



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240
<http://www.blm.gov>



In Reply Refer To:
1617.2 (210)

Honorable Bill Richardson
Governor of New Mexico
State Capitol
Santa Fe, New Mexico 87503

Dear Governor Richardson:

This appeal concerns the ongoing land use planning amendment process for Sierra and Otero Counties in New Mexico. Currently, fluid minerals¹ operations are guided by the *Resource Management Plan for the White Sands Resource Area (White Sands RMP)*. The portion of the *White Sands RMP* addressing fluid minerals has not been updated since the plan was first promulgated in 1986. Under the existing planning direction, the vast majority of land managed by the Bureau of Land Management (BLM) in Sierra and Otero Counties can be nominated and leased for oil and gas exploration and development. The BLM New Mexico State Office, as part of its oil and gas management discretion, has chosen not to lease any public land since 1998 when it initiated this planning amendment process in response to an increase in leasing nominations.

Governor Richardson, you have appealed the decision of BLM State Director Linda Rundell made in accordance with BLM planning regulations at 43 C.F.R. 1610.3-2(e).

Background

In October 2000, the BLM Las Cruces, New Mexico Field Office released the *Draft Resource Management Plan Amendment and Environmental Impact Statement for Federal Fluid Minerals Leasing and Development in Sierra and Otero Counties (Draft RMPA/EIS)*. The BLM began laying the groundwork for this draft in October, 1998 with the initiation of the National Environmental Policy Act (NEPA) scoping process. After releasing the *Draft RMPA/EIS*, BLM solicited and accepted public comments for an extensive period of time. BLM received numerous comments, and these comments helped lead to changes that BLM then incorporated in the December, 2003 *Proposed Resource Management Plan Amendment and Final Environmental Impact Statement for Federal Fluid Minerals Leasing and Development in Sierra and Otero Counties (Proposed RMPA/EIS)*.

¹ Primarily oil and natural gas.

BLM New Mexico State Director Linda Rundell made the *Proposed RMPA/EIS* available to you and the public. On March 5, 2004, you sent the State Director your *Consistency Review of and Recommended Changes to the United States Department of the Interior, Bureau of Land Management's Proposed Resource Management Plan Amendment and Final Environmental Impact Statement for Federal Fluid Minerals Leasing and Development in Sierra and Otero Counties (Consistency Review and Recommendations or CRR)*. There you recommended that the BLM adopt a management alternative that was similar to an alternative (Alternative B) that was first considered and analyzed by the BLM in the *Draft RMPA/EIS*.

State Director Rundell subsequently responded to your *Consistency Review and Recommendations* on May 19, 2004. Although the State Director found that you had not presented any inconsistencies that required BLM to make further modifications, she did make a change to BLM's proposed action based upon your recommendations. The BLM's proposed action was changed to close 35,790 acres of desert grasslands and potential Aplomado falcon habitat to fluid minerals leasing. BLM described this change in the *Supplement to Proposed Resource Management Plan Amendment and Final Environmental Impact Statement for Federal Fluid Minerals Leasing and Development in Sierra and Otero Counties (Supplement)*. The New Mexico BLM made the *Supplement* available to the public and posted it on the BLM website. The State Director also announced a formal public comment period associated with the *Supplement* that extended from May 28, 2004 until June 28, 2004. On June 16, 2004, you sent a letter appealing the State Director's decision to me in Washington, D.C., and I am now responding to that appeal.

Relevant Statutes and Regulations

In deciding this appeal, I am guided by the BLM's planning regulations in 43 C.F.R. § 1610.3-2 (*Consistency requirements*). These regulations implement section 202(c)(9) of the Federal Land Policy and Management Act of 1976 (FLPMA) which states in part:

In the development and revision of land use plans, the Secretary shall . . . to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located . . . by among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, . . . assure that consideration is given to those State, local and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use

programs Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

The “Consistency requirements” regulations state that RMP amendments shall be consistent with officially approved or adopted state “resource related plans, and the policies and programs contained therein . . . so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands.” 43 C.F.R. § 1610.3-2(a). Also, in the absence of such plans, RMPs shall “to the maximum extent practical” be consistent with officially approved and adopted state “resource related policies and programs.” 43 C.F.R. § 1610.3-2(b). After a BLM State Director makes a proposed amendment available to a governor, the regulations provide a special means for noting inconsistencies and making recommendations:

The Governor(s) shall have 60 days in which to identify inconsistencies and provide recommendations in writing to the State Director. . . . If the State Director does not accept the recommendations of the Governor(s), the State Director shall notify the Governor(s) and the Governor(s) shall have 30 days in which to submit a written appeal to the Director of the Bureau of Land Management. The Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State’s interest. The Director shall communicate to the Governor(s) in writing and publish in the FEDERAL REGISTER the reasons for his/her determination to accept or reject such Governor’s recommendations.

43 C.F.R. § 1610.3-2(e). While State Directors should always keep generally apprised of state, local, and tribal policies, plans, and programs, State Directors “shall not be accountable for ensuring consistency if they have not been notified, in writing, by State and local governments or Indian tribes of an apparent inconsistency.” 43 C.F.R. § 1610.3-2(d).

Thus, in reviewing this appeal, I have focused on your *Consistency Review and Recommendations* that you first submitted to State Director Rundell and the points raised in your appeal letter. I will first consider whether you have raised actual inconsistencies with officially approved state resource related plans, policies, and programs. If an actual inconsistency is raised, I will then consider whether a recommendation addresses that inconsistency and provides for a reasonable balance between the national interest and the State of New Mexico’s interest.

Your appeal letter and *Consistency Review and Recommendations* also address a variety of issues in addition to possible inconsistencies with officially approved state resource related plans, policies, and programs. For example, you have expressed your view regarding BLM’s adherence to multiple use management under the Federal Land Policy and Management Act of 1976 (FLPMA) and shared suggestions regarding the environmental analysis made pursuant to the National Environmental Policy Act (NEPA). *See e.g., Appeal*, pp. 3, 12. It is certainly appropriate to share comments such as these in the midst of the overall RMP amendment

process, but this appeal procedure is generally designed to address situations where the BLM proposed action would substantially impede a specific enforceable state resource related plan, program, or policy that is being applied on similarly situated non-federal lands. Your comments on other issues have been noted and considered, and many, if not all, of these issues have been addressed through the protest process. See 43 C.F.R. § 1610.5-2. For purposes of this appeal decision, though, I will focus on (1) the sections in your *Consistency Review and Recommendations* that allege specific inconsistencies with officially approved resource related state plans, policies, and programs (*CRR*, § II); and (2) your recommendations to address these potential inconsistencies (*CRR*, § III). I will address your potential inconsistencies and recommendations in the order you have presented them in your *Consistency Review and Recommendations*.

Potential Inconsistencies with Resource Related State Plans, Policies, and Programs

(i.) Study: *Ecoregion-Based Conservation in the Chihuahuan Desert* (*CRR*, § II. A.)

You have asserted that the *Proposed RMPA* is inconsistent with a study entitled *Ecoregion-Based Conservation in the Chihuahuan Desert*. *CRR*, p. 6. This study was a collaborative effort of the World Wildlife Fund, CONABIO, The Nature Conservancy and other organizations. Although this may be a very useful scientific study, it is not a State of New Mexico resource related plan, policy, or program. It is, therefore, not a potential source for inconsistencies that are germane to this appeal decision. Your comments regarding this study have been noted, however, and have been considered as part of the decision making process for the proposed amendment.

(ii.) Executive Order 2004-005 (*CRR*, § II. A.)

After the *Proposed RMPA/EIS* was released in December 2003, you signed Executive Order 2004-005 on January 31, 2004. The order directed several state agencies to begin taking specific actions relevant to the Otero Mesa and Nutt grassland areas. Any potential inconsistencies with those agency actions are addressed in subsequent sections of this decision.

(iii.) Proposal for a National Conservation Area (*CRR*, § II. A.)

You have expressed a desire to see Congress designate approximately 643,754 acres as a National Conservation Area, and have requested that the BLM manage these areas consistent with your legislative request. While I appreciate your input on this issue, a request for federal congressional action is not a qualifying state plan, policy, or program that is directly relevant to this appeal. Should such a designation occur in the future, BLM will, of course, manage those lands in accordance with the congressional mandate.

(iv.) Wildlife Conservation Act (*CRR*, § II. B.)

You assert that the proposed plan is inconsistent with New Mexico Statutes sections 17-2-37 through 17-2-46, known as the Wildlife Conservation Act. That act establishes the New Mexico Department of Game and Fish (NMDGF) and defines its authority. You have not identified a

specific inconsistency though, and I can find no inconsistency with the statutes you have cited. Specific NMDGF wildlife plans are discussed separately below. In your appeal letter, you have noted habitat fragmentation as a general concern. Certainly, this is a concern for the New Mexico BLM as well and the topic has been addressed in the environmental impact statement. *See e.g., Proposed RMPA/EIS*, pp. 4-32 — 4-34. BLM must continually balance the desire to minimize habitat fragmentation with other valuable uses that may contribute to fragmentation. This task is sometimes difficult. I have noted your concerns, but here you have not outlined a specific inconsistency with a state plan, program, or policy that is appropriate for this appeal review.

(v.) New Mexico Game Management Plans/Agreements (*CCR*, § II. C.)

You have asserted that the “PRMPA/FEIS’ change to standard lease terms and conditions in Alternative A (modified) is inconsistent with several of NMDGF’s specific endeavors and plans.” *CCR*, p. 13. You have mentioned antelope and aplomado falcon, but have not cited the existence of any state plan for these animals.² State plans are in place with respect to desert bighorn sheep and black-tailed prairie dogs. My staff and I have examined these plans and discuss them below.

Bighorn Sheep Plan

In August 2003, the NMDGF developed the *Plan for the Recovery of Desert Bighorn Sheep in New Mexico: 2003-2013 (Bighorn Sheep Plan)*. The *Bighorn Sheep Plan* lists the Guadalupe and Sacramento Mountains in Otero County and the Caballo Mountains in Sierra County as unoccupied historic bighorn sheep habitat and as potential transplant areas.³ *Bighorn Sheep Plan*, p. 20 & Table 5. While bighorn sheep do not currently inhabit any BLM lands in the planning area, New Mexico BLM noted the possibility of bighorn sheep reintroduction in the *Proposed RMPA/EIS*. *See e.g. Proposed RMPA/EIS* pp. 3-23, 4-37, 4-39. The New Mexico BLM also recognized the Cornudas Mountains and Brokeoff Mountains as potential future bighorn habitat, but those areas are not listed as potential transplant areas in the *Bighorn Sheep Plan*. *See Draft RMPA/EIS*, p. 2-23, Table 2-7. You have stated your view that areas suitable for desert bighorn reintroduction “need to remain closed to oil and gas development.”⁴ *CCR*, p. 14.

The *Bighorn Sheep Plan* goal is to increase bighorn sheep populations to the point where the species can be removed from the state endangered species list. *Bighorn Sheep Plan*, p. 50. The plan includes a number of strategies for addressing individual issues related to the overall goal. However, the plan does not include a schedule of actions related to these strategies. The plan is described as “a broad scale document and as such is not specific in nature.” *Bighorn Sheep Plan*, p. iii. Thus, there is no timeframe for reintroducing bighorn sheep into specific areas, and

² It should be noted again that the State Director implemented your recommendation to close several thousand acres of potential aplomado falcon habitat to leasing.

