



DAVID C. BURGESS, *ET AL.*

173 IBLA 116

Decided November 30, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

DAVID C. BURGESS, *ET AL.*

IBLA 2006-117

Decided November 30, 2007

Appeal from a decision of the Colorado State Office, Bureau of Land Management, rejecting an application for conveyance of Federally-owned mineral interests. COC-69580.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

An application for conveyance of Federal mineral interests to the owner of the surface estate pursuant to section 209(b) of the Federal Lands Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (2000), may be approved where BLM determines (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development. Such conveyance is discretionary with the Secretary, and if one of the conditions in section 209(b), or even both, are met, BLM may still reject the application if BLM determines that conveyance of the Federal mineral estate is not in the public interest.

2. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

Lands determined to be within a known geologic structure (KGS) are considered presumptively productive of oil and gas, even though no actual production has occurred on the lands. An appellant's reliance on a map showing the lands within an area are unlikely to produce oil and gas does not rebut this presumption, where more recent,

credible data, on which BLM reasonably relies, shows that the lands are likely to be productive.

3. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

The second condition of section 209(b) of Federal Land Policy and Management Act is not met where possible interference to residential use of a surface estate from mineral development can be avoided or mitigated and where, considering Congressional directives and the public interest, the mineral development is a more beneficial use of the land than the residential use.

APPEARANCES: Stephen B. Johnson, Esq., Telluride, Colorado, for appellants; Lance Wenger, Esq., Office of the Solicitor, Lakewood, Colorado, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE M^cDANIEL

David C. Burgess, *et al.* appeal from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated January 20, 2006, rejecting their application for conveyance of the Federally-owned mineral interests underlying their respective privately-owned lots located in southwestern Colorado within the Peninsula Park, Peninsula Pines, and Peninsula Point subdivision developments (collectively known as The Peninsula), located in San Miguel County, southwestern Colorado, within secs. 1, 7, 12, 13, 18, and 19, T. 43 N., R. 11- 12 W., New Mexico Prime Meridian.¹ We affirm BLM's rejection of the application.

I. BACKGROUND

The Peninsula is a residential development located on top of a mesa situated between Specie Creek and Saltado Creek and terminates on the northeast by the canyon of the San Miguel River. The Peninsula is within "the far eastern limb of the Paradox Basin." Application at 5; Statement of Reasons (SOR), Ex. C, Gustavson Associates Preliminary, Limited Appraisal of Federal Mineral Rights underlying Peninsula Lands (Preliminary Appraisal), at 3 (Dec. 14, 2005). Also, underlying The Peninsula are the Lower Cutler and Honaker Trail geologic formations. Preliminary

¹ David C. Burgess filed the original application for conveyance of mineral interests, as President of The Peninsula Owners Association, Inc., and as attorney-in-fact for the 21 individual landowner co-applicants. The individual applicants are listed in the Application for Conveyance of Federally Owned Mineral Interests within Portions of The Peninsula (Application), at 3-4 (Dec. 27, 2005).

Appraisal at 4. The Peninsula is characterized as isolated with steep side slopes and divided into large lots of land of approximately 35-40 acres each. Application at 2, 5. Vacant lots are valued from \$200,000 to \$265,000. *Id.* at 6. Twenty-nine of the 47 lots have split surface and mineral estates, where the U.S. government owns the mineral interests.² *Id.* at 2. A dozen homes have been built in the development for between \$300,000 and \$1,000,000. SOR at 20. Seven of the houses sit on split estates. Application at 6. Recent BLM oil and gas lease auctions in the western part of San Miguel County drew the landowners' attention to the Federally-owned mineral estates underlying about one-third of The Peninsula acreage and prompted them to file their Application. SOR at 3.

