



RANDY A. GREEN, WALLIS V. McPHERSON,  
JOHN and SUSAN SIMPSON

177 IBLA 264

Decided May 28, 2009



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

RANDY A. GREEN, WALLIS V. McPHERSON,  
JOHN and SUSAN SIMPSON

IBLA 2006-103, 2006-104, 2006-105

Decided May 28, 2009

Appeals of decisions by the California State Director, Bureau of Land Management, dismissing protests of the proposed direct sale of 40.37 acres of public land near the Bridgeport Township, Mono County, California. CACA 41111.

Affirmed in part, set aside in part, and remanded.

1. Appraisals--Federal Land Policy and Management Act of 1976:  
Sales--Public Sales: Generally

The purchaser of a Federal mineral estate must pay the fair market value of the mineral interests being conveyed. When a mineral report states that a tract of land has a high potential for mineral materials but provides no information about the size of the deposit or its monetary value and the record does not otherwise document its fair market value or establish a lack of value, a finding in the Decision Record/Finding of No Significant Impact that there are no minerals of value will be set aside.

APPEARANCES: Randy A. Green, Bridgeport, California, *pro se*; Wallis V. McPherson, Bridgeport, California, *pro se*; John and Susan Simpson, Bridgeport, California, *pro sese*; Nancy S. Zahedi, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management; Mark A. Levitan, Esq., Steven J. Bloxham, Esq., John M. Peebles, Esq., Sacramento, California, for the Bridgeport Paiute Indian Colony.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Randy A. Green, Wallis V. McPherson, and John and Susan Simpson have appealed three separate decisions of the California State Director (SD), Bureau of Land Management (BLM), dated December 9, 2005, dismissing their individual protests of the proposed direct (non-competitive) sale and conveyance of 31.86 acres

of a 40.37-acre parcel of public land <sup>1</sup> to the Federally-recognized Bridgeport Paiute Indian Colony of California (the Tribe), and deciding to go forward with the sale. BLM proposed the sale of the entire 40.37 acres pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (2006) on October 1, 1999 (64 Fed. Reg. 53405). The approximately 40-acre undeveloped parcel adjoins the Reservation's western boundary. It has been divided by a dependent resurvey into four lots. Lot 1 (28.51 acres) and lot 2 (3.35 acres) are to be sold to the Tribe. Lot 1 is immediately west of the Bridgeport Paiute Indian Reservation (the Reservation). Lot 2, best described as the northwest corner of lot 1, was made a separate lot because it contains an archeological site.<sup>2</sup> The parcel is the only Federal land available for immediate transfer to the Tribe.<sup>3</sup> See 43 U.S.C. § 1782(c) (2006). Appellants Green and McPherson own homes in the residential area south of the parcel.

The Field Manager of the Bishop Field Office, BLM, approved the sale on April 29, 2005, by a Decision Record/Finding of No Significant Impact (the "Sale DR/FONSI"), based on an analysis of potential environmental impacts in Environmental Assessment (EA) CA-170-05-25 (April 2005) (the "Sale EA") approved the same day. He determined, in the Sale DR/FONSI at 2-4, that sale of the land in fee simple was authorized under sections 203(a) and 209(b) of FLPMA, 43 U.S.C. §§ 1713(a), 1719(b) (2006), and qualifies for direct sale:

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<sup>1</sup> The subject land is situated in sec. 28, T. 5 N., R. 25 E., Mount Diablo Meridian, Mono County, California, one-half mile north of Bridgeport Township, which is approximately 25 miles north of Mono Lake and 15 miles from Nevada.

<sup>2</sup> Lot 3 (8.10 acres), adjacent to lots 1 and 2, contains a portion of the right-of-way (ROW) for State Highway 182 (ROW CAS-053545), and is to be sold to the State of California Department of Transportation (Caltrans). It is encumbered by an archeological site. Lot 4 (0.41 acre) is a sliver of land between the highway ROW and the Bridgeport Reservoir separated from lots 1 and 2 by the highway. Lot 4, also to be sold to Caltrans, is identified as a separate lot because it contains wetlands.

<sup>3</sup> South of the 40-acre parcel is private land occupied by a church and residential development, and north is the Mono County/Bridgeport landfill. West of the parcel is the Bridgeport airport runway and Bridgeport Reservoir. It appears that Mono County owns the quarter-quarter sections to the east and south of the Reservation as well as a 40-acre parcel which lies north of both the Reservation and lots 1 and 2. The area to the east of the Reservation has sewage disposal ponds, and south of the Reservation are ballfields and a park. The remainder of the land north of the Reservation is BLM land, some of which is under review as a wilderness study area (WSA) and unavailable for transfer.

[T]he parcels are considered unmanageable; the parcels are in proximity to the Bridgeport Indian Colony; and the lands are identified for transfer to a State or local government, or an entity legally capable of conveying and holding lands or interests therein under the laws of the State within which the lands to be conveyed are located . . . .

The Board docketed the three appeals as IBLA 2006-103 (Green), IBLA 2006-104 (McPherson), and IBLA 2006-105 (Simpsons). By order dated March 15, 2006, the Board granted BLM's motion to consolidate the appeals and allowed the Tribe to intervene. The Board took under advisement appellants' petitions for a stay of the decisions while the parties considered pursuing alternative dispute resolution (ADR). On April 28, 2006, the Board issued an order suspending proceedings on the appeals pending ADR and, in a series of subsequent orders, extended the suspension until September 15, 2008, on which date BLM notified the Board that the Tribe, following election of a new Tribal Council, had informed BLM that it wished to end settlement negotiations. By order dated September 24, 2008, the Board denied appellants' petitions for stay as moot based upon BLM's assurance that it would not take action to convey the land before the Board ruled on the appeals. Both BLM and the Tribe have filed responses to appellants' statements of reasons (SORs).

