, the Secretary determines that

3/ As we are remanding this case to BLM for further consideration, it will be appropriate for it to address these objections in the context of any future decision on the proposed sale. By remanding the matter, we do not imply any opinion on the merits of appellants' objections.

* * * * *

(3) disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership.

43 U.S.C. § 1713(a)(3) (1988); 43 CFR 2710.0-3(a)(2). Sales must be made at a price not less than their fair market value as determined by the Secretary. 43 U.S.C. § 1713(d) (1988); 43 CFR 2710.0-2.

Appellants argue that BLM should not offer these lands for sale to the County, in view of the availability for immediate sale of private lands, also abutting the existing facility to the south. We find no indication that BLM determined that "important public objectives * * * cannot be achieved prudently or feasibly on land other than public land." 43 U.S.C. § 1713(a)(3) (1988); 43 CFR 2710.0-3(a)(2). The present record is insufficient to support a conclusion that the County could not meet its needs for expanded landfill capacity by acquiring the private lands to the south of the existing facility. There is no evidence that the County made any effort to acquire these lands. There is no comparison showing that the lands south of the existing waste disposal facility are so much less suitable for acquisition that it would not be prudent or feasible to expand the facility using these lands. In these circumstances, BLM's decision approving the sale is properly set aside and the case remanded for further consideration.

[3] We also find no indication that BLM has complied with the requirements of 43 CFR 2711.1-1(a), under which tracts of public lands may only be offered for public sale in implementation of land-use planning prepared and/or approved in accordance with 43 CFR Subpart 1601. See also 43 U.S.C. § 1713(a) (1988); 43 CFR 2710.0-6(a).

The BLM Manual provisions governing public sales procedures leave no room for doubt as to the required procedures for section 203 sales.

.11 Identification of Tracts by Land Use Planning. A tract of public land can be offered for sale only if the planning requirements of 43 CFR Part 1600 and BLM Manual Sections 1601-1632 have been met and the sale is consistent with the terms, conditions, and decisions of the approved plan or plan amendment.

A. Planning Conformance. A proposal to sell public land is considered to be in conformance with an approved land use plan if: the planning decision states that the land can be offered for sale under Section 203 of FLPMA, the land is identified by tract

(or map) in the land use plan, and the land use plan clearly states which of the disposal criteria applies.

B. Documentation. Determination of a proposed action's conformity with a land use plan shall be made by the District or Area Manager. Such determination shall be in writing and shall explain the reasons for the determination (see BLM Manual Section 1617.33B).

BLM Manual Rel. 2-251 (Mar. 2, 1987) section 2711.11. There is no indication that the MFP stated that this tract could be offered for sale under section 203 of FLPMA or that the tract was identified by tract or map in the MFP. Thus, it does not appear it could properly have considered that the sale of this tract of land to the County is "in conformance with an approved land use plan" under section 2711.11A. In any event, BLM has not provided us with any written "determination of [the] proposed action's conformity with" the MFP by the District or Area Manager explaining the reasons for the determination, as required by section 2711.11B of BLM Manual Rel. 2-251 (Mar. 2, 1987).

Here, BLM's land-use planning document is evidently the October 25, 1979, Royal Gorge MFP, although the record does not indicate whether this MFP has been determined to be valid, i.e., in conformance with the standards of 43 CFR 1610.8. See section 1618.1 of BLM Manual Release 1-1364 (Apr. 6, 1984). If the MFP is valid but the proposed sale does not conform with it, and if BLM believes the proposed sale warrants further consideration, BLM may consider the proposal through a plan amendment. An amendment to an MFP follows the standards and procedures for amending a Resource Management Plan. See 43 CFR 1610.8(a)(3)(ii) and 1610.5-5; sections 1617.42 and 1618.12 of BLM Manual Rel. 1-1364 (Apr. 6, 1984). If the MFP is not valid, the proposed sale may be considered through a planning analysis, using the process described in 43 CFR 1610.5-5 for amending a plan. 43 CFR 1610.8(b)(2); see section 1618.3 of BLM Manual Rel. 1-1364, (Apr. 6, 1984); see also section 2711.1, Step 2b, of BLM Manual Rel. 2-251, (Mar. 2, 1987).