Appellants filed the Application on December 27, 2005, claiming the mineral estates should be conveyed to The Peninsula surface estate owners because their expert found that no known mineral values exist within The Peninsula and the mineral reservation interferes with the nonmineral development of the land. Pursuant to section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b) (2000) and 43 C.F.R. § 2720.0-3, BLM rejected the Application and appellants' claims therein. BLM found known mineral values to exist in The Peninsula based on two documents: BLM's "Scientific Inventory of Onshore Federal Lands Oil and Gas Resources and Reserves and the Extent and Nature of Restrictions of Impediments to their Development from January 2003" (2003 Inventory) and a 1992 U.S. Geological Survey (USGS) map, "State of Colorado Oil and Gas Potential" (1992 USGS Map) showing high oil and gas potential. BLM also noted the oil and gas industry's nomination of these lands for inclusion in the February 2006 lease sale. Decision at 2-3. According to BLM, these documents show The Peninsula has a high potential for oil and gas. *Id.* at 2.³ In addition to finding that the area has known mineral values, BLM found that retaining the split estates is unlikely to interfere with residential use of the land because stipulations and mitigation measures can be used when developing the mineral estate. *Id.* at 3-4. Also, BLM stated it was in the public's best interest for the Federal government to maintain and encourage oil and gas leasing within the area, and cited the Energy Policy Act of 2005, Pub. L. No. 109-58, 42 U.S.C. § 1592(a)(1), the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.* (2000), as amended, and the Mineral Leasing

² The northern part of The Peninsula contains split estates where Colorado owns the mineral interests, and the Colorado State Land Board approved a 70 year agreement to restrict mineral development of this part of The Peninsula, which is not part of this appeal. Application at 6.

³ BLM points out that a "comparison of Map No. 3 of the Record of Decision for the 1991 RMP/EIS . . . with the 1991 RMP/EIS map . . . indicates that leasing is authorized in the area which includes the Peninsula Subdivision, albeit with timing stipulations to protect wildlife values." Answer at 14.

Act for Acquired Lands of 1947, 30 U.S.C. §§ 351-359 (2000), *as amended*, as evidence of the public interest in “[a]llowing the lease and development of federally-owned oil and gas resources underlying the subject area . . . as identified by Congress.” Decision at 4. Therefore, BLM concluded that the application did not satisfy the statutory requirements for conveyance, and denied it. Appellants promptly appealed.

II. ARGUMENTS

On appeal, appellants assert that BLM abused its discretion, acted arbitrarily and exceeded its jurisdiction by rejecting the application. They proffer four main arguments in support of this assertion: 1) no known mineral values exist in The Peninsula; 2) the mineral development of The Peninsula interferes with its more beneficial nonmineral development; 3) conveyance of the Federally-owned mineral estates is in the public interest, and 4) BLM violated conveyance regulations by not publishing notice of the Application in the Federal Register. Appellants filed a SOR, and Reply addressing these issues. BLM responded, filing an Answer and Sur-Reply.

A. *Existence of Known Minerals*

First, appellants argue that there are no known minerals in The Peninsula based on a broad-based map from BLM’s January 1991 Colorado Oil and Gas Leasing and Development Final Environmental Impact Statement (FEIS), which shows a zone of no oil and gas potential where The Peninsula is located. SOR at 11.⁴ Thus, they argue that BLM should have based its decision on the FEIS and RMP Amendment data rather than on the 2003 Inventory.

In addition appellants argue that their geologist’s Preliminary Appraisal confirms that no mineral values for oil and gas production exist within The Peninsula. SOR at 14. Based on numerous factors, including the difficulty of creating a 640-acre exploratory block for gas wells, the noncontiguous nature of the mineral rights (16 miles from the nearest drilling and separation by geologic faults), and the location of The Peninsula in the Paradox Basin, appellants’ expert appraiser, Gustavson Associates, concluded that oil and gas leasing may occur in the area but that productive drilling would not. *Id.* at 14-15. The appraiser initially speculated that the total Federal mineral estate should be valued at \$6,803, which was

⁴ Appellants also claim that the Oct. 1991 amendment to the San Juan/San Miguel Resource Management Plan (RMP Amendment) notes that “within a 15 mile radius of the area, 44 dry oil wells, and 9 holes with gas shows have been drilled. SOR at 12.

characterized as a “nominal” amount. Preliminary Appraisal at 2, 5-6.⁵ Then, based on BLM’s mineral conveyance history, the appraiser concluded that it was unusual for BLM to deny the conveyance of mineral interests of such nominal value. SOR at 16-17.⁶ Furthermore, appellants argued that BLM ignored the physical constraints and the strict rules adversely affecting access to The Peninsula that would diminish the values because it would be impossible to remove any oil and gas in a cost-effective manner. SOR at 18-20. For these reasons, appellants believe BLM’s finding of prospective mineral values is unsupported by the record.