Appellants Green and McPherson filed lengthy protests and SORs raising numerous objections to the decisions relating to the process leading to the sale and BLM's environmental review. The Simpsons, by contrast, raise a single concern, shared by McPherson, regarding consideration of impacts to air quality. The protests and SORs have been reviewed in their entirety and are addressed below.

### *I. Background of the Appeals*

The Tribe's interest in obtaining additional land for its Reservation dates back to at least 1980 when the Bureau of Indian Affairs (BIA) filed application CA 8297 to have the 40-acre parcel withdrawn in aid of legislation. *See* 45 Fed. Reg. 41710 (June 20, 1980). The parcel was included in a larger proposed withdrawal of 320 acres for possible legislative conveyance to the Tribe. 48 Fed. Reg. 17148 (Apr. 21, 1983). It appears, however, that most of the land was within the WSA. Recognizing that only the 40-acre parcel was available outside the WSA, on April 26, 1994, members of the Tribe passed Resolution 94-09 authorizing "the Tribe Administration to pursue an Administrative transfer of . . . approximately 40 acres into trust status for the Tribe." By letter dated May 4, 1994, the Tribe provided BLM a copy of the resolution and requested information about the next step needed "to expedite this administrative transfer process."

After many years of attempting to acquire the parcel, first by legislative conveyance, then by administrative transfer, the Tribe in 1998 requested BLM to “consider our proposal to purchase a 40-acre parcel of BLM land.” Letter from Tribe to SD dated Sept. 1, 1998. Public meetings were held to discuss the potential sale to the Tribe, including one by the Mono County Board of Supervisors on December 1, 1998.<sup>4</sup>

In time, BLM became aware that, when the Bishop Resource Management Plan (RMP) was adopted in 1993, the 40-acre parcel was not classified as subject to disposal, despite the Tribe’s longstanding interest in obtaining it, and consequently that it was not available for sale. See 43 C.F.R. §§ 2710.0-6(a), 2711.1-1(a); *Redding Gun Club*, 171 IBLA 28, 31 (2006); *Mr. and Mrs. Michael Bosch*, 129 IBLA 373, 375 (1994); *Joyce and Tony Padilla*, 119 IBLA 33, 39-40 (1991). BLM then published a notice of its intent to amend the RMP to allow a direct sale of the 40-acre parcel to the Tribe. 64 Fed. Reg. 53405 (Oct. 1, 1999).

In the course of undertaking an EA for the RMP amendment, BLM conducted a wildlife habitat assessment on January 11, 2000, and a plant survey on May 11, 2000. Sale EA at 21-22. In addition, a BLM geologist prepared a mineral report, dated July 27, 2000, which was approved by the Bishop Field Office Manager on January 30, 2001. On October 10, 2000, the Tribe and Mono County signed a “Protocol for Government-to-Government Relations” which allows the parties to request information from each other about planning, development, and other matters of governmental interest and to schedule meetings for consultation.

On April 16, 2003, the SD approved a “Proposed Decision and [FONSI]” to amend the RMP based upon EA CA-170-03-29, approved the same day (“RMP Amendment EA”). The RMP Amendment EA reported that:

The Tribe had an economic feasibility report completed for them in December 1995 by the Economic Development Center of Sacramento, CA. The report examined existing businesses in Bridgeport and the surrounding area, and indicated that a mini-mart/gas station, capturing about 8% of the business in the area, would be economically feasible. The report also said that a casino, an RV park and a community center would be economically feasible.

The primary economic development being considered by the Tribe is a gas station/mini-mart/gift shop. Additional development

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<sup>4</sup> It appears that the Mono County Board of Supervisors is the governing local political authority and is informed about local issues by the Bridgeport Valley Regional Planning Advisory Committee (RPAC).

could include an RV Park and Community Center. A community center might offer indoor swimming, a small theater, indoor basketball courts and other amenities.

RMP Amendment EA at 9. The RMP Amendment EA also noted that “[a] casino is not being considered at this time,” explaining that the Tribe had opened a temporary casino in its community center, but after a year “determined that it was in the Tribe’s best interest to discontinue the operation” and the casino was closed. *Id.* On June 18, 2004, the SD issued a Decision Record and FONSI (the “RMP Amendment DR/FONSI”) approving the amendment of the RMP “to allow for the sale or other disposal” of the four lots “as shown on the certified Dependent Resurvey Plat dated February 28, 2003.” RMP Amendment DR/FONSI at 2.

Prior to completion and approval of the RMP Amendment, the Tribe applied to BIA to have the land transferred “into trust” after its conveyance from BLM. *See* 25 U.S.C. § 465 (2006). On December 1, 2003, BIA issued an “Environmental Assessment for a 31.86-acre Fee-to-Trust Transfer and Associated Development Project for the Bridgeport Indian Colony” (“Fee-to Trust EA”), which had been prepared by Tierra Environmental Services (Tierra) of San Diego, California. Based upon that EA, on April 13, 2004, BIA issued its “[FONSI], Proposed Trust Acquisition of 28.51 Acres, Bridgeport Indian Colony, Mono County, California.” Subsequently, Tierra completed both a “Transportation Plan” and a “Comprehensive Land Use Plan for Development” for the Tribe, dated May 20, 2004. Also in May 2004, the Tribe and BLM adopted a Memorandum of Understanding (MOU) to protect two species of plants on portions of lots 1 and 2.