The procedures for amending the MFP are specified in the BLM Manual:

.42 Amendment. A plan amendment is used to consider a proposal or action that is not in conformance with the plan, but warrants further consideration before the plan is revised. Proposals considered through an amendment can span the spectrum from modest sorts of changes, to changes of a substantial nature for a portion of the plan. Regulation provisions and requirements for making plan amendments apply equally to RMP's and MFP's. There are three categories of plan amendments. These categories provide appropriate variation in procedures for use in considering different kinds of proposals. The variations are based on the significance of environmental impacts and the role of resource management decisions in a program activity decision sequence.

* * * There are public participation, interagency coordination, and consistency requirements associated with each category of amendment.

Section 1617.42 of BLM Manual Rel. 1-1363 (Apr. 6, 1984). Procedures dictated by 43 CFR 1610.5-5 for plan amendment require appropriate environmental review of the proposed change, public involvement, interagency coordination and consistency determinations, and other appropriate analysis. Further, 43 CFR 1610.5-5 dictates that, "[i]n all cases, the effect of the amendment on the plan shall be evaluated." The BLM Manual requires that documentation is required for every such plan amendment. Specifically, "planning issues and criteria" must be addressed (section 1602.32 of BLM Manual Rel. 1-1358 (Apr. 6, 1984)).

BLM's NORA does not meet the requirements of a plan amendment. It does not mention planning issues or allude to any evaluation of the effect of the amendment on the plan or consideration of the need for interagency coordination. See 43 CFR 1610.5-5. It was prepared prior to the completion of the EA and thus predated that document's Finding of No Significant Impact, in apparent contravention of the procedure established by 43 CFR 1610.5-5(a). A joint NORA/plan amendment notice may be published under 43 CFR 1610.5, but it must meet the requirements of both 43 CFR 1610.5 and 2711.1-2(a). See 43 CFR 2711.1-2(e).

We do not regard these omissions as insignificant. BLM's failure to address the sale in the context of land planning or to coordinate action with other agencies, including the Environmental Protection Agency (EPA), might have resulted in a failure to address alternate forms of disposal, including sale under the R&PP Act, as amended. 4/ The importance of

4/ The question of whether the section 203 of FLPMA is appropriate for this sale, rather than the R&PP Act, is presented in this case, although it is not before us.

On Nov. 10, 1988, Congress enacted the Recreation and Public Purposes Amendment Act of 1988, 43 U.S.C. § 869-2 (1988). Section 2(b) of this Act, codified as 43 U.S.C. § 869-2(b) (1988), specifically addresses conveyance of land under the R&PP Act for solid waste disposal. Under the amendments, lands can be conveyed for public purposes, including use as a solid waste disposal facility, to State and local governments for less than fair market value. See H.R. Rep. No. 934, 100th Cong, 2d Sess. 3 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 5352. The purpose of the amendment to the R&PP Act is to exempt conveyances of areas used for solid waste disposal from the usual reverter provisions of the R&PP Act, to avoid the possibility of future liability to the United States from operation of the facility.

Id. at 4, 5353. The amendments also provide for the conversion of previously issued R&PP Act disposal site leases and patents to patents without reverter.

Certain responsibilities are imposed on the Department and the community under the amendments. Before making conveyance for use as solid

complying with planning requirements prior to sale of public lands under section 203 of FLPMA was emphasized in the Preamble to the 1984 amendments to the sales procedures regulations, particularly where (as here) the lands are being sold following nomination:

A number of comments objected to the public nomination process for the identification of lands suitable for sale

fn. 4 (continued)

waste disposal, BLM is required to investigate to determine whether a hazardous substance is present on the land, in order to lessen the chance that land containing a hazardous substance will be conveyed and that a local government would be exposed to liability concerning such substance through inadvertence. The Department must ensure that the lands meet the existing or reasonably anticipated need for solid waste disposal. To assure that appropriate authorities would be in a position to effectively discharge their responsibilities, applicants are required to inform the EPA and other appropriate agencies concerning the proposed uses of the land. The applicant must agree to comply with State and Federal laws applicable to the use of the land, and to hold the United States harmless from any liability that might arise out of any violation of any such law. *Id.* at 5, 5355.

