



NEW MEXICO WILDERNESS ALLIANCE, *ET AL.*

186 IBLA 183

Decided September 25, 2015



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

NEW MEXICO WILDERNESS ALLIANCE, *ET AL.*

IBLA 2013-204

Decided September 25, 2015

Appeal from a July 15, 2013, decision of the New Mexico Deputy State Director, Bureau of Land Management, denying appellants' May 20, 2013, protest of the sale of certain oil and gas lease parcels, located in Otero County, New Mexico, which the agency offered in the July 17, 2013, Oil and Gas Lease Sale. NM-201307-001, *et al.*; DOI-BLM-NM-L000-2012-0156-EA.

Decision affirmed; motion for reconsideration of denial of stay petition denied as untimely; motion to supplement the record denied as moot in part and granted in part.

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

An appellant, complaining BLM failed to adhere to the multiple-use mandate of section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2012), has the burden of showing BLM did not engage in a reasoned and informed decision-making process, which demonstrated how the agency balanced competing resource values in order to best meet the present and future needs of the American people. The authority to manage the public lands is committed to BLM, and it is well established that a mere disagreement with BLM's analysis or conclusions, or a preference for an alternative course of action, does not suffice to establish that BLM violated any law or otherwise erred in its decision.

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

Management implementation decisions must comport with valid, existing land use plans. Pursuant to section 202 of FLPMA, 43 U.S.C. § 1712 (2012), BLM must "develop,

maintain, and, when appropriate, revise land use plans.” Even where BLM has determined to update the RMP for the purpose of considering which lands should be available for leasing and what protections are needed for resource values within leasable lands, BLM can lawfully continue to manage public lands consistent with an existing land use plan during a land use plan’s amendment or revision. Although land use plans should be revised as necessary, the age of an RMP alone does not create a duty to revise a land use plan, nor invalidate an existing one.

3. Environmental Quality: Environmental Statements-- National Environmental Policy Act of 1969: Oil and Gas Leases: Competitive Leases: Generally

If the proposed action is within the scope of, and analyzed in the existing, valid environmental document that was prepared in compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347h (2012), which supports the current plan or program, then BLM may properly rely on the existing NEPA documentation so long as it supports the individual action.

4. Environmental Quality: Environmental Statements-- National Environmental Policy Act of 1969: Finding of No Significant Impact

Under section 102(2)(C) of NEPA and its implementing regulations, agencies are encouraged to facilitate public involvement in the NEPA process. The Department’s NEPA rules require BLM, to the extent practicable, to provide for public notification and public involvement when an EA is being prepared, but the methods for providing public notification and opportunities for public involvement are at the discretion of BLM. Where BLM has engaged in some type of public process and an appellant alleges that public notice and comment procedures were inadequate, this Board will scrutinize that process on a case-by-case basis to determine its adequacy. An agency may revise an EA in response to comments received without initiating another comment period.

APPEARANCES: Judy Calman, Esq., New Mexico Wilderness Alliance, Albuquerque, New Mexico, and Nada Culver, Esq., The Wilderness Society, Denver, Colorado, for appellants; Michael C. Williams, Esq., Office of the Solicitor, Santa Fe Unit, Southwest Region, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

New Mexico Wilderness Alliance and the Wilderness Society (collectively, appellants), the New Mexico Wildlife Federation, the Rio Grande Chapter of the Sierra Club, and the Southwest Environmental Center have appealed from and petitioned for a stay of<sup>1</sup> the effect of a July 15, 2013, decision (Protest Decision) of the New Mexico Deputy State Director (State Director), Bureau of Land Management (BLM). In its Protest Decision, BLM denied appellants' May 20, 2013, protest of the sale of 4 oil and gas lease parcels located on public lands administered by the Las Cruces District Office (LCDO), which the agency offered in the July 17, 2013, Oil and Gas Lease Sale in New Mexico.<sup>2</sup> The decision to hold a lease sale was based on the LCDO's Decision Record (DR), approving 12 nominated parcels of Federal minerals for leasing. The DR relied on the environmental review in EA, which BLM prepared pursuant to the Council on Environmental Quality's (CEQ) and the Department of the Interior's regulations, implementing the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347h (2012). See 40 C.F.R. §§ 1500.1-1518.4 and 43 C.F.R. Part 46. The DR selected the agency's Alternative C-Preferred Alternative, as presented and analyzed in the EA.

We begin by addressing two procedural matters, and then, as discussed below, affirm BLM's Protest Decision, determining appellants have not carried their burden on appeal to show error in it.

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<sup>1</sup> By Order dated Nov. 18, 2013, this Board denied appellants' petition for a stay, finding that they failed to demonstrate a likelihood of success on the merits. We also dismissed the appeal for lack of standing with respect to the New Mexico Wildlife Federation, the Sierra Club, and the Southwest Environmental Center.

<sup>2</sup> The leases at issue are identified as NM-201307-001, -002, -003, and -009, and are situated in secs. 3, 10, 15, and 21, T. 14 S., R. 9 E., secs. 3, 4, and 9, T. 16 S., R. 9 E., Principal Meridian, Otero County, New Mexico. See Administrative Record (AR) 173-202 (Notice of Competitive Lease Sale, dated Apr. 17, 2013), AR 203 (Amendment #1); AR 352-53 (Environmental Assessment (EA) (DOI-BLM-NM-L000-2012-0156-EA) at 13-14).

*Procedural Matters*

On March 12, 2014, appellants filed a motion for reconsideration of our November 18, 2013, order denying appellants' petition for a stay. Pursuant 43 C.F.R. § 4.403(b)(1), "[a] party that wishes to request reconsideration of a Board decision must file a motion for reconsideration with the Board within 60 days after the date of the decision." Appellants filed this motion approximately 54 days after the expiration of the 60-day deadline. We therefore deny the motion because it is untimely. See *U.S. v. Walter B. Freeman*, 179 IBLA 341, 386 (2010); see also 43 C.F.R. § 4.21(d) (requiring that requests for reconsideration must be filed promptly).

In its March 12, 2014, pleading, appellants also moved this Board to supplement the AR. A review of the record reveals all but one of the documents, which appellants seek to make part of the record, are already included therein. Compare AR 1599-1601 (June 21, 2012, letter from BLM to Jalapeno Corp.) with Statement of Reasons (SOR) Ex. C (same); compare AR 1121-22 (May 16, 2012, letter from BLM to Jalapeno Corp.) with SOR, Ex. E. Therefore, we deny the motion to supplement the record as moot in part. The remaining document appellants seek to include in the AR, a June 6, 2012, letter from Jalapeno Corp. to BLM, is not included in the agency's AR made available to this Board, but we now accept it and include it in the record. See SOR at Ex. D (June 6, 2012, letter from Jalapeno Corp. to BLM); see also *In Re Stratton Hog Timber Sale*, 160 IBLA 329, 334 (2004) (holding that the Board may "accept documentation to supplement a record" and then may "review it as an exercise of the Board's *de novo* review authority"); *Vulcan Power Co.*, 143 IBLA 10, 23-24 (1998) (holding that the Board has discretionary review authority to grant supplementation of the record on appeal).

*Background*

The White Sands Resource Management Plan (RMP) was approved in 1986. While the public lands in northern Otero County were available for oil and gas leasing under standard terms and conditions, the RMP "contained no overall guidance on the management of fluid minerals development, leaving management decisions to be made on a case-by-case basis." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 689 (10th Cir. 2009) (*Richardson*); see 63 Fed. Reg. 55404 (Oct. 15, 1998) (Notice of Intent (NOI) to Prepare an RMP for Public Land in Otero and Sierra Counties, NM) (declaring that the RMP "lack[ed] information to make leasing decisions commensurate with the increased leasing nominations and potential subsequent exploration and development"); see also AR 1152 (White Sands RMP) ("In general, public land is available for oil and gas and geothermal leasing. . . . Oil and gas and geothermal drilling is evaluated on a case-by-case basis through the EA process.").

In 1998, after natural gas was discovered on the Otero Mesa and the oil and gas industry nominated for leasing approximately 250,000 acres of BLM-administered land in the Otero Mesa area, the LCDO began the RMP amendment process in order to develop management guidelines for future oil and gas lease sales, to determine which public lands in Sierra and Otero Counties should be available for mineral leasing, and to address how possible oil, gas, and geothermal development in the area would affect the human environment. *See* 63 Fed. Reg. at 55404. No new oil and gas leases within the planning area were issued during this process.

In 2005, after preparing a final Environmental Impact Statement (EIS), the LCDO adopted its Record of Decision and RMP Amendment. The agency selected its preferred alternative, Alternative A-modified,<sup>3</sup> for fluid minerals leasing and development on public lands in Sierra and Otero Counties. Alternative A-modified was not specifically analyzed in the EIS. The State of New Mexico, the New Mexico Wilderness Alliance, and others challenged the RMP Amendment in U.S. District Court, claiming, *inter alia*, that BLM was required to analyze its adopted alternative in a supplemental EIS. *See New Mexico ex rel. Richardson v. BLM*, 459 F. Supp. 2d 1102 (D.N.M. 2006). The District Court found, in part, that the LCDO had no duty to prepare a supplemental EIS proposing to adopt Alternative A-modified and did not need to discuss the environmental effects of that alternative because further NEPA analysis would be conducted at the leasing stage. The plaintiffs appealed.

The Tenth Circuit reversed the District Court's ruling that the RMP amendment complied with NEPA, finding that the LCDO failed to evaluate the difference between Alternative A and Alternative A-modified, and otherwise affirmed the District Court's decision in part and vacated in part, as moot. *Richardson*, 565 F.3d at 702, 708, 720. The District Court subsequently set aside the RMP Amendment as the Tenth Circuit directed. *See New Mexico ex rel. Richardson v. BLM*, No. 6:2005-cv-00460-BB-RHS (D.N.M. Dec. 7, 2009). Therefore, the governing land use plan left in place was the 1986 White Sands RMP. The LCDO continued to forebear in approving nominated parcels within its jurisdiction for oil and gas lease sales.

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<sup>3</sup> Under Alternative A, most of the leasable lands would have been sold pursuant to a no surface occupancy (NSO) stipulation, which would have required exploration to be conducted by means of directional drilling rather than vertical drilling. Alternative A-modified would have removed the NSO stipulation, and would have allowed the leaseholder to create surface disturbance on up to only five percent of the leased parcel at any one time.

In 2010, the LCDO issued a newsletter, informing the public the existing 1986 White Sands RMP would remain in effect throughout the RMP Planning Area for existing oil and gas operations. The agency further explained that the “fluid minerals program for oil and gas will be addressed later in a programmatic RMP Amendment . . . . The BLM may also defer any new, proposed oil and gas actions in the Planning Area until completion of the programmatic RMP Amendment.” Tri-County RMP/EIS Newsletter 4, dated May 2010.<sup>4</sup> The programmatic RMP amendment dealing with oil and gas matters has yet to be finalized. *See* 78 Fed. Reg. 76852 (Dec. 19, 2013) (NOI to Prepare a Supplement to the 2013 Draft Tri-County RMP and Draft EIS Regarding Oil and Gas Development).<sup>5</sup>

On October 14, 2011, Jalapeno Corporation (Jalapeno) filed an Expression of Interest (EOI) in leasing Federal lands in Otero County, and on March 21, 2012, the State Director, New Mexico State Office, BLM, responded, explaining that no lands would be offered for sale until the LCDO completed the necessary environmental review and adopted an amended RMP that specifically determined which lands would be open to leasing and under what terms and conditions. AR 1606 (Jalapeno EOI); AR 1121 (Mar. 21, 2012, letter from BLM to Jalapeno).

In a letter to Jalapeno, dated May 16, 2012, BLM reversed its position on leasing lands within Otero County:

As the Bureau of Land Management (BLM) moves forward in its development of new programmatic analysis for oil and gas leasing in Otero, Sierra, and Dona Ana Counties, collectively referred to as the TriCounty planning area, the decision pertaining to fluid minerals development in the 1986 White Sands Resources Management Plan (RMP) . . . remains in effect. The BLM will therefore consider parcels to nominate for Federal oil and gas leasing in the TriCounty planning area . . . on a case-by-case basis.

AR 1121-22.

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<sup>4</sup> This document is available at [http://www.blm.gov/nm/st/en/fo/Las\\_Cruces\\_District\\_Office/tricounty\\_rmp.html](http://www.blm.gov/nm/st/en/fo/Las_Cruces_District_Office/tricounty_rmp.html) (last visited on Sept. 9, 2015).

<sup>5</sup> *See* [http://www.blm.gov/style/medialib/blm/nm/field\\_offices/las\\_cruces/las\\_cruces\\_planning/tricounty\\_rmp.Par.87669.File.dat/Public\\_Newsletter\\_5.pdf](http://www.blm.gov/style/medialib/blm/nm/field_offices/las_cruces/las_cruces_planning/tricounty_rmp.Par.87669.File.dat/Public_Newsletter_5.pdf) (last visited on Sept. 9, 2015).

On June 21, 2012, BLM again wrote to Jalapeno stating that:

BLM will not have to prepare a resource management plan before we make a decision on the acreage you nominated. After the Tenth Circuit Court of Appeals voided the 2005 Resource Management Plan Amendment for Sierra and Otero Counties, management for the area reverted to the [ ] White Sands RMP. In that plan, the lands in northern Otero County were available for oil and gas leasing under standard terms and conditions. . . . The Las Cruces District Office (LCDO) must prepare an environmental assessment (EA) to determine whether or not the nominated lands should be made available for leasing. If the nominated lands are made available for leasing, the EA would identify which stipulations should be required to protect other natural and cultural resources on the land. . . . The EA will consider potential effects of leasing and development on the natural and cultural resources, and methods to mitigate those impacts.

AR 1599.

In 2013, BLM held an oil and gas lease sale for lands governed by the White Sands RMP. From January 28, 2013, to February 11, 2013, BLM held a two-week public scoping period regarding parcels nominated for oil and gas leasing for a proposed July 17, 2013, lease sale. BLM's interdisciplinary team reviewed the parcels and prepared an EA. In the EA, the LCDO documented the environmental impacts of leasing 12 parcels in Otero County and identified stipulations and best management practices that would protect surrounding resources. The LCDO also published a Finding of No Significant Impact (FONSI) and, based on factors set forth in 40 C.F.R. § 1508.27, verified that the lease sale was not likely to result in any significant impacts to the human environment that exceed the scope and intensity of those already considered and analyzed in the White Sands RMP and corresponding EIS. Thus, BLM determined that it was not required by section 102(2)(C) of NEPA to prepare an EIS. AR 401.

In addition, BLM determined the lease sale conformed to the applicable land use plan, as required by section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2012). See AR 397 (Decision Record at 1). BLM provided a 30-day public review period (Mar. 1, 2013, through Apr. 1, 2013) for the EA, during which the agency invited comments from the public. Appellants neither participated in public scoping nor submitted comments on the EA. On April 17, 2013, the BLM State Office published a Notice of Competitive Lease Sale for Oil and Gas in New Mexico, which listed 37 parcels within the LCDO's jurisdiction.

On May 20, 2013, appellants protested the inclusion in the lease sale of the 12 Otero County parcels, contending that the LCDO did not have a valid RMP in place, and therefore the agency “lack[ed] authority to offer any new leases before an adequate leasing plan is created.” AR 149 (Protest at unpaginated (unp.) 2). On July 15, 2013, the State Director issued the Protest Decision now on appeal, addressing each of appellants’ comments. The Decision dismissed the Protest as to 7 of the 12 protested oil and gas lease parcels, “as the BLM deferred them from this lease sale in order to allow the LCDO to inventory the areas for wilderness characteristics,” and denied the Protest with respect to the remaining 5, 4 of which are located on public lands administered by the LCDO, and are at issue here. AR 145; *see supra* note 2. In the Decision, the State Director determined that BLM

must continue to manage public lands according to existing land use plans while new information is being considered in a land use planning effort. Development of new supplemental guidelines for fluid minerals . . . and additions to policy do not prevent BLM from continuing to rely on existing RMPs. The proposed lease sale therefore implements the goals, objectives, and management actions in the existing White Sands RMP. Although the White Sands RMP is admittedly in need of revision, the BLM is still required to manage the public lands in accordance with the management actions described therein until such time as the revision is completed. . . .

BLM’s statements in the Draft Tri-County RMP that oil and gas leasing in the planning area would be deferred until completion of the RMP revision were inaccurate. Suspending all action once the BLM has decided to prepare a new plan would seriously impair the BLM’s ability to perform its management responsibilities. . . . Although the BLM has the discretion to defer or modify any proposed action, this must be determined on a case-by-case basis and supported by reasoned analysis rather than a blanket moratorium.

. . . .

To reiterate, until the White Sands RMP is superseded by completion of a new plan, the BLM will continue to implement the goals and objectives of the White Sands RMP. If necessary, the BLM will prepare updated NEPA analysis to consider new information that has become available since the RMP ROD was signed. In light of the California District Court decision and your protest comments, the BLM has amended the lease sale EA to include supplemental analysis of the potential impacts of hydraulically fracturing wells on the subject leases,

if hydraulic fracturing were to occur. It is not a foregone conclusion that leased parcels will eventually be drilled with wells that will be hydraulically fractured, particularly since this is an area of unproven oil and gas development potential. Nevertheless, the BLM will analyze these potential impacts and disclose them in the final lease sale EA.<sup>[6]</sup>

AR 138 (Protest Decision at 2-3, 6).

In addition to considering and responding to each of appellants' protest comments and withholding 7 of the 12 parcels protested by appellants from the sale, BLM amended the EA to include a discussion of potential environmental impacts of hydraulic fracturing wells on the subject leases, as requested by appellants, and developed new, specifically-tailored mitigation measures as stipulations, lease notices, and conditions of approval (COAs) for the protection of streams, rivers, floodplains, playas, alkali lakes, agricultural farmland, and range monitoring plots. AR 339, 352-54; *see also id.* 1152-56, 1273-74, 1299, 1365.<sup>7,8</sup>

Appellants timely appealed.

### *Discussion*

#### *Appellants' Arguments*

Appellants filed a petition for a stay and an SOR, alleging that BLM failed to amend the White Sands RMP and to prepare an EIS before it issued the Federal oil and

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<sup>6</sup> The Protest Decision also indicated BLM's actions would continue to be consistent with Instruction Memorandum (IM) No. NM-2012-031, dated July 13, 2012, in which the New Mexico State Office, BLM, provided NEPA guidance to each of its District and Field Offices reiterating BLM policy that "[i]f EOIs are received for parcels designated as open for leasing in the applicable land use plan, the [field office] will consider the nominated parcels on a case-by-case basis," conducting site-specific analysis through preparation of an EA. AR 138 (Protest Decision at 7).

<sup>7</sup> BLM publicized notice of the amended EA on its webpage. *See* [http://www.blm.gov/nm/st/en/prog/energy/oil\\_and\\_gas/lease\\_sale\\_notices/2013\\_lease\\_sales/july\\_23\\_lease\\_sale.html](http://www.blm.gov/nm/st/en/prog/energy/oil_and_gas/lease_sale_notices/2013_lease_sales/july_23_lease_sale.html) (last visited Sept. 9, 2015).

<sup>8</sup> These new stipulations and lease notices, identified as LC-51-CSU; LC-52-CSU; LC-53-CSU; and LC-LN-5 are in addition to the lease stipulations BLM had developed in conformance with the White Sands RMP, pursuant to IM No. 2010-117, dated May 7, 2010.

gas leases in Otero County, which, according to appellants, violates both the Tenth Circuit's ruling in *Richardson*, and BLM's policy that it would refrain from issuing oil and gas leases until such programmatic RMP amendments could be promulgated.<sup>9</sup> See SOR at 2-3 ("BLM cannot remedy the lack of a current, valid EIS underlying the White Sands RMP by preparing an [EA]. . . . BLM cannot proceed with leasing until a new EIS is prepared.")<sup>10</sup> Appellants also argue BLM violated NEPA by failing to make the revised EA available for public comment. Petition for Stay at 3, 20, 21.

Appellants' contention implicates FLPMA's requirements to "develop, maintain, and, when appropriate, revise land use plans," 43 U.S.C. § 1712 (2012); see 43 C.F.R. § 1610.5-5, and "to manage the public lands under principles of multiple use" 43 U.S.C. § 1732 (2012), as well as NEPA's directive that an agency, "to the fullest extent possible" shall prepare an EIS for "every . . . major Federal actio[n] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2012). We take each in turn.

*Appellants Have Not Shown That BLM Violated  
Sections 202 or 302(a) of FLPMA*

[1] Appellants suggest, but have not shown, that BLM failed to informedly and rationally balance competing uses of public lands slated for oil and gas lease sale and to issue a decision in conformance with a valid land use plan. Section 302 of FLPMA requires BLM "to manage the public lands under principles of multiple use." 43 U.S.C. § 1732 (2012). An appellant, complaining BLM failed to adhere to FLPMA's multiple-use mandate, has the burden of showing BLM did not engage in a reasoned and informed decision-making process, which demonstrated how the agency balanced

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<sup>9</sup> Appellants incorporated the petition for a stay into their SOR. See SOR at 2.

<sup>10</sup> As we have often explained:

An appellant bears the burden to affirmatively demonstrate error in the decision on appeal. Conclusory allegations, unsupported by evidence showing error, do not suffice. Nor is the requirement to affirmatively demonstrate error in the decision on appeal satisfied when an appellant has merely reiterated the arguments considered by the decisionmaker below, as if there were no decision addressing those points. The right of review provided by this Board is not intended to be a circular promenade in which the parties simply repeat their steps. In such cases, BLM's decision properly may be affirmed in summary fashion.

*Western Watersheds Project*, 183 IBLA 297, 316 (2013) (all internal quotations and citations omitted). In this appeal, although appellants repeat the arguments they made in their Protest, we decline to exercise that discretion.

competing resource values in order to best meet the present and future needs of the American people. See 43 U.S.C. § 1702(c) (2012) (defining multiple use); see, e.g., *Forest Guardians*, 168 IBLA 323, 329 (2006) (citing *Wildlife Damage Review*, 150 IBLA 362, 368 (1999) (“The ‘multiple-use’ mandate in FLPMA requires a choice of the appropriate balance to strike between competing resource uses, recognizing that not every possible use can take place fully on any given area of the public lands at any one time, often necessitating a trade-off between competing uses.”)).

In this case, BLM considered and balanced competing uses. BLM analyzed 39 potential land parcels to be leased and concluded that 27 of those parcels had unresolved matters, which included potential negative impacts to sensitive and erosive soils, critical community watersheds, riparian areas, steep topography, special status species and their habitats, springs and seeps, and impacts the proposed Sacramento Mountains Area of Critical Environmental Concern. After considering land-use priorities, BLM decided to lease only 12 of the nominated parcels of Federal minerals. See EA at 7.

The authority to manage the public lands is committed to BLM, and it is well established that a mere disagreement with BLM’s analysis or conclusions, or a preference for an alternative course of action does not suffice to establish that BLM violated any law or otherwise erred in its decision. See, e.g., *Powder River Basin Resource Council*, 180 IBLA 1, 48 (2010). While appellants would prefer BLM manage the public lands at issue for recreational purposes, they have not shown BLM failed to balance competing resource values or fulfill its obligations under the statute. See, e.g., *National Wildlife Federation v. BLM*, 140 IBLA 85, 100-01 (1997).

BLM is also required to ensure all resource management authorizations and actions conform to the approved land use plan. 43 C.F.R. § 1610.5-3(a); *Powder River Basin Resource Council*, 180 IBLA at 18 n.34. The regulations define “conformity or conformance” as meaning “that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment.” 43 C.F.R. § 1601.0-5(b); *Wildlands Workshop*, 175 IBLA 124, 140 (2008) (quoting *Tom Van Sant*, 174 IBLA 78, 91 (2008)); *Forest Guardians*, 168 IBLA 323, 328 (2006); *Great Basin Mine Watch*, 159 IBLA 324, 340 (2003). Currently, BLM’s decisions of which public lands in Otero County, New Mexico are open or closed to leasing are governed by the White Sands RMP. But, as indicated, BLM, in balancing competing uses on a case-by-case basis, initially reduced the number of nominated leases it decided to offer for lease to 12, and after considering appellants’ protest, further reduced the number of Otero County parcels offered at the lease sale to 5. See Answer at 3-4. BLM relied on the lease stipulations in the White Sands RMP, which remain valid, but to further reduce the potential impacts of leasing the parcels, BLM also developed additional lease stipulations and COAs that are in conformance with the

White Sands RMP. Appellants have not shown that the decision to lease was not in conformance with the White Sands RMP.

[2] Appellants assert, but have not demonstrated, that BLM violated FLPMA's section 202 requirement to "develop, maintain, and, when appropriate, revise land use plans." 43 U.S.C. § 1712 (2012); *see* 43 C.F.R. § 1610.5-6. As discussed, under 43 C.F.R. §§ 1601.0-5(b), 1610.5-3(a), management implementation decisions must comport with valid, existing land use plans, and we have found the White Sands RMP, now under revision, remains valid, and the decision to lease in this case conforms to that RMP. Even where, as here, BLM has determined to update the RMP for the purpose of considering which lands should be available for leasing and what protections are needed for resource values within leasable lands, BLM can lawfully continue to manage public lands according to the existing land use plan during the land use plan's amendment or revision. Although land use plans should be amended or revised as necessary (43 C.F.R. §§ 1610.5-5, 1610.5-6), the age of an RMP alone does not create a duty to revise a land use plan, nor invalidate an existing one. *See Cascadia Wildlands*, 184 IBLA 385, 387 n.4 (2014) (citing *ONRC Action v. BLM*, 150 F.3d 1132, 1139 (9th Cir. 1998)); *Colo. Env'tl. Coalition*, 161 IBLA 386, 396 (2004); *S. Utah Wilderness Alliance*, 163 IBLA 14, 27-28 (2004); *Wyoming Outdoor Council*, 156 IBLA 377, 384 (2002). "Acceptance of appellants' position that, once BLM had decided to prepare a new land use plan for an area, it must suspend action in conformance with the prevailing plan would seriously impair BLM's ability to perform its management responsibilities." *Powder River Basin Resource Council*, 180 IBLA at 18 (quoting *Sierra Club Legal Defense Fund, Inc.*, 124 IBLA 130, 140 (1992)).

The White Sands RMP was never overturned nor has it ever been declared invalid. *See Richardson*, 565 F.3d at 689. Accordingly, since BLM is not required to await a further decision regarding the amendment or revision of an existing, valid land use plan when its actions already comport with the existing plan, appellants have not shown that BLM's management action failed to conform to the White Sands RMP. *See* 43 C.F.R. § 1601.0-5(b).

*Appellants Have not Shown Error in BLM's Reliance on the  
White Sands RMP and Site-Specific EA/FONSI*

[3] Appellants claim BLM erred in relying on an outdated, invalidated RMP and EIS to support the lease sale, rather than waiting for development of the Tri-County RMP and EIS. Even when revising a land use plan environmental document to support revisions to a valid land use plan, if the proposed action is "within the scope of, and analyzed in, the existing, valid NEPA document supporting the current plan or program, so long as there is adequate NEPA documentation to support the individual action," BLM may properly rely on the existing NEPA documentation. 43 C.F.R.

§ 46.160; *see also* BLM NEPA Handbook H-1790-1 (2008) at 3; IM No. NM-2012-031, dated July 13, 2012; IM No. 2010-117, dated May 17, 2010; *see also* *ONRC Action v. BLM*, 150 F.3d 1132, 1139 (9th Cir. 1998). “Nothing in NEPA or its implementing regulations requires BLM to postpone or deny a proposed action *that is covered by the EIS for the current land use plan*, in order to preserve alternatives during the course of preparing a new land use plan and EIS. 40 C.F.R. § 1506.1(c)(2); *Colo. Env'tl. Coalition*, 169 IBLA 137, 144 (2006).” *Powder River Basin Resource Council*, 180 IBLA at 17 (quoting *Montana Trout Unlimited*, 178 IBLA 159, 172 (2009)) (emphasis added); *Wyoming Outdoor Council*, 156 IBLA at 384; AR 139 (Protest Decision).

Appellants erroneously claim the Tenth Circuit tacitly invalidated the White Sands RMP. The Court has not invalidated the RMP; it remains valid. However, the Tenth Circuit required “additional analysis” for oil and gas leasing in the planning area, including Otero County. Answer at 10 (citing *Richardson*, 565 F.3d at 169). BLM undertook that additional analysis. In the EA and White Sands RMP EIS to which it was tiered, BLM considered reasonably foreseeable impacts associated with leasing the protested parcels, committed to applying its best management practices, and developed specific stipulations, lease notices, and COAs.

We find that BLM properly took action that is in conformance with the governing RMP and “within the scope of, and analyzed in, adequate, existing NEPA documents, which support the lease sale.” 43 C.F.R. § 46.160.<sup>11</sup> The above analysis

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<sup>11</sup> Appellants further argue that BLM cannot offer leases within the planning area because it “has stated repeatedly . . . that no leasing may be allowed in the planning area until an acceptable Land Use Plan is finalized.” Petition for Stay at 3; *see also id.* at 6-7. Viewed as an estoppel claim, this argument fails. *See* Answer at 8-11. BLM asserts that statements it has made in three documents admitting the White Sands RMP needs revision (in the NOI to prepare an RMP to amend the White Sands RMP, the RMP Amendment, voided by the Tenth Circuit, and the Draft Tri-County RMP) cannot change any BLM management prescription on Otero County, such that BLM is estopped from undertaking leasing pending RMP revisions. *Id.* at 9 (citing Appellants’ Petition, at Exs. A-D). BLM quotes Board precedent in stating that “[e]stoppel is an extraordinary remedy when applied against the United States, especially when what is at issue is the proper use and management of the public lands.” *Id.* at 8 (quoting *Atchee CBM, LLC*, 183 IBLA 389, 409 (2013)); *see also* *Shamrock Metals, LLC*, 184 IBLA 1, 4 (2013). Furthermore, BLM states, under section 202 of FLPMA, 43 U.S.C. § 1712 (2012), only by amending the land management plan can BLM change management prescriptions, and no such amendment has been completed. Therefore, appellants “cannot deem the lease parcels closed to mineral entry, where they are currently open

(...continued)

and precedent “undermine [appellants’] contention that BLM violated FLPMA and NEPA by offering the parcels for leasing during the amendment process for the existing RMP.” *Wyoming Outdoor Council*, 156 IBLA at 384 (citations omitted).

*Appellants have not Shown that BLM Violated Public  
Participation Requirements under NEPA*

[4] Appellants raise a new NEPA argument regarding an issue, which arose as a consequence of their protest. In the Protest Decision, BLM notified appellants that, although “[i]t is not a foregone conclusion that leased parcels will eventually be drilled with wells that will be hydraulically fractured,” in this area of unproven oil and gas development potential, nevertheless, “BLM will analyze these potential impacts and disclose them in the final lease sale EA.” AR 138 (Protest Decision at 6). BLM did so, and published notice of availability on its webpage. *See supra* note 7. Appellants now claim BLM violated NEPA by failing to make the revised EA available for public comment. Petition for Stay at 7, 19-21. Appellants “overstate[] BLM’s public participation obligation under NEPA, and minimize[] the agency’s considerable discretion.” *Great Basin Resource Watch*, 185 IBLA 1, 13 (2014). BLM is accorded significant flexibility in how it engages the public in preparing an EA. 43 C.F.R. § 46.305(a).

Under section 102(2)(C) of NEPA and its implementing regulations, agencies are encouraged to facilitate public involvement in the NEPA process. In preparing EAs, agencies are directed to “involve environmental agencies, applicants, and the public, to the extent practicable . . . .” 40 C.F.R. § 1501.4(b). The rule at 40 C.F.R. § 1506.6(d) directs Federal agencies to “solicit appropriate information from the public.” In addition, under 40 C.F.R. § 1506.6(b), Federal agencies must “[p]rovide public notice of . . . the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.” The Department’s NEPA rules, requiring that BLM “must, to the extent practicable, provide for public notification and public involvement when an [EA] is being prepared,” also state, the “methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.” 43 C.F.R. § 46.305(a); *see Great Basin Resource Watch*, 185 IBLA at 14; *Birch Creek Ranch, LLC*, 184 IBLA 307, 322 (2014).

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(...continued)

to leasing under the White Sands RMP.” *Id.* (citing *Southern Utah Wilderness Alliance*, 163 IBLA at 28 n.10. We agree.

Notably, “[n]either NEPA nor CEQ regulations explicitly require a Federal agency to allow public comment on every EA.” *Great Basin Resource Watch*, 185 IBLA at 14 (quoting *Birch Creek Ranch, LLC*, 184 IBLA at 321-22). We have held that, where BLM has engaged in some type of public process and an appellant alleges that public notice and comment procedures were inadequate, this Board will scrutinize that process on a case-by-case basis to determine its adequacy. *The Wilderness Workshop*, 175 IBLA 124, 133 (2008); *Lynn Canal Conservation, Inc.*, 169 IBLA 1, 7 (2006) (clarifying *Lynn Canal Conservation, Inc.*, 167 IBLA 136 (2005)). Finally, Departmental rules implementing NEPA are clear: An agency may revise an EA in response to comments received, “without need of initiating another comment period.” 43 C.F.R. § 46.305(b).

As indicated, in the present case, BLM invited the public to participate at several stages during the lease sale process. It engaged in a two-week public scoping period, and interdisciplinary environmental review, and a 30-day EA/FONSI public comment period. Appellants declined to engage until the protest phase. The record shows BLM gave careful consideration and responded to each of appellants’ protest comments. As promised in the Protest Decision, BLM amended the EA to include a supplemental discussion of potential impacts of hydraulic fracturing wells on the subject leases, if hydraulic fracturing were to occur, as requested by appellants. BLM publicized notice of the amended EA, withheld 7 of the 12 parcels protested by appellants for additional wilderness analysis, and developed new, specifically-tailored mitigation measures as stipulations, leasing notices, and COAs.

Appellants assert BLM violated NEPA and implementing regulations by not providing an additional public review period. We disagree. The facts, as recorded and recited, reflect that BLM complied with the public notice and involvement requirements for EAs under the CEQ and Departmental regulations implementing NEPA. Under the circumstances here presented, we conclude appellants have not supported their claim that BLM failed to involve the public, to the extent practicable, and to provide notice, with respect to its environmental review of the lease sale, thereby violating NEPA or implementing regulations.<sup>12</sup>

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<sup>12</sup> Appellants also point to BLM’s former forbearance in leasing lands in Otero County until a programmatic land use plan was approved, and suggest BLM’s decision to lease before then proves the arbitrary and capricious nature of BLM’s decision. Appellants’ claim does not preponderate in showing error or a violation of any law in BLM’s decision on appeal.

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 motion for reconsideration of the denial of appellants' petition for a stay is denied as untimely; appellants' motion to supplement the record is denied as moot in part and granted in part; and the Protest Decision appealed from is affirmed.

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/s/  
Christina S. Kalavritinos  
Administrative Judge

I concur:

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/s/  
Amy B. Sosin  
Administrative Judge