Following amendment of the RMP, BLM published a Notice of Realty Action (NORA) for the sale of the land. 69 Fed. Reg. 55648 (Sept. 15, 2004). It stated that a June 10, 2004, appraisal had estimated the fair market value of the land at \$2,000 per acre and that the mineral estate “has been determined to be of no value.” *Id.*<sup>5</sup>

The Sale EA, issued on April 29, 2005, identifies the “proposed action” as the Tribe’s request that “BLM sell 40.37 acres of land to the Tribe, to be simultaneously taken into Trust Status” by BIA. Sale EA at 10. It describes the proposed development of “six residential homes, maintenance building, [two] 4[-]unit apartment buildings, mini-storage facility, RV park, biological protected area, open space, community recreation center or minimart and gas station.” *Id.* The Sale EA reviews five alternatives. From these, the SD selected alternative 4—the immediate

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<sup>5</sup> The appraisal, prepared, reviewed, and approved by the Appraisal Services Directorate of the National Business Center, Pacific Regional Office, U.S. Department of the Interior, was forwarded to BLM on Aug. 31, 2004. *See* 112 DM 10.9 (July 31, 2007).

sale of lot 1 to the Tribe and subsequent sale of lot 2 to the Tribe and lots 3 and 4 to Caltrans after mitigation or protection of the archeological site.<sup>6</sup>

*II. Legal Regimes and Issues Presented by the Appeals*  
*A. Adequacy of Notice of Sale*

Beginning with their protests, appellants McPherson and Green have complained of alleged limited public notice of the proposed sale. See Green SOR at 1, 7, 9-10; Green Protest at 10, 15, 19; McPherson SOR at 22, 31-32, 34-35; McPherson Protest at 7, 10-11, 14-16, 29-34, 50, 51-52. They contend that BLM notified by mail only the owners of the immediately adjacent properties, but not others living in the immediate area who had participated in meetings or submitted comments or protests on the proposed sale of the land. McPherson asserts that he was not notified even though he had participated in RPAC meetings in 2000 and owns land (apparently his home) 250 feet from the 40-acre parcel. McPherson SOR at 17; McPherson Protest at 2, 6-7, 14-15, 29. BLM points to publication of the NORA in two local newspapers, posting in the Bridgeport library and post office, and transmittal “to affected parties, including adjacent, contiguous landowners.” In addition, BLM notes that the public had notice of the RMP Amendment and various public opportunities to comment on it. BLM Response at 24-26; see McPherson Decision at 4.

Publication of a NORA is governed by 43 C.F.R § 2711.1-2:

A notice of realty action offering for sale a tract or tracts of public lands identified for disposal by sale shall be issued, published and sent to parties of interest by the authorized officer not less than 60 days prior to the sale. The notice shall include the terms, covenants, conditions and reservations which are to be included in the conveyance document and the method of sale. The notice shall also provide 45 days after the date of issuance for the right of comment by the public and interested parties.

43 C.F.R § 2711.1-2(a). The regulation requires that notice be published in the *Federal Register* “and once a week for 3 weeks thereafter in a newspaper of general circulation in the general vicinity of the public lands being proposed to be offered for

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<sup>6</sup> The Sale DR/FONSI at 3 states that it:  
allows for the sale of Lot 1 to the Tribe as soon as possible and provides the Tribe with the largest amount of developable area; it allows for the complete mitigation of the cultural site; it protects most of the sensitive plant populations through the Tribe’s Rate Plant Protection [MOU]; and Caltrans would obtain the fee estate of Lot 3 which is totally encumbered by Highway 182.

sale.” *Id.* § 2711.1-2(c). In addition, the regulation requires that notice be sent to a number of government officials and agencies and that it also “shall be sent to other known interested parties of record including, but not limited to, adjoining landowners and current land users.” *Id.* § 2711.1-2(b).

The NORA was published in the *Federal Register* and in both the *Mammoth Times* and the *Inyo Register*. The Proof of Publication for the *Mammoth Times* says that the paper “was adjudicated on March 24, 1992, as a newspaper of general circulation for the Town of Mammoth Lakes and Mono County, CA.” Similarly, the Proof of Publication for the *Inyo Register* says that it has been adjudicated as a newspaper of general circulation for Inyo County. Although McPherson criticizes BLM’s selection of the *Mammoth Times* because “[p]eople in Bridgeport don’t read it, because it doesn’t carry Bridgeport news,” (McPherson Protest at 33), he has not shown that BLM failed to publish the NORA in “a newspaper of general circulation in the general vicinity of the public lands.” 43 C.F.R § 2711.1-2(a).

On the other hand, we think that BLM’s depiction of McPherson and other residents of the small Buckeye Drive neighborhood, a subdivision south of the 40-acre parcel, as people who “may conceivably have an interest” is too narrowly drawn. BLM Response at 24. As quoted above, the regulations refer generally to “parties of interest,” “interested parties,” and specifically to “known interested parties of record” and “current land users.” BLM believes that the meetings it held and its presentations to the Mono County Board of Supervisors and the Bridgeport RPAC provided the public “ample opportunities” to make its views known to BLM. *Id.* at 25-26. Given McPherson’s participation by speaking and making his concerns known regarding Buckeye Drive at meetings held in the process of amending the RMP, his ownership of land very near the 40-acre parcel and on a small cul-de-sac that BLM recognized would likely be impacted by the Tribe’s development plan,<sup>7</sup> the Board agrees that he

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<sup>7</sup> The Tribe’s land use plan states: “Buckeye Drive which currently ends in a cul-de-sac at the southern boundary of the acquisition parcel should be extended north onto the parcel between the two apartment complexes to join Sage Brush Drive.” Comprehensive Land Use Plan for Development of the Bridgeport Indian Colony (May 20, 2004) at 19. The EA at 28 describes Buckeye road as “a dead-end cul-de-sac road . . . designed as a cul-de-sac in order to reduce traffic for residents located along the road,” and explains that “[t]he proposed action is to extend this road into the acquired parcel.”

As BLM recognizes, the EA reports that:

The extension of Buckeye road, which would be an additional access to the proposed Tribal development, would increase traffic through the adjacent private development to the south. The road currently receives only local residential use since it is a dead-end road.

(continued...)

was a known interested party under 43 C.F.R § 2711.1-2(b) and should have received a copy of the NORA.

A consequence of BLM failing to notify McPherson and others who reside near the 40-acre parcel and had participated in meetings discussing the possible sale of the land as “known interested parties” under 43 C.F.R § 2711.1-2(b)<sup>8</sup> was that Green was the only individual who submitted comments on the NORA. *See* Sale EA at 15. The Board cannot, however, treat the deficiency in providing notice as a fatal defect requiring reversing or setting aside the Sale EA and Sale DR/FONSI, because, although McPherson and his neighbors were not sent copies of the NORA, he and others are deemed to have had constructive notice as a consequence of its publication in the *Federal Register*, *Mammoth Times*, and the *Inyo Register*. Ultimately, McPherson learned of the Sale DR/FONSI and the Sale EA, submitted a protest, and has appealed the denial of his protest. He has suffered no discernable harm or prejudice from BLM’s failure to notify him directly. At best, notice of the NORA would have allowed him to provide BLM with his comments and objections at an earlier date. Consequently, there is no basis for nullifying the agency action due to a lack of notice required by regulation. *See Stephen J. Stagnaro*, 107 IBLA 323, 325 (1989); *Richard D. Troon*, 93 IBLA 256, 262 (1986).

#### B. Conveyances of the Surface and Mineral Estates

BLM proposes to transfer the land in fee by direct sale under FLPMA, 43 U.S.C.

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<sup>7</sup> (...continued)

Traffic noise would be increased from the current use this road receives and the noise may be extended from early morning to late-very late evening . . . .

Sale EA at 35, BLM Response at 16. In the DR at 6, the Field Manager had this to say regarding Buckeye Drive:

I do find that the proposed extension of Buckeye road into the acquired land (Lot 1) would likely increase and extend traffic and noise within the adjacent development especially for those residences located on Buckeye Road. . . . However, the extension of Buckeye Road is clearly outside the purview of this federal action, which is simply [to] sell public land to the Tribe. Jurisdiction over and review and approval of the proposed extension of Buckeye Road lies with Mono County, not BLM.

<sup>8</sup> The SD’s decision was unresponsive to this aspect of Green’s protest (“See response to item #1 above”). “Response to item # 1” refers to the Sale EA at 3, 5, where comments are addressed, none of which concern adequacy of notice.

§§ 1713(a) and 1719(b) (2006). Sale DR/FONSI at 2; Sale EA at 9. McPherson's protest questioned whether BLM has authority to sell the land to the Tribe. He contends on appeal that BLM should not have considered selling the land while legislation to transfer it was before Congress, and that the sale will almost certainly lead the Tribe to build a casino on the parcel. McPherson Protest at 46-47; *see* McPherson SOR at 2, 8-9. Green's protest argued more specifically that the sale does not qualify under 43 U.S.C. § 1713(a)(3), because the Tribe has "no reasonable expectation of success for their proposed business ventures" and that a direct, rather than competitive, sale was not in accord with 43 U.S.C. § 1713(f) and 43 C.F.R. § 2710.0-6(c)(3)(iii). Green Protest at 8-10. On appeal, he argues that the SD's response that a direct sale to the Tribe is allowed by 43 C.F.R. § 2711.3-3(a) is unjustified; that the Tribe is not a qualified recipient; and that the land would be more appropriately conveyed to Mono County for the construction of a new fire station. Green SOR at 5-7, 9; *see* Green Decision at 4. He contends that the SD failed to respond to his arguments. Green SOR at 11; *see* Green Protest at 10.

Under FLPMA, a tract of public land may be sold when, as a result of BLM's land use planning process, the Department determines that:

- (1) such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency; or
- (2) such tract was acquired for a specific purpose and the tract is no longer required for that or any other Federal purpose; or
- (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) (2006). The document conveying title must "reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove any minerals under applicable law and such regulations as the Secretary may prescribe." 43 U.S.C. § 1719(a) (2006); *see* 43 C.F.R. § 2711.5. The sale of the surface estate of Federal land is governed by the regulations at 43 C.F.R. Part 2710; the conveyance of the mineral interests falls under 43 C.F.R. Part 2720.

We analyze the specific issue of BLM's authority to undertake this direct sale by examining three questions that arise from the applicable regulations. First, we consider whether the public lands at issue were appropriately designated for sale in

the RMP. Departmental regulations allow members of the public to nominate the surface estates of tracts of public land for disposal by sale, and authorize BLM to identify in an RMP those lands it chooses to designate for sale. 43 C.F.R. §§ 2710.0-6(b), 2711.1-1. In issuing the RMP Amendment DR/FONSI, the SD determined that the Bridgeport RMP would be amended to designate the land as available for sale because it is “difficult and uneconomic to manage for public land values” and designation of the parcel for sale “will help meet the need for additional retail and commercial services and residential development.” That decision, made pursuant to 43 U.S.C. § 1713 (2006), was not subject to appeal to this Board and cannot be reviewed. *See* 43 C.F.R. § 1610.5-2(b); *Redding Gun Club*, 171 IBLA at 31; *Jane Delorme*, 158 IBLA 260, 263-64 (2003) (quoting *Lehman Perkaquanard*, 136 IBLA 182, 185-86 (1996)).

Second, BLM determines whether to offer the lands for sale by competitive bidding, modified competitive bidding, or direct sale without competitive bidding, and publishes notice of the sale. 43 U.S.C. § 1713(f) (2006); 43 C.F.R. §§ 2710.0-6(c), 2711.1-2, 2711.3. We examine whether a direct sale, rather than a sale by competitive or modified competitive bidding, is appropriate in the instant case. The Secretary is authorized to sell land by means other than competitive bidding when he “determines it necessary and proper in order to assure equitable distribution among purchasers of lands, or to recognize equitable considerations or public policies, including but not limited to, a preference to users . . . .” 43 U.S.C. § 1713(f) (2006). “In recognizing public policies, the Secretary shall give consideration to” potential purchasers which include “(1) the State in which the land is located; (2) the local government entities in such State which are in the vicinity of the land; (3) adjoining landowners; (4) individuals; and (5) any other person.” *Id.*; *see* 43 C.F.R. § 2710.0-6(c)(1). When determining the method of sale, BLM is to consider the competitive interest in the land, the “needs of State and local governments; adjoining landowners; historical uses; and equitable distribution of land ownership.” 43 C.F.R. § 2710.0-6(c)(2).