BLM explains its decision not to use the R&PP sales authority as follows: "The sale under section 203 of FLPMA is the only method of permitting the landfill on unleased property for landfill purposes. R&PP sales regulations for landfills are not available and not expected to be available in time" (LR at 2). Some Acts of Congress, by their own terms, require the Department to promulgate regulations before they may be enforced. See, e.g., Golden Reward Mining Co., 111 IBLA 217, 96 I.D. 452 (1989); The Dredge Corp., 64 I.D. 368, 373-74 (1957), aff'd, Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966). However, no such restriction appears in the R&PP Act Amendments.

It is properly up to BLM to determine its authority in the first instance. We do not question the legality of using section 203 of FLPMA to dispose of this tract. The R&PP amendments appear to apply only where "the Secretary receives an application for conveyance of land under [the R&PP] Act." 43 U.S.C. § 869-2(b)(1) (1988). Thus, it appears that applications for conveyances for solid waste disposal facilities may be made under other acts. The County's application was, by its own terms, made under the terms of section 203 of FLPMA.

There is no reverter under patents issued under section 203 of FLPMA, so that the purpose of protecting the Government from future liability for environmental consequences of the solid waste facility may be served. However, we are not aware that BLM has inspected the lands to be transferred or required the County to indemnify it from future liability and to comply with the certification and reporting requirements imposed by the R&PP Act amendments. The question also remains what effect transfer under section 203 might have on the possible conversion of the existing R&PP lease under these amendments.

BLM may wish to consider these issues on remand.

contained in the proposed rulemaking because the comments were of the view that it bypassed the [BLM's] land use planning process. The existing regulations specifically state in [43 CFR 2711.0-6(a) and 2711.1-1(a)] that sales of public lands must be made in accordance with the land use planning regulations in [43 CFR] Part 1600. This requirement applies to sales that result from the public nomination process. Public nominations will be examined either as part of the preparation of a land use plan or as part of an amendment to a land use plan. Since it is clear that any public nominations of lands for disposal must conform to [BLM's] land use planning process before those lands can be disposed of, the final rulemaking retains this provision. [Emphasis supplied.]

49 FR 29012 (July 17, 1984).

We are aware that planning decisions under 43 CFR Part 1600 are not appealable to the Board. See 43 CFR 1610.5-2(b). Nevertheless, where BLM takes action concerning a specific parcel that is authorized by law only where relevant planning actions have been completed, we will review the record to the extent necessary to ensure that BLM has complied with the requirements to conduct planning. Sales under section 203 of FLPMA are permitted only where specifically authorized by land planning decisions. In the absence of a showing of completion of land planning, we would be unable to affirm the decision to proceed with the sale.

We note three matters concerning BLM's NORA. Under 43 CFR 2711.1-2(c), publication is required once a week for 3 weeks in a newspaper of general circulation in the general vicinity of the public lands being proposed to be offered for sale. BLM's NORA was apparently published only once in the local newspaper. Secondly, the NORA does not contain the "terms, covenants, conditions, and reservations which are to be included in the conveyance document." 43 CFR 2711.1-2(a).

Finally, the NORA states that the sale is to include conveyance of the mineral interest in the sale. Conveyance of mineral interests is not authorized under section 203 of FLPMA. 43 U.S.C. § 1719(a) (1988); see Golden Reward Mining Co., supra at 220, 96 I.D. at 453. However, under section 209(b) of FLPMA, 43 U.S.C. § 1719(b) (1988), the mineral estate may be conveyed if it is determined that there are no known mineral values on the land, or if the reservation of ownership of the mineral interests in the United States would interfere with or preclude appropriate non-mineral development of the land and such development would be a more beneficial use of the land than its mineral development. 43 CFR 2720.0-6. Although BLM's EA/LR refers to a "mineral report found in the case file," no such report is to be found in the file sent to us by BLM. Thus, we are uncertain whether BLM has ensured that the requirements of section 209 of FLPMA have been met. Presuming that BLM is able to proceed with the sale following the steps outlined above, it is directed to comply with section 209 before completing the conveyance to the County. See 43 CFR 2711.5-1.

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 set aside, and the case is remanded for further consideration.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge