



WESTERN INDUSTRIAL MINERALS

182 IBLA 11

Decided January 30, 2012



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

WESTERN INDUSTRIAL MINERALS

IBLA 2011-128

Decided January 30, 2012

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting a prospecting permit application. MTM-100752.

Set aside and remanded.

1. Administrative Procedure: Adjudication: Leases and Permits--Administrative Procedure: Burden of Proof

Under 43 C.F.R. § 3505.50(a), a decision whether to approve a mineral prospecting permit on Federally-acquired lands is at BLM's complete discretion. However, BLM must ensure that the decision is supported by a rational basis and that such basis is stated in the written decision as well as supported by the administrative record accompanying the decision. Where an appellant shows by a preponderance of the evidence that, contrary to BLM's decision, its mineral prospecting permit conforms with the terms and conditions of the applicable land use plan, the Board will set aside the decision and remand the matter for further review.

APPEARANCES: Stephanie Gehres Kruer, Esq., Sheridan, Montana, for Western Industrial Minerals; Karan L. Dunnigan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Western Industrial Minerals, LLC (WIM), appeals from a February 28, 2011, decision of the Montana State Office (MSO), Bureau of Land Management (BLM), rejecting its prospecting permit application (MTM-100752). The company submitted the application to secure an exclusive right to prospect for valuable quartzite deposits on 63.81 acres of Federally-acquired lands. BLM rejected WIM's application as

“inconsistent” with the 2006 Dillon Field Office (DFO) Resource Management Plan (RMP) “as well as the rationale for acquiring and managing the [acquired] lands,” which was to protect the area’s natural, cultural, and recreational resources. Decision at unpaginated (unp.) 3.

Based on the record before us, we cannot sustain BLM’s decision. We conclude that BLM’s decision is at odds with key provisions of the DFO RMP. The DFO RMP allows for solid mineral prospecting and leasing on acquired lands so long as operations adhere to terms, conditions, and stipulations that would mitigate any environmental impacts. BLM rejected WIM’s prospecting permit application on the basis that significant, difficult to mitigate resource degradation will result from prospecting activities on those acquired lands.¹ Decision at unp. 2. Further, there is no indication in the record that BLM considered whether mitigation measures could minimize or effectively eliminate any adverse environmental impacts a solid mineral prospecting project could cause. As explained below, we set aside BLM’s decision and remand the case for further consideration.

BACKGROUND

In 1999, BLM acquired 2,244 acres of privately-owned lands in sec. 1, T. 9 S., R. 10 W., Principal Meridian (PM), Beaverhead, Montana, to protect natural, cultural, and recreational resource values along the Beaverhead River. The River is designated as a Class I blue ribbon trout stream and is heavily used for angling, floating, and other recreational purposes. The acquisition was funded in part by the Land and Water Conservation Fund (LWCF) Act, 16 U.S.C. §§ 46014-460111 (2006),² and monies congressionally appropriated through the North American Wetlands Conservation Act (NAWCA), 16 U.S.C. §§ 4401-4414 (2006). See 64 Fed. Reg. 58439 (Oct. 29, 1999).³ BLM stated in Environmental

¹ BLM’s rejection was also based upon its concern that resource degradation would result from future mining on the acquired lands. Because WIM’s permit application seeks only to explore for minerals, we do not presently consider BLM’s hypothetical concern that mining the lands is not consistent with the purposes for they were acquired.

² The LWCF program allows BLM to purchase land needed to manage key natural resources, to acquire legal ownership of land to enhance the management of existing public land and resources, and to provide public access to Federal lands.

³ The NAWCA provides matching grants to organizations and individuals who have developed partnerships to carry out wetlands conservation projects in the United States for the benefit of wetlands-associated migratory birds and other

(continued...)

Assessment (EA) No. MT-050-00-16, prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), that the 2,244-acre tract would be managed for the protection and preservation of critical resource values in accordance with the NAWCA. The EA provided that “[a]ll future projects to be undertaken on the tract as a result of a site-specific plan must have the emphasis and intent of enhancing the resource values while still protecting and preserving those same critical resource values.” EA MT-050-00-16, *Withdrawal of Beaverhead River Acquisition* (Aug. 3, 2000), at 2. However, BLM stated in the EA that minerals leasing may be allowed if consistent with the management goal of protecting critical resource values along the Beaverhead River, and that leasing minerals on the tract “is a discretionary action and can be controlled in a manner which will not have a significant impact on the property.” *Id.* at 9-10;⁴ see Public Land Order (PLO) No. 7472, 65 Fed. Reg. 77038 (Dec. 8, 2000) (leaving the land open to mineral leasing).

In October 2003, BLM effected an emergency acquisition⁵ of five small tracts of private land located on or adjacent to the Beaverhead River. BLM’s purpose for acquiring the patented lands was to “consolidate [its] ownership in a continuous two-mile stretch of the Beaverhead River and [to] protect that immediate area from development.” EA MT-050-03-04 at 4. The agency also wanted the lands so that it could better protect the river viewshed, wetlands, cultural resources, and the river

³ (...continued)

wildlife. Ducks Unlimited, Inc. (DU), a wetland and waterfowl conservation group, partnered with BLM in 1999 to acquire, take possession of, and manage the 2,244 acres of acquired lands. See Memorandum of Understanding No. MT-050-MOU-99-01. As a condition of using NAWCA funds for the 1999 acquisition, BLM and DU designed a shallow pond, 25 to 30 acres in size, to create wetland habitat on the lowlands portion of that tract; this pond was constructed and is managed by DU.

⁴ Minerals on public lands are classified as locatable, leasable, or salable. The Mineral Leasing Act of 1920 (MLA) governs leasable minerals. 30 U.S.C. §§ 181-287 (2006). These include sodium, potash, coal, oil and gas, phosphates and others specifically named in the statute. Salable minerals are governed by the Materials Act, 30 U.S.C. §§ 601-604 (2006), and include common varieties of sand, stone, gravel, pumicite, cinders, and clay. The locatable minerals are governed by the General Mining Law of 1872, as amended, 30 U.S.C. §§ 21-54 (2006). Locatable minerals are usually a geologic formation not listed in either the Mineral Leasing Act or the Materials Act.

⁵ According to BLM’s Acquisition Handbook, H-2100-1, Rel. No. 2-290, Ch. IV, IV(A)(3) (Jan. 31, 2002), an emergency acquisition opportunity occurs when a property is ready for sale and may be lost if the purchase cannot be completed timely.

banks from accelerated siltation, which could occur as a result of any development in the flood plain or near the river. *Id.* at 3-4. BLM stated that “[n]o specific use is proposed for any of the properties once they are acquired. They would be managed in conjunction with the adjacent BLM lands acquired in 1999 and any subsequent management plans that may be completed for those lands.” *Id.* To date, these lands have not been Federally designated as a special recreation management area (SRMA), an area of critical environmental concern, a wilderness area, wilderness study area, wild and scenic river corridor, wildlife refuge, or as any other particular designation or reservation, and only the 2006 DFO RMP applies to the area’s land use.

Of present concern are four of the small tracts acquired in 2003,⁶ patented placer mining claims (Patent Nos. 12070, 12072, 12073, and 14589), that form “intrusions into the large tract of land (2244 acres) acquired by [BLM] in 1999.” EA MT-050-03-04 at 2. Three of those patented mining claims, Patent Nos. 12072, 12073, and 14589, are contiguous, create a “C” shape, and are situated east of the Beaverhead River in sec. 1, T. 9 S., R. 10 W., PM. *See* SOR, Replacement Ex. 8. Union Pacific Railroad has an operational railroad right of way that parallels and runs between the River and these three C-shaped parcels. *Id.* Interstate 15 lies to the west of the River. *Id.* The fourth patented claim, Patent No. 12070, is situated predominantly on the west side of Beaverhead River in sec. 36, T. 8 S., R. 9 W., and overlaps about 500 feet of the river. Thus, some wetlands/flood plains are included within the borders of Patent No. 12070. EA MT-050-03-04 at 5. There is a Native American rock shelter and rock art on its south boundary, and the Historic Lewis and Clark Trail crosses the western portion of these Patented lands. *Id.*

To the southwest of the River lies the Rocky Hills SMRA, a designated waterfowl pond for duck hunting, and the Ney Ranch Homestead, an historical and a BLM-designated recreational site. *See* DFO RMP, Maps 23, 24. There also exists William Clark’s historic campsite some distance to the east of the patented lands at the confluence of Gallagher Creek and the Beaverhead River. The area is also designated as a visual resource management class III. *See* DFO RMP, Map 30.

In its 2006 RMP, BLM sought to balance resource uses on the public lands, thus describing allowable land uses and including a variety of goals, objectives, land

⁶ The fifth small tract, referred to as the “Frampton property,” is described as “a ‘remnant’ or remaining part of a larger parcel which has been slowly sold off in small pieces over the years to an adjacent landowner and to the Montana Department of Transportation for the construction of Interstate Highway 15.” Statement of Reasons (SOR), Ex. 12, EA MT-050-03-04, *Beaverhead River Emergency LWCF Acquisition* (January 2003), at 2.

use allocations, and land use terms, conditions, and stipulations.⁷ Among many other matters, the RMP contains management criteria for cultural resources, lands and realty, leasable minerals, National Trails, riparian and wetland vegetation, recreation, and visual resources. Through the RMP, the DFO sought, *inter alia*, to “[p]reserve and protect significant cultural resources and ensure that they are available for appropriate uses by present and future generations” (RMP at 24); to “[m]anage newly acquired lands for the highest potential purpose for which they were acquired” (*id.* at 40); to “[m]ake all lands in the planning area available for exploration and development of leasable solid minerals (phosphate, etc.) except for approximately 124,235 acres in the Bear Trap Wilderness area and the nine Wilderness Study Areas which are unavailable for new leases” (*id.* at 44); to “[p]rovide a diverse array of quality, resource based recreation opportunities while protecting and interpreting the resource values, providing educational opportunities, minimizing user conflicts, and promoting public safety” (*id.* at 51); to “[t]ake actions to cooperatively conserve riparian/wetland habitat, minimize the destruction, loss or degradation of wetlands, and preserve values served by floodplains where occurring on public land while reducing hazards to human safety” (*id.* at 55); and to manage scenic values so as to “partially retain the existing character of the landscape” and so that “[c]hanges caused by management activities [will] not detract from the existing landscape” (*id.* at 65).

Measures to avoid or minimize environmental harm were built into the DFO RMP. The Plan contains management actions for each resource to help in meeting established goals and objectives. For example, the RMP allows BLM to place restrictions on lease operations to prevent unnecessary or undue degradation to surrounding resources. Appendix K of the DFO RMP contains stipulations that BLM applies to mineral leases in certain cases.⁸ Appendix K states that no surface occupancy is allowed on any lands designated for a NAWCA wetland project (*e.g.*, a duck pond), because to do so would thwart the project’s purpose. All leasing activity is prohibited within ½ mile from the centerline of Class 1 fishery streams (*e.g.*, the Beaverhead River), so that there is no net increase in sediment and no adverse effects on water quality and quantity. A lessee cannot occupy any developed recreation site or lands within ½ mile of its border (*e.g.*, the Ney Ranch Recreation Site).

In addition, the RMP prohibits any activity within ½ mile of the boundaries of cultural properties determined to be of particular importance to Native American

⁷ The record contains a CD-ROM of the DFO RMP. It is also available online at http://www.blm.gov/mt/st/en/fo/dillon_field_office/rmp/rod.html (last visited on Oct. 27, 2011).

⁸ While these stipulations generally apply to oil and gas leases, they are applicable to any leasable mineral operation. See RMP at 45-46.

groups, determined to be Traditional Cultural Properties, and/or designated for traditional use. Such properties include pictograph/petroglyph sites. To control the visual impacts of leasing activities and facilities within a visual resource management class III area, all surface disturbing activities and construction of semi-permanent and permanent facilities may require special location and design so as to blend with the natural surroundings. All mining activity is prohibited within wetlands, floodplains, and riparian areas. BLM must approve engineering and reclamation plans to prevent excessive soil erosion on steep slopes. Use is prohibited within ½ mile of any designated National Historic Trail, such as the Lewis and Clark and Nez Perce Trails, to preserve and protect the Trail's natural setting.

On September 21, 2010, John P. Hill submitted to BLM a prospecting permit application that would allow prospecting activities on the previously-patented mining claims.⁹ Hill sought to discover quartzite that would be used to commercially develop "frac sand," a material employed in hydraulic fracturing for oil and gas extraction. Hill subsequently notified BLM that he was WIM's Vice President and filed another quartzite prospecting permit application on November 5, 2010, on behalf of WIM, explaining that it sought to explore only 63.81 acres of the lands acquired in 2003 that are on the east side of Beaverhead River in sec. 1, T. 9 S., R. 10 W., PM. BLM treated the application as a revision of the one filed in September 2010.

By notice dated December 1, 2010, BLM acknowledged that it had changed the permit applicant from Hill to WIM and that WIM had substantially reduced the prospecting area. BLM also instructed WIM to submit a preliminary exploration plan. That same month, BLM received a two page letter from WIM that contained its "Daly Exploration Plan."¹⁰ According to WIM, the proposed prospecting area

is vegetated predominately with sparse bunch grass, prickly pear cactus and juniper trees. The land around the area is used by mule deer. It is a very rocky area as deposit[s] of quartzite protrude[] to [the] surface. There are no threatened or endangered species in the subject area.

As the deposit is largely exposed, we will take samples from exposed areas. The height of the deposit is exposed by an old quarry,

⁹ Specifically, Hill described the area as comprising 376.43 acres and situated within the W½ sec. 1, T. 9 S., R. 10 W., and the SW¼ sec. 36, T. 8 S., R. 10 W., PM, Beaverhead County, Montana.

¹⁰ WIM explained in its letter that the lands described in its application were known as "Daly Mountain located on the east side of Highway 15, South of Dillon, Montana, between the Grasshopper exit to the North and the Pipe Organ fishing access for the Beaverhead River to the South." Letter from WIM to BLM dated Dec. 27, 2010.

so we will take samples from the entire face as it is much more conclusive than drill holes could ever be.

The area that we will test will have no effect on any water in the area, as we will use existing roads and trails to supply egress to the testing areas. ATV, pickups, and foot travel will be used where applicable and any disturbance will be difficult, if not impossible, to ascertain. All access vehicles will have fire suppression equipment on board.

Drilling will not be necessary.

Reclamation will not be necessary as disturbance will be noninvasive.

Letter from WIM to BLM dated Dec. 27, 2010.

On January 12, 2011, WIM submitted a preliminary geologic report for the quartzite deposit prepared by Gene M. Nellis, a certified geologist (Nellis Report). The report stated that the quartzite deposit “is unique” because it “is massive and [] contains very little foreign material,” *i.e.*, it is a “massive uniform deposit.” Nellis Report at 1; *see also* Letter from BLM to Iverson dated Jan. 28, 2011. Nellis “took a close look at 10 sites randomly spaced throughout the outcrop and saw a fine-grained quartzite of high purity.” *Id.* at 2. He speculated one site east of the Beaverhead River contains an estimated 12.8 million tons of reserve quartzite, but that “to classify the tonnage as proven, [he] would recommend drilling four holes to a depth of 200' near the area where mining would commence.” *Id.*; *see id.* at attachment (tonnage calculations).

BLM recognized that the quartzite outcropping covered only a portion of the prospecting area, and required WIM to amend its exploration plan to include several bore holes to help with the collection of additional geologic data and would facilitate a proven reserve calculation for the entire 63.81-acre area. *See* Letter from BLM to Iverson dated Jan. 28, 2011. WIM submitted an amended exploration plan, prepared by Anderson Engineering, Inc., that further described WIM’s proposed prospecting activities. In addition to taking grab samples, as described in its initial exploration plan, WIM proposed to use a truck-mounted, reverse circulation drill rig to bore four holes on various sites within the prospecting area. WIM would conduct its drilling operations during February and March of 2011, when the ground is frozen, to insure “minimal disturbance of the area surrounding the drill locations.” Amended Exploration Plan at unp. 1. WIM’s amended plan stated that the first two holes would be drilled to depths of about 350' and 400' on Patent No. 14589’s southeastern border and on Patent No. 12073’s southeastern corner. *Id.* at unp. 2. The third bore hole would be located on Patent No. 14589’s southwestern border, accessible by an existing road; the fourth drill location would be along an existing

road on Patent No. 12073. WIM also provided detailed reclamation procedures and described how it would test the samples gathered during the exploratory phase for value.

By memorandum dated February 15, 2011, the DFO informed the MSO of its concerns “regarding the potential leasing, exploration and mining of minerals on public lands in the vicinity of the Daly’s site . . . to Western Industrial Minerals.” Feb. 15, 2011, Memorandum at 1. According to the DFO, extracting solid minerals in that area would potentially cause impacts to the Beaverhead River’s viewshed and flood plain, the Lewis and Clark National Historic Trail, the William Clark campsite, the waterfowl pond, the Ney Ranch, Native American rock art, and the area’s pristine feel, which it believed “would be difficult to mitigate.” *Id.* at 2. The DFO concluded that WIM’s proposed actions are inconsistent “with the rational[e] for acquiring the property under consideration for these activities.” *Id.* The DFO explained to the MSO that the lands subject to WIM’s proposed prospecting plans were originally acquired with LWCA funding for their historical, recreational, fishery, waterfowl, wildlife, and wetlands values, and for their access to adjacent public lands and resources, but not for their leasing potential: “If BLM had been interested in seeing these lands mined[,] it would have never purchased them.” *Id.*

On February 28, 2011, the MSO issued the decision at issue. The MSO used verbatim the DFO’s reasons for rejecting WIM’s prospecting permit application. The MSO held that mineral excavation in the area is inconsistent with the governing RMP, and BLM’s rationale for acquiring the patented lands subject to WIM’s prospecting permit application. WIM appealed.

ARGUMENTS OF THE PARTIES

WIM correctly states that BLM is not prevented by the RMP or a withdrawal order from granting its applied-for prospecting permit on the subject lands. SOR at 7-8, 15-16; *see id.* at 19 (“the area at issue in this appeal is not part of the land prescribed by the RMP”). It argues that its prospecting activities can be conducted consistent with BLM’s goal of protecting critical resource values along the Beaverhead River and that BLM has not shown how exploration would undermine the agency’s goals for the prospecting permit area or the resources of the surrounding land. *See* SOR at 2-3. WIM states that its exploration operations will not interfere with the surrounding area because “[n]o wetlands occur on the subject tracts,” but are “located on the other side of the railroad tracks” (*id.* at 11); that the waterfowl pond constructed pursuant to EA No. MT-050-03-04, as a condition of the use of NAWCA funds for the 1999 acquisition, is not located on the prospecting permit area, but on the 1999 acquired property west of the River (*id.*); that the nearest drill hole would be $\frac{3}{4}$ mile away from the bank of the Beaverhead River (*id.* at 11, 12); that the Ney

Ranch Homestead is on the western side of the River and outside the proposed prospecting permit area (*id.* at 11); that the Native American rock art and rock art site, again, being on the River’s west side, “is buffered from any de minim[is] impacts of the exploration permit by the railroad tracks, the river, the Interstate highway, and the frontage road” (*id.* at 12); that all things related to Lewis and Clark’s historic journey are outside of the proposed prospecting area and will not be impacted by exploration activities (*id.*); that “[d]rilling can be done at a location and time when it will have the least effect on any recreation activities” (*id.* at 13); and that “[r]ecreation interests are far more affected by the Interstate highway system and active railway line than the insular drill holes included in the subject permit” (*id.*).

BLM counters that its “decision whether to approve [an] application is at BLM’s *complete discretion.*” Answer at 3 (quoting 43 C.F.R. § 3505.50). BLM argues that such discretion confers the authority to reject a permit for any prospecting, and potential leasing, that would defeat the primary purpose for which the Department acquired the lands. *Id.* at 5; *id.* at 3 n.1. In BLM’s view, mineral extraction on the lands described in WIM’s prospecting permit application is inconsistent with the DFO’s stated goal of protecting the area’s resource values, as documented in the RMP.

DISCUSSION

BLM’s discretionary authority to issue mineral prospecting permits and leases on Federally-acquired lands is set forth in the Mineral Leasing Act for Acquired Lands (MLAAL), 30 U.S.C. §§ 351-360 (2006). Pursuant to the MLAAL, BLM may grant any qualified applicant a permit to prospect or a lease to mine certain mineral deposits on lands acquired by the United States. *See* 30 U.S.C. § 352 (2006). Solid minerals underlying acquired lands that are open to mineral leasing are prospectable and leasable under the same conditions contained in the MLA’s provisions for solid minerals, 30 U.S.C. §§ 181-287 (2006), and its implementing regulations, 43 C.F.R. Part 3500.

[1] As noted, the regulation at 43 C.F.R. § 3505.50(a) provides that a “decision whether to approve [a prospecting permit] application is at BLM’s complete discretion.” Despite that phraseology, this Board follows the fundamental rule that when BLM rejects an application for a land use authorization, it must provide a rational basis for its decision. *Shooters-Edge, Inc.*, 178 IBLA 366, 370 (2010); *Mark Patrick Heath*, 175 IBLA 167, 176 (2008); *Wiley F. & L’Marie Beaux*, 171 IBLA 58, 66 (2007). The regulation itself establishes standards for the exercise of BLM’s discretion. BLM is required to “[d]etail the reasons why [it] rejected [the] application” and to inform the applicant how it “may appeal an adverse decision.” 43 C.F.R. § 3505.50(a). We fail to see how an action can be immune from Board

review, as BLM argues herein, when that action is specifically subject to appeal.¹¹ Moreover, under 43 C.F.R. § 4.1, the Board decides appeals “as fully and finally as might the Secretary.” That regulation gives the Board “authority to stand in the shoes of the Secretary and to review decisions de novo when it finds that those decisions are not properly supported.” *Aera Energy LLC v. Salazar*, 691 F. Supp. 2d 25, 36 (D.D.C. 2010), *aff’d*, 642 F.3d 212, 224 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 132 S.Ct. 252 (2011); *see Statoil Gulf of Mexico LLC*, 42 OHA 286-90 (2011). We therefore conclude that 43 C.F.R. § 3505.50(a) does not and cannot have the effect of limiting our review of the subject decision.