The regulations authorize conveyance by direct sale “when in the opinion of the authorized officer, a competitive sale is not appropriate and the public interest would best be served by a direct sale,” including where “the adjoining ownership and access indicate a direct sale is appropriate.” 43 C.F.R. § 2711.3-3(a). In addition, a direct sale “may be used when the lands offered for sale are completely surrounded by lands in one ownership with no public access, or where the lands are needed by State or local governments or non-profit corporations, or where necessary to protect existing equities in the lands or resolve inadvertent unauthorized use or occupancy of said lands.” 43 C.F.R. § 2710.0-6(c)(3)(iii). Other than issuing and publishing notice, there is no formal procedure for conducting a direct sale, but the regulations contemplate that BLM will provide 45 days for comment, review any comments and

objections it has received, and make a decision whether to proceed with the sale. 43 C.F.R. § 2711.1-2. If it decides to sell the land, BLM notifies the purchaser of its decision and the price of the land and specifies a date by which an offer to purchase must be submitted. 43 C.F.R. § 2711.3-3(b), (c), and (d). The sale may not take place less than 60 days after publication of notice. 43 C.F.R. § 2711.1-2(a).

Green contends on appeal, as he did in his protest, that none of the examples provided in 43 C.F.R. § 2711.3-3 are applicable to the Tribe, that its proposed commercial uses of the land are not needed and are bound to fail economically and, accordingly, that direct sale of the land to the Tribe is not in the public interest. Green SOR at 5-6, 8-9; Green Protest at 8-12, 17; *see also* McPherson Protest at 49. We agree with the SD, who rejected these arguments as speculative, and because a decision based upon a “determination of economic success or failure . . . falls outside BLM’s scope of authority.” Green Decision at 4. BLM argues that the Tribe qualifies as both a governmental entity and an adjoining landowner and asserts that the benefits the Tribe will receive from providing housing for its members and economic development are in the public interest. BLM Response at 23-24; *see* Green Decision at 4; NORA, 69 Fed. Reg. 55648 (Sept. 15, 2004).

Factors evidenced in the record fully satisfy the statutory and regulatory criteria necessary for a direct sale. BLM previously determined that the parcel’s sale to the Tribe for the anticipated commercial development was in the public interest, as reflected in the RMP Amendment. The ownership pattern of adjoining lands also supports the appropriateness of a direct sale. Moreover, the list of examples in 43 C.F.R. § 2711.3-3 is not intended, and does not purport to be, exhaustive. Appellants have shown no error in BLM’s determination of conveyance method and we, therefore, affirm the SD’s decisions in that regard. *See* Sale EA at 9, 19, 27; RMP Amendment EA at 8-11.

The third question, whether the Tribe qualifies as an eligible purchaser, requires little additional discussion. As an adjoining landowner, the Tribe clearly qualifies as a potential purchaser of a direct sale under the statute. 43 U.S.C. § 1713(f) (2006).

Accordingly, the Board concludes that BLM’s decision to sell the surface estate of lots 1 and 2 to the Tribe by the method of direct sale was in accord with the applicable statutes and regulations.

A separate legal regime attends conveyance of the mineral estate. “Conveyance of mineral interests is not authorized under section 203 of FLPMA [43 U.S.C. § 1713 (2006)].” *Joyce and Tony Padilla*, 119 IBLA at 43. As quoted above, Congress has specified that documents conveying title “reserve to the United States all minerals in the lands” along with the right to prospect for, mine, and

remove them. 43 U.S.C. § 1719(a) (2006); *see* 43 C.F.R. § 2711.5. The mineral estate may be conveyed to the surface owner when the Department determines “(1) that there are no known mineral values in the land, or (2) the reservation of the mineral rights in the United States is interfering with or precluding appropriate non-mineral 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) (2006).

The regulations require that a surface owner, or prospective surface owner, submit an application. 43 C.F.R. §§ 2711.5, 2720.1-1. A \$50.00 application fee and certain information must be provided, including a statement as to:

- (i) the nature of federally-reserved or owned mineral values in the land,
- . . . (ii) the existing and proposed uses of the land, (iii) why the reservation of the mineral interests in the United States is interfering with or precluding appropriate non-mineral development of the land covered by the application, (iv) how and why such development would be a more beneficial use of the land than its mineral development, and
- (v) a showing that the proposed use complies or will comply with State and local zoning and/or planning requirements.

43 C.F.R. § 2720.1-2(c) and (d)(4); *see Kenneth C. Pixley*, 88 IBLA 300, 302-303 (1985). In addition, an applicant must submit to BLM the estimated amount of the administrative costs of processing the application and issuing conveyance documents, including the costs of conducting an exploratory program to determine the character of any mineral deposits in the land and evaluating existing data to determine the fair market value of the mineral interests. 43 U.S.C. §§ 1719(b)(2), 1719(b)(3)(i) (2006); 43 C.F.R. § 2720.3(b)(1); *see generally Niles H. Thim Corp.*, 93 IBLA 128 (1986); *Richard E. Doscher*, 83 IBLA 264 (1984). Alternatively, an applicant may obtain approval to conduct an exploratory program or BLM may determine that an exploratory program is not needed because the available data indicates that there are no known mineral values in the land, that further exploration is not economically justified, or that there already is sufficient information to determine the fair market value of the mineral estate. 43 C.F.R. §§ 2720.1-3(b)(2), 2720.2.

As discussed more fully below in relation to valuation of the mineral estate, there is no evidence in the record that the Tribe or Caltrans filed an application to purchase the mineral estate pursuant to 43 C.F.R. Part 2720, or that BLM complied with the regulations to characterize the mineral material deposit in order to determine its fair market value.

*C. Fair Market Value of the Surface and Mineral Estates*

Under FLPMA, the “[s]ale of public lands shall be made at a price not less than their fair market value as determined by the Secretary.” 43 U.S.C. § 1713(d) (2006). Appellants argue that the June 10, 2004, appraisal of the land is defective in its selection of comparable sales and does not correctly identify the fair market value of the land as required by FLPMA. *See* Green SOR at 1-2; Green Protest at 5-7, 9; McPherson SOR at 6-7, 32-33, 38; McPherson Protest at 35-38, 52. BLM points out that the appraisal’s transmittal memorandum states that its estimate of fair market value of \$2,000 per acre is good for only 12 months and, accordingly, that it prepared a new appraisal, approved on June 27, 2008. It asserts that appellants’ objections to the original appraisal are moot. BLM Response at 30, n.9.

BLM has not provided a copy of the new appraisal to the Board (or, it appears, to appellants). We are therefore unable to determine the applicability of appellants’ arguments to the more recent appraisal and whether the issues raised on appeal regarding the original appraisal are moot. *See Desert Vipers Motorcycle Club*, 142 IBLA 293, 294 (1998) (appeal not moot when issue is “capable of repetition, yet evading review”); *Michael Blake*, 135 IBLA 9, 12 (1996). Since the original appraisal relied upon in the DR/FONSI has expired and no decision has been made to adopt the new appraisal, the Board sets aside and remands the portions of the Sale DR/FONSI which accept “the market value opinion as set forth in the [expired] appraisal report” and provide that BLM “will use these amounts for the sale.” Sale DR/FONSI at 2.<sup>9</sup> The Board also sets aside those portions of the SD’s protest

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<sup>9</sup> In addition, BLM’s finding that the sale “appears to conform to Mono County General Plan provisions” (Sale DR/FONSI at 4-5) lacks a supporting analysis and is set aside. In the event that the second appraisal closely mirrors the first, we note that the appraisal of the highest and best use of the land as a single residential parcel appears to be inconsistent with BLM’s stated justification for a direct sale to the Tribe, which was to “help meet the need for additional retail and commercial services and residential development” (RMP Amendment DR/FONSI at 3; *see also* Sale EA at 9, 10, 27; Sale DR/FONSI at 4) and to employ tribal members “for the construction phase and operation of the businesses once established” (NORA, 69 Fed. Reg. 55648 (Sept. 15, 2004)). *See* 43 U.S.C. § 1713(d) (2006); *Uniform Appraisal Standards for Federal Land Acquisitions* (2000), § B-23 (“if there is a reasonable probability that the property’s zoning classification will be changed, this probability should be considered in arriving at the value estimate”).

In addition, due consideration must be given to appellants’ contention that the treatment of the four lots as a single residential parcel skewed the selection of comparable sale properties toward large parcels of rural land over smaller parcels closer to developed areas. *See Uniform Appraisal Standards for Federal Land*

(continued...)

decisions relating to the appraisals in order for BLM to issue a decision concerning the current value of the parcel. McPherson Decision at 4; Green Decision at 3, 5.

[1] In addition to paying fair market value for the surface estate, the purchaser of a mineral estate must pay “the fair market value of the interests being conveyed.” 43 U.S.C. § 1719(b)(2) (2006). The Sale EA reports without explanation that the “[m]ineral resources are considered to be of no value.” Sale EA at 34. The Sale DR/FONSI asserts “[t]here are no minerals of value on the disposal parcels” and paraphrases 43 U.S.C. § 1719(b)(1) (2006) in stating that “that there are no known mineral values in the land”<sup>10</sup> and that retaining the mineral interest “would interfere with or preclude appropriate non-mineral development of the land” which is “a more beneficial use of the land than mineral development.” Sale DR/FONSI at 2, 3.

The 2004 appraisal evaluates the market value of a fee simple interest in the 40-acre parcel and does not distinguish between surface and mineral estates. In regard to the mineral estate, it says only that, “[a]ccording to information provided the appraiser by the client office (Bishop BLM Field Office), there are no known valuable minerals on the property.” Appraisal at 6. The record does not include any correspondence between BLM and the Appraisal Services Directorate and the appraisal does not expressly state whether mineral rights were included in the values of the properties used as comparable sales.

The only document in the record providing factual information about minerals on the 40-acre parcel is the July 27, 2000, mineral report. It states at 3 that

[the parcel] has a low potential for metallic and non-metallic locatable minerals. It also appears to have low potential for geothermal resources. *The parcel has a high potential for mineral materials and approval of the sale would result in foregoing of future extraction of fill*

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<sup>9</sup> (...continued)

*Acquisitions* (2000), § A-17 (“In selecting the comparable sales to be used in valuing a given property, it is fundamental that all sales have the same economic highest and best use as the property under appraisal and that the greatest weight be given to the properties most comparable to the property under appraisalment.”).

<sup>10</sup> 43 C.F.R. § 2720.0-5(b) defines “known mineral values” to mean “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.”

*material*. No other known salable or leasable minerals exist within the application. [Emphasis added.<sup>11</sup>]

The report identifies the mineral material as decomposed granite, noting that the same deposit was being extracted for use as fill material at a site 3 miles to the north. *Id.* at 7. The report, however, provides no information about the possible size of the deposit, and, more significantly, fails to estimate its monetary value or state that it has no economic value. As noted above, there is no evidence in the record that the Tribe or Caltrans filed an application to purchase the mineral estate pursuant to 43 C.F.R. Part 2720,<sup>12</sup> or that BLM undertook or required an exploratory program to characterize the mineral material deposit in order to determine its fair market value. Moreover, the record fails to show that BLM made a determination that further exploration was unnecessary because “a reasonable person would not make exploration expenditures with expectations of deriving economic gain from the mineral production” or that sufficient information was already available to determine the fair market value. 43 C.F.R. § 2720.2(b) and (c).<sup>13</sup>

No document in the record establishes the fair market value of the mineral estate or finds that it has no monetary value. BLM’s statements in the Sale EA at 2-3 and in the Sale DR/FONSI at 34 are unsupported by, if not contrary to, the mineral report. BLM may be correct that commercial development of the land by the Tribe would be a more beneficial use than mineral development, but the statement lacks a basis in the record. Therefore, the conclusion of the Sale DR/FONSI that there are no minerals of value is set aside. If either the Tribe or Caltrans applies for a conveyance of a mineral estate, BLM must either prepare an analysis of its fair market value and require payment by the transferee or document its finding that the mineral estate has no economic value. *See* 43 C.F.R. § 2720.3(a).