BLM asserts that the record supports its decision that there are prospective mineral values in The Peninsula. First, BLM notes that the 2003 Inventory was prepared by BLM, USGS, the U.S. Forest Service, and the Department of Energy using “the best commercial and scientific information available.” Answer at 9, *quoting* from the 2003 Inventory. As indicated in the 2003 Inventory, The Peninsula is located within a known geologic structure (KGS), the Paradox Basin. Answer at 10. While it admits that the RMP Amendment map places The Peninsula in an area initially thought to be without potential for oil or gas when it was completed in 1991, BLM points out that the map is more than 10 years older than the 2003 Inventory, that appellants’ appraiser admits The Peninsula is located in the Paradox Basin, that The Peninsula is located over “the potentially gas-bearing reservoirs of the lower Cutler and underlying Honaker Trail formations,” and that appellants have not established that BLM’s reliance on the 2003 Inventory was incorrect. Answer at 10.⁷

Furthermore, BLM argues that appellants have not shown that the value of the minerals presumptively underlying The Peninsula is nominal, asserting that the value of the minerals varies significantly depending on the facts of the case. Sur-Reply at 9. It argues that of the 16 BLM mineral conveyances considered in Gustavson’s Review, only one included a mineral estate valued at \$42 per acre, four included mineral estates valued at over \$15 per acre, one had an assessed value of \$10 per acre, and the majority were conveyed for only the \$50 application fee or at no cost. *Id.* at 8. Further, BLM asserts that the Gustavson Review does not address the apparent increase in prices paid in more recent lease sales (at \$25 to \$120 per acre). Answer

⁵ Later appellants increased this estimated mineral estate value to \$12,313.70 based on a more recent lease sale for one of the four areas of the Federally-owned mineral estate located within The Peninsula. Appellants still maintain this increased value is nominal. Supplement to Appellants’ Reply at 1-3.

⁶ Attached to appellants’ SOR as Ex. G was a subsequent report prepared on their behalf by Gustavson Associates, dated July 11, 2006, and entitled “Review of BLM Conveyance of Mineral Interest Case Files” (Gustavson Review).

⁷ BLM also relied on a 1992 USGS map showing The Peninsula within a zone of “High” oil and gas potential. Decision at 2-3.

at 16-17, *citing* the Gustavson Review at 8. In addition BLM points out that when appellants revised their estimate of the mineral values based on a recent Federal lease sale of minerals within the Peninsula, they did so for only one of the four areas that make up the Federal mineral estate located there and yet appellants argue that the Federal minerals underlying The Peninsula equal only a nominal value of \$11.51 per acre. Sur-Reply at 7. Moreover, BLM argues that appellants have not cited precedent which holds that BLM must consider a mineral value of a certain amount as nominal. *Id.* It contends that “the varying value of minerals conveyed makes it impossible to reasonably conclude that a set ‘nominal’ value exists at which federal minerals will be conveyed” and that BLM’s rejection of appellants’ application accords with similar BLM decisions in the past. *Id.* at 9. BLM concludes that appellants have not provided sufficient support to overcome BLM’s determination that this estate possesses known mineral values. Answer at 17.

Also speculative, according to BLM, are the physical and legal constraints appellants claim are facing potential mineral lessees trying to remove oil and gas from The Peninsula. BLM argues that there may be no need to enter The Peninsula to extract minerals because of directional drilling from outside, which cannot be known until exploration is completed. *Id.* at 18-19, 22, *quoting* Decision at 3. If entry into The Peninsula is required, it will be addressed by the lessee either in an agreement with the surface owner or by placing a surface owner bond on the land to protect against damage to the surface estate. *Id.* at 19-20. BLM concludes that “[t]he effects, if any, of the potential legal and physical constraints cited by appellants on the value of oil and gas resources underlying the Peninsula Subdivision are currently too uncertain to support Appellants’ contention that the federal mineral estate lacks known mineral values.” *Id.*

In their Reply, appellants question the reliability of the 2003 Inventory and the 1992 USGS map. Appellants assert that according to the Inventory, it “cannot be used to imply that mineral resources are known to occur under specific land parcels.” Reply at 3. They claim that their appraisal is not speculative like the 2003 Inventory, but proves there are no known mineral values. Appellants also question the data used by the 1992 USGS Map. They claim that the map is based on 1982 data processed in 1989 and therefore uses data even older than that used in the RMP. Because the regulations require the best scientific data available, appellants assert that the Board should disregard the 1992 USGS Map in favor of the RMP map, noting it indicates that The Peninsula has no potential for oil or gas leasing.