³ The Sacramento Mountains do not have historic accounts of bighorn sheep prior to the 1930s. *Bighorn Sheep Plan*, p. 20.

⁴ Currently, under the 1986 White Sands RMP that BLM is now attempting to amend, the majority of these areas are actually open for potential leasing. Little, if any, leasing has actually occurred though.

often important barriers must be overcome before any transplant projects could be undertaken. In the Guadalupe and Sacramento Mountains, the plan notes that currently “aoudads, domestic sheep, and feral goats preclude transplants.” *Id.*, at Table 5. Regarding the Caballo Mountains, past local public opposition is noted as a barrier to reintroduction. *Id.*, at p. 20 & Table 5.

Oil and gas activities are not discussed at length in the *Bighorn Sheep Plan* (with only a single paragraph devoted to the topic). *Bighorn Sheep Plan*, p. 37. The existence of this land use plan amendment process is noted in this section, but no recommendations are offered. *Id.* Interestingly, the plan says that in other potential habitat areas, federal lands have been withdrawn from leasing while state lands in the area have been leased. *Id.* No special provisions to accommodate bighorn habitat on state lands with oil and gas potential have been described in the *Bighorn Sheep Plan* or in the *Consistency Review and Recommendations*.

The *Bighorn Sheep Plan*'s objective is the following:

To have a minimum of 500 free-ranging desert bighorn sheep in at least 3 geographically distinct self-sustaining populations, each of which contains at least 100 bighorn, and to delist the subspecies under the New Mexico Wildlife Conservation Act at that time.

Bighorn Sheep Plan, p. 50. In spring 2003, there were an estimated 304 desert bighorn in New Mexico at six locations. *Id.*, p. 6. The state plan identifies 12 potential transplant areas. *Id.*, Table 5. Several of these areas have fewer issues that must be overcome before a transplant could occur than the potential transplant areas in the Caballo, Guadalupe, and Sacramento Mountains. *Id.* Thus, it does not appear that these areas are essential for achieving the *Bighorn Sheep Plan* goal.

Additionally, it should be noted that merely making areas available for leasing in an RMP does not dictate that leases must be issued and development must occur. These areas have been open to leasing for decades without activities occurring. Further, under the standard lease terms and conditions, BLM retains the ability to prevent the location of surface disturbing activities in environmentally sensitive areas. The extreme slopes associated with bighorn sheep terrain, as a practical matter, may often prevent a conflict with oil and gas activities. *See Bighorn Sheep Plan*, p. 1 (“Habitat Requirements”). Several thousand acres of bighorn habitat in the Guadalupe, Sacramento, Cornudas, and Brokeoff Mountains are already slated for increased protection because they are included in ACECs, areas nominated for ACEC status, or Wilderness Study Areas and would be closed to leasing under the *Proposed RMPA*. In short, you have not pointed to an actual inconsistency between the BLM proposed action and the *Bighorn Sheep Plan*, and our review does not show any inconsistency.

Both the *Bighorn Sheep Plan* and the BLM's EIS suggest that, of the potential transplant locations in BLM's planning area, the Caballo Mountains possess the best bighorn habitat. *See Bighorn Sheep Plan*, p. 20; *Proposed RMPA/EIS*, p. 4-39. However, the *Bighorn Sheep Plan* understates the problems associated with reoccupying this habitat. For example, in the Caballo Mountains area there are well over a hundred active mining claims and several hundred miles of roads crisscrossing the area. Many of these roads are regularly used by members of the local

community. In 1992, BLM worked closely with the NMDGF to try to bring Bighorn Sheep to the area, but local opposition eventually prevented a transplant. New Mexico BLM sees no evidence that this situation has changed.

Nevertheless, the New Mexico BLM State Director has agreed to defer any leasing in the Caballo Mountains for five years as the NMDGF continues to evaluate the area for possible reintroduction efforts. The State Director will then evaluate the progress of NMDGF, and, if BLM finds it unlikely that reintroduction would occur within the life of the *Bighorn Sheep Plan*, the area will be available for potential leasing at that time. Again, making the area available for potential leasing would not mean that leasing would necessarily occur, and historically little interest been expressed in obtaining fluid mineral leases in the Caballo Mountains.

Black-Tailed Prairie Dog Plan

The NMDGF completed the *Conservation Management Strategic Plan for Black-Tailed Prairie Dogs in New Mexico (Prairie Dog Plan)* in November, 2001. This plan is a “working plan” designed to guide activities “toward developing a final conservation and management strategy for black-tailed prairie dogs in New Mexico.” *Prairie Dog Plan*, p. 1. The New Mexico BLM participated in the Working Group that helped to craft the plan, along with several other federal agencies, state agencies and non-government organizations. *Prairie Dog Plan*, p. 23. The BLM also “supplied substantial assistance “ with the baseline survey associated with the Prairie Dog Plan. *Prairie Dog Plan*, p. 38. The stated goal in the *Prairie Dog Plan* is to “determine and achieve an appropriate balance of conservation and management” of prairie dogs to preclude the listing of the species on either the national or state endangered species lists. *Prairie Dog Plan*, p. 10.

The plan outlines a number of broad objectives and lists potential strategies. One objective is to achieve 97,000 acres of occupied habitat statewide within 10 years based upon a 6.5% annual increase. *Prairie Dog Plan*, p. 16. You have noted this objective as well as the objective to identify and encourage maintenance of important existing habitats. *CRR*, p. 14; *see Prairie Dog Plan*, p. 12. You have noted the unique characteristics of the small prairie dog colonies in Sierra and Otero Counties and have described them as “extremely vulnerable.” *CRR*, p. 14. You conclude that the “habitat loss and fragmentation that will very likely occur under Alternative A (modified) of the PRMPA/FEIS will be counterproductive to this plan’s population and distribution goal.” *CRR*, p. 14.

As you may be aware, the State of New Mexico currently manages the black-tailed prairie dog as a “rodent pest” under the supervision of the Department of Agriculture, *see Prairie Dog Plan*, p. 24, and authorizes State agents to control prairie dog populations through lethal means on State and private lands. *See generally*, N.M. STAT. ANN. § 77-15 (Michie 2004) (“Predatory Wild Animals and Rodent Pests”). The prairie dog is not managed as wildlife by the NMDGF. I recognize, though, that the *Prairie Dog Plan* represents an important step on the part of the State towards increasing the population of prairie dogs.

I find that the *Proposed RMPA* is already consistent with the goals and strategies of the *Prairie Dog Plan*. The *Proposed RMPA* protects the prairie dog as a “special status species.” *See*

Proposed RMPA/EIS, pp. E-2, E-3. While the Fish and Wildlife Service recently decided that the black-tailed prairie dog did not warrant Endangered Species Act listing—which removes it as a formal special status species—New Mexico BLM will continue to manage the black-tailed prairie dog as a de facto special status species in Sierra and Otero Counties under the *Proposed RMPA*. See 69 Fed. Reg. 51217 (August 18, 2004). Because of their special status species designation, BLM will specifically analyze and mitigate impacts to occupied prairie dog colonies in the planning area during site specific NEPA analysis. This action should further assist NMDGF in reaching the goals of the *Prairie Dog Plan*.

(vi.) Noxious Weed Management Act (*CRR*, § II. D.)

The New Mexico Noxious Weed Management Act authorizes the creation of weed control districts. You have not described any inconsistency with the act, its implementing regulations, or specific weed management plans in your *Consistency Review and Recommendations*. The New Mexico BLM has noted the problem of noxious weeds throughout the planning process and has committed itself to implementing site-specific preventative measures. See *Proposed RMPA/EIS*, Appendix B, p. B-9. In addition, the New Mexico BLM has been an active partner with state agencies and local officials in the battle against noxious weeds. In Otero County alone, BLM has annually provided over \$10,000 worth of assistance since 1996 to support weed control efforts. Your comments on the efficacy of BLM measures has been noted, but you have not identified an actual inconsistency with a state plan, policy or program that can be addressed through this appeal procedure.

(vii.) State Water Plan (*CRR*, § II. E.)

The *New Mexico State Water Plan* was released on December 23, 2003. Your *Consistency Review and Recommendations* provides a general summary of the New Mexico State Water Plan's goals; however, the description of potential inconsistencies focuses mainly on statements from the BLM's *Proposed RMPA/EIS* without detailing how these statements are inconsistent with specific provisions in the *State Water Plan*. As you note in your appeal letter, these issues have been raised in separate protests, and they are more properly addressed in that context. Here, my focus is on any inconsistencies between the proposed plan and state plans, policies, or programs rather than on alleged inadequacies of the BLM's NEPA analysis.

The *State Water Plan* is only quoted once in your discussion. *CRR*, p. 20. There you state that an increase in the areas covered by standard lease terms and conditions is contrary to the following *State Water Plan* policy statement: "The State shall support and conduct watershed restoration projects with a high potential to increase the water supply or improve the quality of water." You further explain that the Tularosa-Salt Basin Regional Water Plan lists watershed restoration as a potential source of up to 15,000 acre-feet of water. Then you conclude, "Therefore, standard lease terms and conditions are not adequate to properly safeguard such opportunities to ensure that future supplies of fresh water are adequately protected."

I do not find an inconsistency between the *Proposed RMPA* and State support for watershed restoration. All riparian areas, wetlands, and playas in the planning area are subject to a quarter-mile "No Surface Occupancy" stipulation. *Proposed RMPA/EIS*, p. D-6. Also, standard lease

terms and conditions do have resource protection and reclamation provisions.⁵ Any wells will be subject to a casing and cementing program designed to protect groundwater resources and will be properly plugged when operations cease. *See Proposed RMPA/EIS*, pp. 4-15 to 4-17. As discussed below, the New Mexico BLM will continue to require that operators secure necessary State permits. Further, BLM agrees with you that it is “extremely important to implement best management practices in oil and gas operations” to protect water resources. *CRR*, p. 21; *Proposed RMPA/EIS*, pp. B-4 to B-9.

(iix.) Water Quality Control Commission Regulations (*CRR*, § II. (F))

Regarding the Water Quality Control Commission, you have cited section 74-6-12 of the state code, prohibiting water quality impairments that exceed standards. BLM agrees that water quality standards should not be exceeded. *See e.g., Proposed RMPA/EIS*, p. 4-16. The BLM proposed plan requires casing measures to prevent fluid or gas migrations that could degrade groundwater. *See Proposed RMPA/EIS*, p. 4-15. You have not described where water quality standards have been exceeded, or even where you believe standards might likely be exceeded because of the BLM proposed plan. I know the New Mexico BLM recognizes the importance of water resources, and I will further instruct local BLM officials to diligently monitor any operations that may occur in the planning area.

(ix.) Executive Order for Proposed Rules on Pits and Injections Wells (*CRR*, § II. (G))

Your January 31, 2004 Executive Order 2004-005 directed that the Oil Conservation Division (OCD) “shall adopt a moratorium prohibiting the use of pits at Otero Mesa” and “shall immediately propose rules to prohibit pits associated with any oil and gas drilling at Otero Mesa.” The executive order also directed OCD to “prepare and propose regulations to implement produced water re-injection standards and controls.” As you can imagine, it was difficult for the State Director to assess consistency with rules that were not yet even proposed. Yet, even though the executive order was issued after the *Proposed RMPA/EIS* was published, State Director Rundell addressed the issue in her reply to your *Consistency Review and Recommendations*. She stated that “we will work with OCD as new State rules are finalized to make sure we adhere to them.” *State Director’s CRR Response*, p. 5. On August 13, 2004, OCD approved new rules that prohibit the use of pits over much of the planning area and place additional requirements on injection wells and related facilities used to dispose of produced water. These rules went into effect over seven months after the *Proposed RMPA/EIS* was published.

In your appeal letter, you have described the New Mexico BLM position as “helpful” and, thus, there is apparently now no alleged inconsistency to address. *Appeal*, p. 12. To the extent you continue to be concerned, let me assure you that the New Mexico BLM will continue to require that operators secure necessary State permits.

⁵ BLM has broad discretion under the standard lease terms to require actions that minimize environmental impacts. Section 6 of the standard lease terms requires, “Lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources and to other land uses or users. Lessee shall take reasonable measures deemed necessary by lessor [BLM] to accomplish the intent of this section.” Section 12 states, “At such time as all or portions of this lease are returned to lessor [BLM], lessee shall . . . reclaim the land as specified by lessor [BLM]”

(x.) Cultural Resources Consultation Issues (*CRR*, § II. (H & J))

You expressed concern with the New Mexico BLM's consultation process regarding cultural resources. While you have cited a number of federal statutes, regulations, and guidance documents, you have not discussed any alleged inconsistencies with state resource related plans, policies or programs. You have noted the existence of the New Mexico Cultural Properties Act, but you have not alleged any inconsistency with state plans, policies, or programs instituted under that statute.

Ensuring that BLM properly consults with tribes and other relevant parties is a high priority for me, and I have noted your concerns. However, this consistency review appeal response is not the proper forum for examining the New Mexico BLM's compliance with the federal statutes you have listed. Some of these issues were raised in protests, and they are more appropriately addressed in that context.

Regarding your policy of government-to-government relations with tribes, BLM agrees that tribes have certain sovereign powers and should be treated accordingly. Contrary to your statement in the *Consistency Review and Recommendations*, BLM regulations do not expect a state governor to review and recommend changes on behalf of tribes. BLM will certainly consider consistency related comments received directly from tribes and local governments. See 43 C.F.R. 1610.3-2(c). The regulations merely establish a special procedure for state governors to raise inconsistencies with state resource related plans, programs, and policies. These regulations were promulgated in 1983, and I will consider your comments in determining whether a future modification of the regulations is warranted.

(xi.) Scope of NEPA Alternatives (*CRR*, § II. (I))

Concerns about the application of NEPA and other federal statutes are not potential inconsistencies with state resource related plans, policies, and programs that can be addressed in this context. Your comments have been noted and will be considered in the decision making process. As you know, the New Mexico BLM did issue a *Supplement* in May, 2004 and accepted public comment regarding the proposed action. I understand that this action has not removed all your NEPA-related objections, but this appeal is not the proper place to address disagreements over the implementation of federal statutes. Again, some of these issues have been raised in protests, and they are more appropriately addressed in that context.

(xii.) Alternative Energy Program (*CRR*, II. (K))

The *Consistency Review and Recommendations* notes various state laws that encourage alternative energy, but no inconsistencies with the proposed plan amendment are raised. As noted earlier, this amendment process focused on fluid minerals and was not designed to directly address other planning topics. Soon the New Mexico BLM will initiate a much broader planning process for Sierra, Otero, and Dona Ana Counties. Issues not directly addressed in this current planning amendment process—such as grazing, recreational uses, and alternative energy issues— will be addressed, and your input is welcomed during that process.

Summary of Potential Inconsistencies

I find that you have not raised any actual inconsistencies with state resource related plans, policies, or programs. Much of what was presented in your *Consistency Review and Recommendations* set forth objections to the BLM's proposed plan amendment and the associated environmental analysis. While these comments are useful as part of the BLM planning process, this appeal decision only concerns inconsistencies with officially approved resource related state plans, policies, and programs. Comments that addressed federal statutes do not raise inconsistencies that can be addressed through the state consistency review appeal process. Many of the issues you raised were addressed previously through the protest procedure. As a general matter, you have not directed me to specific inconsistencies and, upon further review of the state plans, policies, and programs that you have cited, I have found no inconsistencies. Where you did identify officially approved state plans, such as the *Bighorn Sheep Plan*, *Prairie Dog Plan*, and *State Water Plan*, I have attempted to clarify BLM's consistency and have directed New Mexico BLM to take actions that further assist the reaching of plan goals. Where the State has instituted recent regulatory changes regarding the use of pits and injection wells, the State Director has already agreed to continue the traditional New Mexico BLM policy of requiring federal lessees to secure necessary permits from State environmental regulators.

I also note that several aspects of your recommended plan do not appear to be consistent with the current management of New Mexico state lands that are leased for oil and gas development. For example, the leased state lands in the Otero Mesa desert grassland area are not bound by the extensive "No Surface Occupancy" stipulations that you recommend for similar federal public lands. Additionally, several of your other recommended leasing stipulations—such as the recommended stipulation limiting drilling to one surface location per 1,440 acres—are not incorporated into state rules or fluid mineral leases. The measures in the BLM's proposed plan would generally place more restrictions on oil and gas related activities than are currently present on nearby state lands. The BLM's consistency review process exists to help prevent incompatible land management systems in areas of mixed management. Since the recommendations contained in your *Consistency Review and Recommendations* are generally not implemented on state lands, I find that there would not be discordant management between closely situated federal and state lands that might warrant the adoption of your recommendations.

Discretionary Review of Governor's Recommended Alternative

The consistency review process is generally designed to highlight specific inconsistencies between proposed BLM actions and officially approved state resource related plans, policies, and programs. Although you have not raised the type of inconsistencies associated with review under section 1610.3-2 of the BLM planning regulations, I recognize that you have documented a variety of concerns and disagreements with the *Proposed RMPA/EIS*. You have presented an alternative course of action and recommended its full adoption. Therefore, in my discretion as BLM Director, I have decided to re-examine your recommended alternative in light of the federal and state interests involved.

Federal and State Interests

Under the Federal Land Policy and Management Act (FLPMA), BLM must “use and observe the principles of multiple use” when developing and revising land use plans. 43 U.S.C. §1712 (c)(1). Through the land use planning process BLM makes choices among a host of possible land uses. The multiple use mandate does not require that all uses be available upon every acre of public land. Indeed, the choice of one use in a particular area, by its very nature, may exclude some possible uses while being compatible with still others. Overall, however, the public lands managed by BLM are utilized by the nation in an astonishingly wide variety of ways.

Here, the New Mexico BLM has proposed to amend the *White Sands RMP*. The *White Sands RMP* addresses a wide range of uses including recreational uses, wildlife habitat areas, and livestock grazing to name but a few. While the *Proposed RMPA/EIS* considers decision possibilities that relate primarily to oil and gas leasing, it does so with the implicit recognition that any decision may impact the availability of other uses. The integrated planning and NEPA analysis process is designed to insure that the impacts of any proposed action are clearly understood. BLM takes a similar view when it considers any RMP amendment focused on a particular subset of uses (such as the 1997 RMP amendment addressing Areas of Critical Environmental Concern).⁶

In short, when making land use decisions BLM must balance a variety of interests. Of particular importance here is the national interest in domestic oil and gas production. In the Mining and Minerals Policy Act of 1970 Congress declared,

[I]t is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals,⁷ metal and mineral reclamation industries, [and] (2) the orderly and economic development of domestic mineral resources, reserves and reclamation of

⁶ The *White Sands RMP* has been amended four times since it was adopted in 1986.

⁷ “Minerals” is specifically defined to include “all minerals and mineral fuels including oil, gas, coal, oil shale and uranium.” 30 U.S.C. § 21a.

metals and minerals to help assure satisfaction of industrial, security and environmental needs

30 U.S.C. § 21a. Later, in the Federal Land Policy and Management Act of 1976 (FLPMA), Congress noted,

[I]t is the policy of the United States that . . . the public lands be managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970

43 U.S.C. § 1701(a)(12). Thus, Congress has stated a strong national interest in the production of oil and gas on public lands. BLM, in keeping with the multiple use mandate, is charged with balancing this interest along with other valid interests as it manages the public lands entrusted to its supervision.

Similarly, the State of New Mexico shares an interest in the development of oil and gas resources in Sierra and Otero Counties. The State of New Mexico would receive one half of the royalties paid on any oil or gas produced from these public lands. Also, the state is a major landowner within these two counties and has already leased thousands of acres of land for oil and gas development in this same area. Patrick H. Lyons, the State of New Mexico Commissioner of Public Lands, provided New Mexico BLM with written comments during the most recent public comment period. In his comments, the Commissioner stated,

The state’s trust holding in the greater Otero Mesa area are second only to the federal acreage position and with these vast holdings comes a keen awareness of the potential to develop a secure, domestic energy resource and produce significant long-term revenue for New Mexico, while at the same time recognizing the need to harmonize development with environmental and cultural resource protection.

Supplement comment letter of Commissioner Patrick H. Lyons, June 3, 2004. According to Commissioner Lyons, “[T]he State Land Office has leased approximately 80,000 acres of land in the area of Otero Mesa for oil and gas development.” *Id.* Commissioner Lyons noted that state mineral and surface lands are “held in trust to benefit important New Mexico institutions, most notably our public schools and universities.” *Id.* He concluded that the proposed plan presented in the *Proposed RMPA/EIS* and the *Supplement* “allows balanced and sustainable development of oil and gas resources at Otero Mesa in southern New Mexico.” *Id.* The Commissioner also stated, “Any additional delays in the leasing and development process has the potential to deprive trust beneficiaries of much needed funding and is not in the best interest of the trust.” *Id.*

Comments were also received from the Otero County Economic Development Council. The Council’s president stated, “We feel that the addition of an oil and natural gas industry to Otero County is an important diversification of our economy and will shore up the jobs lost in recent years to the decline in the forest industry. We feel that your plan adequately addresses the

balance between this new industry and environmental concerns.” *Supplement* comment letter of Laura Bregler, June 1, 2004.

I would be remiss if I did not give some consideration to the views of the Commissioner of Public Lands and local leaders when reviewing the balance of national and state interests. I am also aware, however, that many public leaders, organizations, and individuals from within and beyond New Mexico expressed a wide range of views on this topic. Some opposed any development; some supported your alternative; some supported the preferred plan in the *Proposed RMPA/EIS*; and some felt that the proposed plan placed too many restrictions on development.

In your appeal you have noted the state’s interest in the natural character, water resources, wildlife, and cultural resources found in Sierra and Otero Counties. Clearly, there is a national interest in these as well. FLPMA, in addition to recognizing the need for domestic sources of minerals, also states it is the policy of the United States that,

The public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8). I have taken these interests into account as I have considered your appeal. I recognize that the Chihuahuan Desert is a special place, and BLM plays an important role in the proper management of this region.⁸

⁸ Before addressing your recommendations, I would first like to correct two misunderstandings regarding the Reasonably Foreseeable Development Scenario (RFD)⁸ and the 5% rule⁸ in BLM’s proposed plan.

In your appeal, you have stated that the proposed plan’s 5% rule allows “disturbance of 5,244 acres in the Otero Mesa grasslands.” (*Appeal*, p. 8). This is not accurate. The 5% rule is not a disturbance authorization; rather, it is a limitation applicable to every exploratory unit that will be formed in the Otero Mesa and Nutt desert grassland areas. *See Proposed RMPA/EIS*, pp. 2-28, D-10. The RFD’s short term disturbance figure of 1,589 acres⁸ is not expanded or affected in any way by the 5% rule. For example, even if the total disturbance within the entire planning area were still far below the 1,589 acre level, lessees within an exploratory unit could not disturb more than 5% of the surface area within that unit. Likewise, the lessees within an exploratory unit would not be exempt from the impact of a maximized RFD disturbance level merely because their particular unit only contained 1% disturbance at the time the overall 1,589 acre level was reached.

Also, allow me to clarify the relationship between *acres leased* and *acres disturbed*. You state, “My recommended plan, in fact, provides more acreage for oil and gas activity than the BLM anticipates will be disturbed in its forecast of the Reasonable Foreseeable Development (RFD) in the two counties.” (*Appeal*, p. 2) Later, you state, “My plan certainly allows for development in more than the 1,600 acres needed to sustain the RFD” (*Appeal*, p. 4). However, simply opening more than 1,600 acres to leasing does not assure that any oil and gas development can occur. Disturbed acreage will normally be much smaller than the actual size of a mineral lease. This is because even a standard vertical well will normally produce from a subsurface area that is much larger than the disturbed drill pad area. Further, the RFD disturbance level is based on the projected success of exploration activities throughout this largely unexplored planning area. Undoubtedly, some areas will emerge as more desirable for

Discussion of Recommendations

You have recommended the following land designations for the approximately 2.1 million acre planning area: 310,554 acres of discretionary leasing closures; 333,200 acres that would be open to leasing but subject to a “No Surface Occupancy” stipulation; 894,264 acres open to leasing but subject to expanded stipulations; and 709,350 acres open subject to standard leasing terms and conditions. As you noted in your appeal, these recommendations are similar to “Alternative B,” first described in the *Draft RMPA/EIS*. Because of the similarities to that alternative (which has been before the public since 2000) and to other public comments that advocated similar measures, the State Director decided not to initiate a special public comment period regarding your recommendations. That specific decision is not the subject of this appeal; however, I note BLM received numerous comments addressing your recommendations in the May 28th through June 28th public comment period offered in association with the *Supplement*. These comments on your recommendations have been noted and are being considered in the ongoing decision-making process. One of your proposed stipulations, however, would limit drilling to one surface location per 1,440 acres.

I believe the BLM’s current proposed plan balances the need to allow for exploration activities with the need to protect wildlife habitat, water resources and the overall environmental health of the area. After reviewing your appeal, however, I cannot say that your recommended plan provides a reasonable balance of the national and state interests involved because your plan would make exploration activities difficult or impossible over a majority of the planning area.

Your recommended plan would completely close 310,554 acres (15% of the planning area) to any drilling, including directional drilling from offsite well pads. Your recommendation would also place a “No Surface Occupancy” (NSO) stipulation on 333,200 acres (16% of the planning area). Under such a stipulation, exploration and development could only be done on the margins of the NSO areas via directional wells started offsite. Your proposal also includes twelve leasing stipulations. Some of these proposed stipulations closely parallel existing BLM best management practices (BMPs).⁹ However, your proposed stipulation allowing only one surface location per 1,440 acres would apply to some 894,264 acres (44% of the project area). This translates to one well pad per 2 ¼ square miles.¹⁰ As you acknowledge, this is not consistent

drilling than others. The RFD does not assume that allowing operations on any random 1,589 acres within the planning area will lead to the level of activity forecasted.

⁹ All BLM offices are instructed to consider applying certain BMPs, such as interim reclamation of well locations, in nearly all circumstances. Seasonal restrictions, requiring multiple wells from a single pad, and the burying of power lines and flow lines in or near roads are examples of BMPs implemented based on case-by-case analysis. See BLM Instruction Memorandum No. 2004-194. It is quite possible that these and other BMPs will be appropriate for well sites in Sierra and Otero Counties. BMPs are typically implemented as mandatory conditions of approval when BLM responds to site-specific Applications for Permits to Drill (APDs) with project-specific NEPA.

¹⁰ Given the relatively small number of wells anticipated under the RFD (141 total wells, of which 84 are projected to be producing wells) and the large size of the planning area, it is quite possible that no more than one surface location will be disturbed per 1,440 acres. In certain circumstances, however, it may be environmentally beneficial to cluster pads rather than widely spacing them.

with the current statewide rules for gas well spacing—one well per 160 acres. *CRR*, p. 42. This stipulation could limit the exploration flexibility needed to properly understand the subsurface resource. It could also produce a disincentive for exploration because, after an initial vertical well is drilled, directional drilling would be required.

It is important to remember that Sierra and Otero Counties are *frontier* exploration areas. While some 101 wildcat wells have been drilled between 1925 and 2003, none have led to full production. Any alternative, therefore, must be able to adequately accommodate *exploration* activities if it can truly be said to meet the national and state interests associated with domestic oil and gas production.

In your appeal you state, “Directional drilling allows for production and is the way to reconcile state and national policies in this area.” *Appeal*, p. 20. Directional drilling is an important and useful drilling technique that can limit surface disturbances over subsurface target areas. Directional drilling is generally most effective during the *production* phase of oil or gas development when the subsurface reservoir characteristics are better understood.¹¹ This type of drilling is strongly encouraged by the BLM when appropriate. *See e.g.*, BLM Instruction Memorandum No. 2004-194. Directional wells undoubtedly have some value at the exploration stage, but it is highly unlikely that the large areas placed under your proposed NSO stipulation could be effectively explored using only directional wells.