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<sup>11</sup> It is unclear from the record whether the referenced “application” is the document required of a surface owner, or prospective surface owner by 43 C.F.R. §§ 2711.5, 2720.1-1 and whether the Tribe and Caltrans satisfied these requirements.

<sup>12</sup> Although the Sale EA states that the Tribe had “requested the mineral estate be included in the sale” (Sale EA at 9), the only relevant document is a Dec. 5, 2002, letter in which the Tribe, apparently after receiving a copy of the draft RMP Amendment EA, stated its “understanding that the Tribe’s proposed purchase of public land . . . includes the surface as well as subsurface land” and asked BLM to “let us know if this is not an accurate understanding.”

<sup>13</sup> Citing the 1993 Mono County Master Environmental Assessment, BIA’s Fee-to-Trust EA states at page 29 that the parcel “and surrounding area have been identified as MRA-3[,] meaning that the significance of mineral deposits cannot be evaluated with available data.”

*D. ROWs Affected by the Transfers*

The parcel is subject to nine ROW grants for water and sewer pipes; above ground power, telephone, and optic cable lines; an underground telephone cable; a BIA road, dike, ditch, and fill area; and Highway 182. *See* Sale EA at 24. In the NORA, BLM proposed to sell the lands subject to the ROWs. 69 Fed. Reg. 55648 (Sept. 15, 2004). The consequence of the “fee to trust” transfer would be that the ROW permits would be subject to administration by BIA. *See* Sale EA at 25. Several permit holders expressed concerns that their annual rentals could be calculated differently by BIA and that their permits might not be renewed at the end of their current terms or could become subject to different terms and conditions. *See* Sale EA at 17; Sale DR/FONSI at 5. Appellant Green contends that BLM would not adequately protect the ROWs from conflicting uses by the Tribe, particularly in regard to the potential extension of Buckeye Drive over underground water and sewer pipes. Green Protest at 3, 11, 16, 18; *see* Green SOR at 6, 7-8. On January 25, 2005, the Tribe adopted Resolution 05-01 agreeing to accept the terms of easements across the lands to be purchased by the Tribe and assess rentals based upon BLM’s published linear right-of-way fee schedule. Sale EA at 25. The Field Manager, however, decided to retain Federal ownership, to amend all ROWs to terms of “in perpetuity,” and to convey the parcels, subject to the ROWs. Sale DR/FONSI at 5.

The decision to convey the lots subject to the ROWs and reserve BLM’s right to enforce terms and conditions and collect rents is authorized by the statute and appellants have not shown error in determining to do so. *See also* 43 C.F.R. § 2807.15.<sup>14</sup> The mere possibility that a problem may arise cannot be the basis for preventing sale of the land. The decision to retain Federal ownership and control of the ROWs is therefore affirmed.

*E. Adequacy of the EA*

Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2006), requires a Federal agency to prepare an environmental impact statement (EIS) when approval of a proposed action would constitute a “major Federal action[] significantly affecting the quality of the human environment.” Regulations promulgated by the Council on Environmental Quality allow an agency to decide whether to prepare an EIS by writing an EA and issuing a FONSI when it determines that an EIS is not required. *See* 40 C.F.R. §§ 1500.4(q), 1501.3, 1508.9, 1508.13. The Board will affirm a BLM decision approving an action based upon an EA and FONSI when the record demonstrates that BLM (1) considered the relevant

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<sup>14</sup> Assuming that all of the ROWs are linear, as they appear to be, the decision to change the term of the permits to “in perpetuity” is also authorized by regulation. *See* 43 C.F.R. § 2806.23(c).

areas of environmental concern, (2) took a “hard look” at the potential environmental impacts of the proposed action, and (3) has made a convincing case that the action will not create a significant environmental impact or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982); *Oregon Chapter Sierra Club*, 176 IBLA 336, 346-47 (2009); *California Wilderness Coalition*, 176 IBLA 93, 105 (2008).

A party challenging BLM’s decision must demonstrate, with objective proof, that it was premised on a clear error of law or a demonstrable error of fact, or that the analysis failed to consider an environmental question of material significance to the action for which the analysis was prepared. *Wilderness Watch*, 176 IBLA 75, 86 (2008); *Oregon Chapter Sierra Club*, 176 IBLA at 346-47; *Bark*, 167 IBLA 48, 76 (2005). Mere differences of opinion provide no basis for reversal if BLM’s decision is reasonable and supported by the record on appeal. *Annunziata Gould*, 176 IBLA 48, 60 (2008), quoting *Gerald H. Scheid*, 173 IBLA 387, 396 (2008).<sup>15</sup> We have reviewed all of appellants’ assertions of error in the Sale EA and focus here only on those that constitute a critical element of the analysis and, if sustained, would require setting aside the DR/FONSI.

On appeal, Green renews his contention that the wildlife habitat study BLM conducted on January 11, 2000, was insufficient to establish species use during the winter, let alone throughout the year. Green SOR at 4; see Green Protest at 7-8. Similarly, he notes from the Sale EA that BLM’s plant survey was conducted on a single day, May 11, 2000, that the California Native Plant Society’s inventory referred to in the literature list was published in 1994, and that biology and botany reports cited in the EA do not indicate that information pertaining to other times of the year was considered.<sup>16</sup> Green SOR at 4-5. BLM does not respond to these arguments and simply quotes from the EA and refers to the MOU with the Tribe adopted to protect certain vegetative species. See BLM Response at 9-10; Sale EA at 31; Sale EA, App. 2.