In its Sur-Reply, BLM asserts that it is authorized to use the data readily available to decide applications, including non-site-specific information like the 2003 Inventory and the 1992 USGS Map, which was based on a USGS survey of the area. Sur-Reply at 3-4. A senior geologist at BLM avers that the mineral potential of an area may change over time, and therefore the maps of mineral locations can change

over time as well. *Id.* at 6. BLM states that “[t]he more recent data used to generate the 2003 Inventory refines the general depiction of the oil and gas potential contained in the 1992 Map by indicating the density of oil and gas per acre and more clearly illustrates the boundaries of each basin.” *Id.* In addition BLM asserts that appellants have cited no authority requiring BLM to find that a “mineral value of \$42 per acre, or even \$15 per acre” is a nominal amount and that a review of BLM cases shows that conveyance applications have been granted where the mineral value was anywhere between \$10 and \$42 per acre. *Id.* at 7. BLM further points out that conveyances have been denied where the land was valued at \$7 and \$10 per acre. *Id.* at 8. Thus, BLM asserts, each case is decided on its own facts, making it impossible to argue there is a standard nominal value which will result in a conveyance. *Id.* at 9.

B. Interference with Beneficial Use

Appellants claim that the residential use of The Peninsula is more beneficial than mineral development because it is a source of tax revenue for the county and could provide, if development continued, more property tax revenue and employment opportunities during the home construction phase. SOR at 20. They also assert that residential use of the land is better than mineral leasing because residential use is permitted by right, whereas mineral leasing is only permitted by review for special use. SOR at 21. As evidence of interference, appellants assert that “since the BLM Oil and Gas Lease Auction activity in the western portion of San Miguel County commenced approximately two years ago, there has been no new residential building activity, and no new lot ownership sales. *See* Application at 19. Appellants further identif[y] a contract for sale of a residential parcel that was terminated specifically because of the possibility of mineral development.” *Id.* Appellants contend that their fears are not assuaged by BLM’s assurances that any mineral leasing in the area would include mitigation efforts to limit interference and that BLM arbitrarily ignored the evidence of interference.

BLM responds that it considered appellants’ claims of interference but found that real interference with the residential use can be prevented by the use of mitigation measures such as directional drilling from outside The Peninsula, small well footprints, and reclamation plans required for each well. Answer at 22-26. Based on its willingness to place conditions on any oil and gas leasing in The Peninsula, BLM does not believe that appellants have established that the split estate interferes with their residential use.

C. Public Interest

Appellants argue that BLM’s additional reliance on the Secretary’s discretion to reject an application based upon consideration of Public Interest, even though the

conditions of section 209(b)(1) of FLPMA are met, “fades behind BLM’s own Oil and Gas FEIS [which found] no potential for oil and gas on the subject parcels.” SOR at 25. BLM counters that appellants have not proven their case concerning the conditions of FLPMA section 209(b)(1), but, regardless, BLM has the authority to deny the application because conveyance of the mineral rights is not in the public interest, *citing* 43 U.S.C. § 1719(b)(1)(2000); *Basin Electric Power Cooperative*, 50 IBLA 197, 199 (1980). Answer at 26-27. BLM contends that according to resources estimates in the 2003 Inventory, there are 20,000 to 40,000 barrels of oil per square mile and 500 million cubic feet of gas per square mile in The Peninsula. *Id.* at 28, 31. BLM asserts that through a number of Congressional acts the importance of finding new domestic energy sources has been emphasized; thus, retaining the mineral rights for the Federal government is in the public’s interest. *Id.* at 27-28.

D. Public Notice of the Application

Finally, appellants argue that the regulations require publication in the *Federal Register* of a notice of their application for mineral rights and BLM failed to do so. 43 C.F.R. § 2720.1-1. Such notice segregates the mineral interests involved in the application from appropriation under the public land laws, including the mining laws. Appellants claim that because segregation of the mineral estate did not take place during consideration, BLM was without jurisdiction to review the application. SOR at 28.

BLM asserts that nothing in 43 C.F.R. § 2720.1-1(b) requires BLM to publish notice prior to the final determination of the application and that this regulation only describes “the effect which publication of such a notice would have on the ability of the public to appropriate these minerals.” Answer at 34. BLM notes that appellants have not claimed that lack of publication affected its decision, *id.*, and therefore this argument should be rejected.

Appellants counter that BLM’s interpretation of the regulation would render it meaningless because notice would not be published and the lands would not be segregated until the application had been acted upon. Reply at 24. They argue that segregation is designed to benefit the applicant and there is no benefit to the applicant when segregation is delayed.

III. ANALYSIS

[1] Pursuant to section 209(b) of FLPMA, the record owner of the surface estate may obtain the conveyance of the underlying Federally-owned mineral interest only if the Secretary “finds (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with

or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development.” 43 U.S.C. § 1719(b)(1)(2000); *see also* 43 C.F.R. § 2720.0-6. Absent a finding of one of these conditions, an application must be rejected. *Denman Investment Corp.*, 78 IBLA 311, 313 (1984). Furthermore, if both conditions are met, the Secretary may still “reject an application upon a determination supported by the facts of record that conveyance of the mineral interest would not be in the public interest.” *Basin Electric Power Cooperative*, 50 IBLA at 199. BLM’s decision to reject an application must be supported by the record and will only be reversed if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *El Rancho Pistachio*, 147 IBLA 205, 208 (1999); 43 C.F.R. § 2720.5. The burden is on appellant to make such showing. *Richard L. Dickard, Sr.* 90 IBLA 83, 86 (1985).

A. *Appellants have not shown that there are no known mineral values in the land.*

[2] Known mineral values are defined as “mineral rights in lands containing geologic formations that are valuable in the monetary sense for exploring, developing, or producing natural mineral deposits. The presence of such mineral deposits with potential for mineral development may be known because of previous exploration, or may be inferred based on geologic information.” 43 C.F.R. § 2720.0-5(b). While the actual discovery of oil and gas is not necessary to conclude there are known mineral values, such conclusion must be based on adequate factual information. *William Y. Ganus*, 122 IBLA 255, 257-58 (1992); *Wayne D. Klump*, 104 IBLA 164, 166 (1988). In *Klump*, the Board found that a brief memorandum referring to prospects and previous producers in the area of the mineral conveyance was not enough to sustain BLM’s decision that the area had known mineral values. *Id.* at 165-66. The Board held that more than mere conclusory statements were needed. *Id.* at 166.

In the present case, BLM based its decision on the 1992 USGS Map and the 2003 Inventory which show The Peninsula is within a KGS – the Paradox Basin – and that it overlies the Honaker Trail and Lower Cutler Formation, and that the Federal minerals within these areas have a “high potential for oil and gas.” Decision at 2. According to estimates in these documents, based on its location within the KGS (rather than on actual drilling), The Peninsula contains between 20,000 and 40,000 barrels of oil per square mile and 500 million cubic feet of gas per square mile. *Id.* The Board has previously determined that lands within a KGS are considered “presumptively productive” of oil and gas (*Richard Alves*, 85 IBLA 397, 401 (1985)), particularly when the KGS “has been shown to be productive somewhere in the vicinity of that land.” *William Y. Ganus*, 122 IBLA at 257.

Appellants question the reliability of BLM's documents and contrast them with another BLM map from the RMP, which places The Peninsula in an area unlikely to produce oil or gas. However, the 2003 Inventory clearly uses more recent data than the RMP map and confirms the information contained in the 1992 USGS Map. Both indicate that The Peninsula is within the Paradox Basin and has the potential for oil and gas development. Moreover, appellants have not disputed that the 1991 RMP authorized leasing in the area at issue, as asserted by BLM. Answer at 14. Thus, BLM has provided more than mere conclusory statements to support its finding of known mineral values.

To prevail, appellants must rebut the presumption that The Peninsula would be productive based on its location in a KGS. The Board will affirm BLM's conclusion that The Peninsula is in an area of known mineral values based on its location in a KGS unless appellants can prove that it is not underlain by the KGS or would not be productive of oil and gas. *William Y. Ganus*, 122 IBLA at 257. To rebut the presumption that The Peninsula is productive, appellants submit their expert's Preliminary Appraisal. It agrees that The Peninsula is located within the KGS; however, it asserts that The Peninsula is miles from any producing gas fields and that, while leasing may occur in the area, actual drilling is unlikely. Preliminary Appraisal at 3-5. Appellants' expert argues that the geology appears to be different in The Peninsula than in the productive areas of the Paradox Basin. Preliminary Appraisal at 2. The expert goes on to say that "it is unclear if this fault or others could provide structural traps for natural gas." Preliminary Appraisal at 2. In other words, appellants argue that even though located in a KGS there is no proof the area will be productive.

The Secretary is entitled to rely on BLM and the USGS as its technical experts regarding geological evaluations of the land. *Temblor Enterprises, Inc.*, 86 IBLA 175, 178 (1985). Rather than basing its decision on the map contained in the 1991 RMP Amendment, BLM relied upon the 2003 Inventory, which contained "the best commercial and scientific information available." Answer at 9, *quoting* from the 2003 Inventory. BLM was acting in compliance with Departmental regulations governing conveyance of Federal mineral interests that authorize it to reject an application based on "data readily available to [it] relating to the land concerned," and to utilize geologic information to infer that "known mineral values" are present. 43 C.F.R. § 2720.1-3(f); 43 C.F.R. § 2720.0-5(b).

Appellants must "present a convincing and persuasive argument to rebut BLM's determination that the subject land has mineral values. In the absence of a clear and definite showing of error, [the Board] will not disturb BLM's determination." *Richard L. Dickard, Sr.*, 90 IBLA at 86 (1985). The evidence appellants have provided is insufficient to override the Secretary's appropriate

reliance on BLM's experts or to disprove BLM's determination that The Peninsula contains known mineral values. Thus, appellants have not met their burden and the Board will not disturb BLM's finding.

Appellants argue that, if minerals do exist in The Peninsula, they are of a "nominal" value and thus BLM should convey the Federally-owned mineral estate to them. We note that when appellants updated their estimate following a higher bonus bid received in a Federal lease sale within The Peninsula in November 2006, they declined to increase the fair market value for all four areas that make up the Federal mineral estate within The Peninsula. Instead, they increased the value of only one area to reach an estimated value of the entire estate in the amount of \$12,313.70 and argue that this amount is "nominal," as they claimed was true of Gustavson's earlier estimate in the amount of \$6,803. Therefore, the value of the estate estimated by appellants changed depending on which bonus amount they chose to use in the calculation. Answer at 16.

Most importantly, even assuming that the total value of the mineral estate is in the lower range appellants assert, they have not shown that BLM only grants mineral conveyance applications when the mineral estate value is within a certain range, and they fail to cite a rule that would require conveyance under these circumstances. We agree with BLM that "the varying value of minerals conveyed makes it impossible to reasonably conclude that a set 'nominal' value exists at which federal minerals will be conveyed." *Id.* at 9. We find that appellants' arguments and evidence do not demonstrate that regulatory criteria for no "known mineral values" has been met. Therefore, appellants have failed to show that there are no known mineral values in the land pursuant to section 209(b) of FLPMA.⁸

B. *Appellants have not established that development of the Federally-owned mineral estate is interfering with or precluding appropriate non-mineral development of the land.*

[3] In order to satisfy the second condition of section 209(b), appellants must show, *inter alia*, that the reservation of mineral interests in the United States is interfering with their nonmineral development of The Peninsula and how and why such use is more beneficial than mineral development. 43 U.S.C. § 1719(b)(1)(2000); 43 C.F.R. § 2720.1-2(d)(4). Appellants claim that BLM's oil

⁸ Appellants have not established that the cost of physical and legal constraints on development of oil and gas from The Peninsula will diminish the value of the Federal mineral estate to preclude such development, given the facility of directional drilling, mitigation and reclamation measures, and the option of entering into agreements with the surface owners or placing surface owner bonds on the land to protect against damage to the surface estate. Answer at 18-20.