The Board will review a decision made in the exercise of BLM’s discretion in accordance with the following longstanding rule:

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is *stated in the written decision*, as well as being demonstrated in the administrative record accompanying the decision. *Eddleman Community Property Trust*, 106 IBLA 376, 377 (1989); *Roger K. Ogden*, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the

¹¹ We note that in other contexts where BLM has “complete discretion” in issuing a decision to grant or deny an application for a land use authorization involving public lands, the Board has reviewed the decision in terms of whether it comports with the criteria set forth in the governing statute and implementing regulations. In *Reliable Coal & Mining Co.*, 18 IBLA 342 (1975), the Board acknowledged that under section 2 of the MLA, 30 U.S.C. § 201(a) (1970), the Secretary has “complete discretion in determining whether to lease coal deposits on public lands.” 18 IBLA at 343. However, the Board observed that under the Secretary’s policy, coal leases would be issued only under certain conditions, and that the applicant had not shown that those conditions were met. In *The Kemmerer Coal Co.*, 26 IBLA 127 (1976), the Board noted that the applicable regulation, 43 C.F.R. § 2710.0-8, provided that the Secretary has complete discretion to determine whether lands should be made available under the Isolated Tract Act, 43 U.S.C. § 1171 (repealed by FLPMA, Pub. L. No. 94-579, Title VII, § 703(a), Oct. 21, 1976, 90 Stat. 2789). In upholding BLM’s decision to reject a public sale application on the basis that surface occupancy was not in the public interest, the Board ruled that the applicant had “produced no evidence to persuade [it] that the . . . determination was improperly made.” 26 IBLA at 130. In both these cases, the clear implication is that a decision made in the exercise of BLM’s “complete discretion” must meet the standards set out in the governing regulation, *i.e.*, the decision must rest upon a rational basis.

decision or, alternatively, for appealing and disputing it before the Board. *Larry Brown & Associates*, 133 IBLA 202 (1995).

Thermal Energy Co., 135 IBLA 291, 322 (1996) (emphasis added) (a decision approving a coal preference right lease application set aside and remanded as not supported by the record); *see also Kitchen Productions, Inc.*, 152 IBLA 336, 345 (2000); *Vulcan Power Co.*, 143 IBLA 10, 23 (1998). As earlier stated in *Southern Union Exploration Co.*, 51 IBLA 89, 92 (1980):

[T]he appellant is entitled to a reasoned and factual explanation for the rejection of its bid. Appellant must be given some basis for understanding and accepting the rejection or alternatively appealing and disputing it before this Board. *The explanation provided must be a part of the public record and must be adequate so that this Board can determine its correctness if disputed on appeal.* [Emphasis added.]

In challenging BLM's discretionary decision to reject its prospecting permit application, WIM bears the burden of proof to show

by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by the record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

Wiley F. & L'Marie Beaux, 171 IBLA at 66 (quoting *International Sand & Gravel Corp.*, 153 IBLA 293, 299 (2000)); *see Utah Trail Machine Association*, 147 IBLA 142, 144 (1999). Among the relevant factors to be considered is whether there are less stringent alternatives to the decision made by BLM. *Moffat County Road Department*, 158 IBLA 221, 224 (2003); *Utah Trail Machine Association*, 147 IBLA at 144. A difference of opinion is insufficient to establish error on BLM's part. 147 IBLA at 224; *Blue Mountains Biodiversity Project*, 139 IBLA 258, 265 (1997).

Section 202(a) of FLPMA, 43 U.S.C. § 1712(a) (2006), requires BLM to "develop, maintain, and, when appropriate, revise land use plans," and section 302(a), 43 U.S.C. § 1732(a) (2006), requires BLM to manage public lands "in accordance with" such land use plans. RMPs are defined by 43 C.F.R. § 1601.0-5(n) as land use plans under FLPMA, and are "designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." 43 C.F.R. § 1601.0-2. An RMP is binding on the agency, and public land use decisions must conform to the applicable RMP. *See* 43 C.F.R. § 1610.5-3(a); *see also* DFO RMP Record of Decision at 3 (the RMP governs

“public lands located in Beaverhead and Madison Counties that are administered by Montana’s Dillon Field Office”). Thus, the RMP is implicated any time anyone proposes activities on *public lands*.¹²

The DFO rejected WIM’s prospecting permit application because “mining” of the subject area is “inconsistent with” the “goals and action items” of the DFO RMP. *See* Decision at unp. 3. The DFO clearly has the discretion to reject a prospecting permit application under the MLAAL, which provides that any permit or lease involving acquired lands is “subject to such conditions as [BLM] may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered.” 30 U.S.C. § 352 (2006). In addition, as previously stated, section 302(a) of FLPMA requires that BLM resource management decisions “conform” to the approved RMP. 43 U.S.C. § 1732(a) (2006); *see* 43 C.F.R. § 1610.5-3(a). The regulation at 43 C.F.R. § 3501.17, which governs solid mineral leasing actions, requires BLM to reject a prospecting permit application “unless it conforms with the decisions, terms, and conditions of an applicable comprehensive land use plan.” Thus, the question we must decide is whether WIM’s proposed action conforms to the DFO RMP. We find that it does.

There is no question that the lands at issue are open to mineral leasing. RMP at 44 (“all lands in the planning area available for exploration and development of leasable solid minerals”); *see* SOR at 8; Answer at 3. Moreover, nothing in the DFO RMP requires BLM to choose one resource over another. Thus, BLM erred in concluding that WIM’s prospecting permit application is *per se* inconsistent with the RMP. *See Sierra Club v. Davies*, 955 F.2d 1188, 1193-99 (8th Cir. 1992) (public use of state park acquired with LWCF monies does not preclude exploratory drilling).¹³

¹² FLPMA makes no material difference between public and acquired lands. Section 103 of FLPMA defines the term “public lands” to mean “any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, *without regard to how the United States acquired ownership*.” 43 U.S.C. § 1702(e) (2006) (emphasis added). Consequently, the management principles articulated in the DFO RMP apply to all lands under the DFO’s jurisdiction, without regard to whether they are public domain or acquired lands.

¹³ While section 7 of the LWCF Act, 16 U.S.C. § 460l-9 (2006), provides that Federal funds may be used for land acquisition in areas administered by the Secretary of the Interior for recreational purposes, nothing in the statute automatically withdraws those lands from mineral leasing. *See Sierra Club v. Davies*, 955 F.2d at 1193. Moreover, the RMP does not restrict mineral leasing on lands

(continued...)

To the contrary, when it acquired the 2,244-acre tract in 1999, BLM concluded that mineral leasing on the tract “can be controlled in a manner which will not have a significant impact on the property.” EA MT-050-00-16 at 9-10; *see* 65 Fed. Reg. 77038 (Dec. 8, 2000) (tract open to mineral leasing).

Regarding the area subject to WIM’s prospecting permit application, WIM states that they “were acquired to protect the *adjacent* larger tract of land purchased by BLM in 1999,” and claims that its prospecting activities will not impact these “adjacent lands.” SOR at 7-8, 10. The previously patented mining claims, part of which would be subject to WIM’s prospecting activities, are “located on terrain which varies from steep and rocky to about 3 or 4 acres of bench land in the western-most corner of MS [Mineral Survey] 1588,” with “little to no vegetation on the steep rocky areas,” and “grasses and sagebrush on the bench ground.” EA No. MT-050-03-04 at 5. With regard to the pond “on portions of the property” (Decision at unp. 2), WIM states that it is ½ mile distant from the area to be prospected. SOR at 11; Ex. 8 to SOR; *see* EA No. MT-050-03-04 at 3.

Notwithstanding the terms of the governing RMP, we acknowledge that BLM still has the discretion to disallow prospecting on land it administers under 43 C.F.R. § 3505.50. *See George G. Witter*, 129 IBLA 359, 363 (1994) (citing *Duesing v. Udall*, 350 F.2d 748 (D.C. Cir. 1965)); *Stanford R. Mahoney*, 12 IBLA 382, 387 (1973) (“The Department of the Interior has no obligation to issue [a] prospecting permit.”). BLM may consider wildlife, endangered species preservation, recreational use, and aesthetic or scenic values, but in exercising its discretion, BLM’s decision must rest upon a rational basis, with the reasons for the decision set forth therein. BLM’s decision rejecting WIM’s prospecting permit application fails to meet this standard. *See Eagle Exploration Co.*, 69 IBLA 96, 98 (1982).

When BLM decides to reject a proposed project in favor of protecting other resources, the record must show that BLM considered whether that proposed action will actually affect those other values. BLM’s decision to deny WIM’s application is clearly based upon its belief that prospecting would inevitably lead to mining and developing the subject lands will negatively impact resource values in the area.¹⁴

¹³ (...continued)

purchased with LWCF monies. Nor does the deed to the acquired property contain any mineral leasing restrictions.

¹⁴ BLM fears that granting a prospecting permit to WIM will require it to issue a preference right lease to develop minerals in the acquired area if WIM discovers a valuable deposit, which would allow full-scale mining to the detriment of the surrounding area’s resources. *See* 43 C.F.R. § 3507.19(a) (BLM may not reject a

(continued...)

However, BLM fails to explain in its decision how and to what extent WIM's prospecting proposal is likely to impact those resources or whether protective stipulations would adequately protect the resource values of the Beaverhead River area. See *Earth Power Resources, Inc.*, 181 IBLA 94, 111-12 (2011); *James O. Breene, Jr. (On Reconsideration)*, 42 IBLA 395, 398 (1979).

On the other hand, WIM provides considerable detail in describing its prospecting activities and the measures it has proposed to protect the resource values of concern to BLM, during both the exploration and reclamation phases of its project. WIM states that “[t]he terrain surrounding the four (4) proposed drilling locations is level enough that no grading for drilling pads will be necessary,” and that “[m]inimal disturbance surrounding the drill location is anticipated.” SOR at 3. WIM explains that “[t]he drill holes are in well-contained areas, surrounded by a protective berm, and do not affect areas outside of their perimeter,” and that WIM “will agree to limit, and historically has limited, the effect of exploration equipment used to administer the drill holes.” *Id.* at 5. WIM indicates that “[a]ccess to [drill holes] DL #1 and DL #2 will be across an existing dirt road on BLM property” that will “require[] some minimal grading maintenance,” and the “[a]ccess to DL #1 and DL #2 will require approximately 0.5 miles of limited off-road travel.” *Id.*; see Ex. 7 to SOR (location of off-road travel). WIM states that “[i]f the prospecting can be completed during the winter months while the ground is frozen no disturbance is anticipated,” and that

[i]f the prospecting is completed during the spring when the ground is thawing, then tire trenches [that] may be formed . . . will be reclaimed by utilizing a 4-wheeler with 10" disks and 6 foot wide harrow to remove the tracks along with noxious weed control and reseeding utilizing a seed mix recommended and approved by BLM.

SOR at 5. WIM states that “[a]ccess to [drill hole] DL #3 will be across an existing dirt road on BLM property.” *Id.* at 6. WIM notes that “[a]ccess to DL #4 will be along an existing road and require crossing both Windmill Livestock Property and State of Montana Property,” and that WIM “currently is negotiating permission to cross with Windmill Livestock and has submitted a Land Use Application to cross state lands.” *Id.* at 6. WIM states that “[a]dditional roadways can be utilized that

¹⁴ (...continued)

preference right *lease* on the ground that mining is not the preferred use of the lands described in the lease application). So long as a prospecting permit has not yet been issued, BLM is not precluded from conducting an environmental analysis of likely impacts of prospecting *and* of reasonably foreseeable mineral development, and to base a decision to grant, grant with conditions, or deny a permit based upon that environmental review.

are more remote from viewshed areas,” and that drill holes DL #3 and DL #4 can be “moved upslope, if necessary.” *Id.* WIM states that the areas for the proposed drill holes “are remote from the floodplain area and the viewshed area addressed in the RMP.” *Id.*

Further, WIM explains that its Amended Exploration Plan and the Prospecting Permit Application include specific reclamation plans. SOR at 8. Among other measures, WIM asserts that “[i]f an artesian aquifer is intercepted, the Montana DEQ [Department of Environmental Quality]–Environmental Management Bureau will be notified within 24 hours and the hole will be plugged to depth prior to the removal of the drill rig,” and that Montana DEQ’s requirements “will be fulfilled if a discharge occurs.” *Id.* at 9; *see* Ex. 3 to SOR. For example, WIM proposes that “[i]f thawing occurs and tire trenches are formed in the native soils, they will be reclaimed in May/June utilizing a 4-wheeler with 10" disks and a 6 foot harrow to remove the tracks,” and either a “barricade or sign will be installed so that the disturbed area is not used as a road.” *Id.* at 9. WIM’s application outlines specific measures for drilling and plugging each well. *Id.* at 9-10; *see* Ex. 3 to SOR.

BLM’s decision to reject WIM’s prospecting permit application rests upon little more than its assertion that mineral prospecting is inconsistent with the RMP. While BLM enjoys broad discretion in making a decision to deny a mineral prospecting permit, its discretion is not unfettered. A decision rejecting a permit for exploration for minerals subject to the Department’s leasing laws must rest upon a rational basis. The record herein lacks any analysis of adverse effects from mineral exploration to support BLM’s conclusion that WIM’s prospecting permit application is inconsistent with the RMP. By contrast, WIM offers considerable detail in demonstrating that its activities, as set out in its exploration plan, will not result in adverse impacts to the resources for which the 2,244 acres were acquired in 1999, and for which the patented claims were acquired in 2003. We conclude that WIM has shown by a preponderance of evidence that its exploration activities may be conducted consistent with the DFO RMP.

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 set aside and the case is remanded for further consideration.

_____/s/
James F. Roberts
Administrative Judge

I concur:

_____/s/
James K. Jackson
Administrative Judge