At least one expert familiar with the planning area, Ronald F. Broadhead (Associate Director and Principal Senior Petroleum Geologist of the New Mexico Bureau of Mines & Mineral Resources) has concluded, “In frontier exploration areas such as Sierra and Otero Counties, exploration and initial development must be accomplished through the drilling of vertical, and not horizontal, wells.” *Draft RMPA/EIS* comment letter of Ronald F. Broadhead, March 27, 2001, *Proposed RMPA/EIS*, Appendix G, p. G-I-45. As Mr. Broadhead has since clarified, his comments were not meant to suggest that some deviated wells (which, as he says, “are more similar to a vertical well than a horizontal well”) could not be used in the exploration phase. *Supplement* comment letter of Ronald F. Broadhead, June 21, 2004. However, neither Mr. Broadhead nor any other recognized expert has suggested that deviated wells are capable of exploring the large NSO areas present in your recommended plan.

For example, in Township 24 South, Range 13 East, your plan would place a three mile by six mile area under an NSO stipulation (sections 7 – 24). This 18 square mile rectangle is bounded either by non-federal land or by still more land subject to the NSO stipulation. Assuming that ground access for directional drilling was possible from the non-federal NSO boundaries, a well would face a *minimum* horizontal displacement of 1.5 miles in order to explore targets in the center of sections 13 through 18. Thus, the uncertainty associated with a frontier exploration area and the large contiguous tracts involved combine to make exploration in much of your NSO zone highly unfeasible.

¹¹ I note that the Biodiversity Conservation Alliance article cited in your appeal focuses mainly on *production* phase efficiencies associated with directional drilling and contains less than two paragraphs addressing the directional drilling of exploratory wells. Erick M. Molvar, *Drilling Smarter: Using Directional Drilling to Reduce Oil and Gas Impacts in the Intermountain West*, Biodiversity Conservation Alliance, p. 8, 16.

It is common knowledge that a directionally drilled well is more costly and complicated than a comparable depth single vertical well.¹² While the added costs are often justified by the ability to hit multiple high value subsurface targets and to protect important surface resources, such is not always the case in an exploration context. Higher exploration costs can reduce the likelihood that areas will be economically feasible to explore. Potentially productive areas that remain unexplored can prevent the nation and New Mexico from realizing the benefits of domestic energy production.¹³

Conclusion

As previously discussed, you have not identified inconsistencies with state resource related plans, policies, and programs. Neither are your recommendations for federal public lands completely consistent with the management practices on state lands with oil and gas resources. Nevertheless, I have instructed the New Mexico BLM to take steps to further strengthen its support for the state plans, policies, and programs that you have noted. Among these steps are expanded protection for potential bighorn sheep habitat and occupied black-tailed prairie dog habitat in the planning area.

Also, I have reviewed your complete recommended alternative as you requested. In short, your recommendations would place some 1,538,018 acres (75% of the planning area), either off-limits to drilling completely or under stipulations that place significant barriers to effective exploration and development. Such a plan is unbalanced. Your recommended plan does not give reasonable consideration to the federal and state interest in domestic energy exploration and production in Sierra and Otero Counties, and it adds little significant protection for other natural resources. I therefore cannot approve your recommended alternative and must deny your appeal.

The BLM proposed plan allows a reasonable opportunity for exploration and development, but the plan does not ignore the important environmental interests of the area. The plan closes the six Areas of Critical Environmental Concern (ACEC) to leasing. It also closes eight areas that have been nominated for ACEC status. As you previously recommended, the BLM proposed plan will not allow any fluid mineral leasing in the 35,790 acres of potential Aplomado falcon habitat located in the Nutt and Otero Mesa grassland areas. The broader grassland areas are subject to protective stipulations, including the 5% maximum disturbance rule. All of this is under the umbrella of the RFD-based analysis that anticipates short term disturbance from oil and gas activities of 1,589 acres throughout this nearly 2.1 million acre planning area. That

¹² You provide an example in your *Consistency Review and Recommendations* estimating a 26% increase in per well costs between nine separate vertical wells and the more expensive nine directional wells drilled from a single drill pad. *Consistency Review and Recommendations*, p. 43. The per well cost differences would likely increase if fewer than nine wells were examined. A lesser number may be more realistic in a frontier exploration area. You did not discuss the horizontal displacement involved in your hypothetical situation, but it should be noted that your example was based on a drilling depth of 2,200 feet, while the area's most successful well in recent years was over 7,000 feet deep. Reaching such depths could be more difficult when extensive horizontal offsets and fractured geology, common in sections of the planning area, are also involved.

¹³ For example, the unleased areas closest to the successful Bennett Ranch well location would be subject to the NSO stipulation under your alternative. Under the *Proposed RMPA/EIS* plan this area would be subject to stipulations, such as the 5% rule, that would allow for the possibility of limited exploration with both vertical and directional wells.

disturbed area is less than one-tenth of 1% of the entire planning area. The proposed plan also includes strict landscape reclamation standards that will be applied to any areas of disturbance. I believe the BLM proposed plan offers a reasonable balance between energy needs and environmental considerations and improves the management regime found in the currently effective 1986 *White Sands RMP*. Under that plan, some 96% of the planning area would be open to leasing without any special stipulations.

Again, I thank you for your participation in the land use planning process for Sierra and Otero Counties. Your appeal is hereby denied, and I affirm the decision of the New Mexico State Director. Although I have denied this appeal, it is my hope that the New Mexico BLM and the State of New Mexico will continue to communicate and cooperate on future issues.

Sincerely,

Kathleen Clarke
Director, Bureau of Land Management