and gas lease auction activity has prevented residential building and lot sales, asserting that one contract for sale was terminated specifically because of the possibility of mineral development. SOR at 21. They also assert that increased tax revenue and employment will result from residential development and that because zoning in the area requires a permit for drilling and not for residential use, residential use of the land is more beneficial. *Id.* However, as BLM notes, appellants' assertion that auction activity has prevented residential building and lot sales appears speculative, considering that the cited sale termination pre-dated the notice of the lease sale for The Peninsula by nine months. Answer at 22. Also, as appellants point out, Federal lease sale activity occurred within The Peninsula in November 2006. Supplement to Appellants' Reply at 2. Finally, appellants have provided little beyond conclusory statements that their non-mineral (residential) use would be more beneficial than mineral development.⁹ Based on the arguments and evidence, we find that appellants have failed to provide the evidence necessary to meet the second statutory and regulatory condition. *Richard L. Dickard, Sr.*, 90 IBLA at 86; *Mr. and Mrs. E. J. Wright*, 83 IBLA at 94.

C. *Appellants have failed to show error in BLM's determination of the public interest.*

Appellants argue that BLM's determination that rejection of their Application serves the public's interest in developing Federally-owned oil and gas resources underlying the area "would categorically remove all potential oil and gas mineral resources located anywhere in the nation from FLPMA disposition, and effectively require an applicant to show that there is 'zero' mineral value." SOR at 25. We disagree; rather, we find that BLM properly decided against granting the application based on the particular facts of this case, *i.e.*, that neither of the conditions under section 209(b) were met. In addition, in accordance with its discretionary authority (*Basin Electric Power Cooperative*, 50 IBLA at 199), BLM determined that denial of the applications was in the public interest based upon the 2003 Inventory finding that there are likely to be 20,000 to 40,000 barrels of oil per square mile and 500 million cubic feet of gas per square mile underlying The Peninsula, and recognizing the Congressional directives encouraging energy development. Further, we note that BLM's decision denying the conveyance application carefully addressed appellants'

⁹ This Board has recognized "BLM's ability to restrict the location and scope of [mineral exploration and development] so as to create the least impact." *William Y. Ganus*, 122 IBLA at 259. We also note that this Board has not previously found that mineral development interfered with and was less beneficial than the following nonmineral uses: residential, avocado production, timber production, grazing, ranching, and orchard farming. *Richard L. Dickard, Sr.* 90 IBLA at 83 (1985); *Richard Alves*, 85 IBLA at 397; *Temblor Enterprises*, 86 IBLA at 175; *El Rancho Pistachio*, 147 IBLA at 205; *William Y. Ganus*, 122 IBLA at 259, and *Mr. and Mrs. E. J. Wright*, 83 IBLA 92 (1984).

concerns of interference with their residential use, stressing its ability to impose conditions on oil and gas development to minimize impacts to appellants, including requiring directional drilling from adjacent lands, limiting the number of drilling pads on the surface estate, as appropriate, providing for reclamation requirements to eliminate signs of drilling or construction activity, and requiring measures to mitigate visual impacts. *Id.* at 22-23.

D. *Failure to publish notice of an application does not remove BLM's jurisdiction.*

Finally, appellants contend that the lack of publication of notice of the Application under 43 C.F.R. § 2720.1-1 caused BLM to lose the authority necessary to decide this Application. The regulation states “publication in the Federal Register of a notice of the filing of an application under this part shall segregate the mineral interests owned by the United States in the public lands covered by the application to the extent that they will not be subject to appropriation under the public land laws, including the mining laws.” 43 C.F.R. § 2720.1-1(b). This section was added to the regulation in 1986. The purpose of the amendment was to protect the lands sought in mineral conveyance applications from mineral location and entry during the process. Thus, we find that nothing in the language of the regulation suggests that failure to publish the notice of application would affect BLM's jurisdiction to act on the conveyance application.

Any other arguments raised by appellants not expressly addressed herein have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/_____
 R. Bryan McDaniel
 Administrative Judge

I concur:

_____/s/_____
 Christina S. Kalavritinos
 Administrative Judge