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<sup>15</sup> In deciding whether BLM has taken a hard look at the likely environmental consequences of a proposed action, we are guided by the “rule of reason,” as expressed in *Don’t Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992) (“An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises.”). *Santa Fe Northwest Information Council, Inc.*, 174 IBLA 93, 107-08 (2008), citing 40 C.F.R. § 1508.9; 46 Fed. Reg. 18026, 18037 (Mar. 23, 1981).

<sup>16</sup> A May 24, 2000, report by a BLM botanist appears as Appendix B of the Fee-to-Trust EA. A Feb. 14, 2001, addendum identifies the areas with plants to be protected by the Tribe. A report on wildlife is not part of the record before the Board.

The Sale EA identifies wildlife resources such as lagomorphs (jackrabbit and/or cottontail), mule deer and their migration corridors, the location of sage grouse leks, and wildlife habitat consisting largely of sagebrush. Sale EA at 22. It concludes that “the parcel appears to have limited value to wildlife,” but that “[t]here would be some slight negative impacts to habitat for small animals such as rodents, birds and reptiles due to development.” Sale EA at 31. The Sale EA’s discussion of wildlife and special species status appear to be a repetition of those sections of the RMP EA. This may be appropriate, as the on-the-ground conditions in 2005 may have remained substantially unchanged since 2000.

There is no indication in the Sale EA, however, that BLM considered whether the biological resource information from 2000, described in the affected environment, adequately and accurately identified the wildlife and vegetative species and habitat in the area in 2005, and whether that information provided a reasonable basis for the Sale EA’s analysis of potential impacts to previously identified resources and to any others that may be present now, such as the many additional species alleged by Green to be present. The EA’s silence on this point prevents our determination of whether the findings of the DR/FONSI with respect to biological resources were made based upon BLM’s consideration of relevant areas of environmental concern, after taking a hard look at the potential environmental impacts of the proposed sale. Accordingly, we set aside and remand for action consistent with this decision.

Finally, and as stated at the outset, the Simpsons present a single issue, renewing their protest contention that the Sale EA is deficient because it fails to recognize that the air quality of the Bridgeport Valley would be affected “by the selling of Non-California Reformulated Fuel which the tribe would buy from a Nevada fuel supplier.” Simpson Protest at 3. In support, they claim to “watch daily as a fuel tanker drives through Bishop to deliver the same fuel to the Bishop Tribe Gas Station.” *Id.* On appeal, the Simpsons focus on the SD’s statement regarding the uncertain possibility that, if a gasoline station were established, the Tribe would sell non-California reformulated fuel. Simpson SOR at 1.

In its Response, BLM terms the claim that the Tribe will sell non-California reformulated fuel “sheer speculation,” falling short of appellants’ burden to demonstrate error, and asserts that, even if the Tribe were to sell such fuel, because the local market for gasoline is “relatively small . . . , it would not be in amounts great enough to cause harmful impacts to air quality.” BLM Response at 14.<sup>17</sup>

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<sup>17</sup> BLM counters the Simpsons’ claim regarding sales of gas by the Bishop Tribe, by stating that “the one other Indian tribe in the local region that operates a gas station on Trust lands, the Bishop Paiute Tribe, sells only California reformulated fuel even  
(continued...)

The EA describes the air quality in the “Affected Environment” as “excellent for most of the year,” though quality can be reduced by inversion layers that trap wood stove emissions during the winter, strong winds that temporarily reduce air quality where fugitive dust from dirt roads and open dirt areas becomes air borne, and summer westerly winds that carry smoke from the central valley across the Sierras. EA at 19. It analyzed impacts to air quality from the proposed sale, stating that there may be some short term dust emission that the Tribe would abate during construction. EA at 29. It also considered that there would be some increase in vehicle emissions following commercial development, but determined that the amount of any increase would not be great enough for the sale to significantly affect air quality. *Id.*

Though terse, the SD’s decision on the Simpsons’ protest was not in error, and, applying the “rule of reason,” we find that appellants have not carried their burden of demonstrating that BLM’s environmental analysis of impacts to air quality erred in determining that the sale, as proposed, would not create a significant environmental impact to air quality. Appellants’ difference of opinion provides no basis for reversal, as we find that BLM’s decision is reasonable and supported by the record on appeal. *Annunziata Gould*, 176 IBLA at 60.

To the extent not expressly addressed herein, all other errors of fact or law raised by appellants have been considered and rejected as contrary to the facts or law, or immaterial to a final resolution of the appeal.

### *III. Conclusion*

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the December 9, 2005, decisions of the California State Director on the protests by Randy A. Green and Wallis V. McPherson are affirmed in part and set aside in part and remanded, as discussed above. The December 9, 2005, decision of the California State Director on the protest by John and Susan Simpson is affirmed. The decision of the Sale DR/FONSI to conduct a direct sale of lots 1 and 2 to the Tribe is affirmed to the extent we find that BLM’s decision to sell the surface estate of those lots by the method of direct sale was in accord with the applicable statutes and regulations. The decision of the Sale DR/FONSI to conduct a direct sale of lots 1 and 2 to the Tribe and lots 3 and 4 to Caltrans is set aside in part and remanded so that BLM may (1) address whether the

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<sup>17</sup> (...continued)

though it could legally purchase and sell non-California reformulated fuel.” BLM Response at 14. And it asserts that, if the public land parcel were taken into trust and the Tribe were authorized to sell non-California reformulated fuel, the cost of transporting such fuel would serve as a deterrent. *Id.*

decision to sell will include the mineral estate, as provided by FLPMA and applicable regulations, (2) base any sale on the fair market value of all property to be conveyed by the sale, and (3) more clearly indicate that it has taken a “hard look” at the potential environmental impacts to the current biological resources.

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
R. Bryan McDaniel  
Administrative Judge