



# Bureau of Land Management Director's Protest Resolution Report

October 18, 2019

for the

## Ray Land Exchange Final Supplemental Environmental Impact Statement and Proposed Resource Management Plan Amendment

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**Summary of Protest Process**

The Bureau of Land Management (BLM) released the Ray Land Exchange Final Supplemental Impact Statement/Proposed Plan Amendments (FSEIS/PRMPA) for public protest on July 12, 2019. The BLM received one (1) protest letter during the 30-day protest period.

**Table.** Protesting Party Index.

<b>Protester</b>	<b>Organization</b>	<b>Determination</b>
Roger Flynn Allison Melton Roger Featherstone Sandra Bahr Christopher Krupp	Western Mining Action Project Center for Biological Diversity Arizona Mining Reform Coalition Sierra Club Grand Canyon Chapter WildEarth Guardians	Remanded in part; Denied in part; Dismissed in part

As outlined in the BLM’s *Federal Register* notice dated July 12, 2019 (84 FR 33284), the planning regulations at 43 CFR 1610.5-2 describe the requirements for filing a valid protest. The BLM evaluated all protest letters to determine which protest letters were complete, timely, and which persons held standing to protest, consistent with BLM land use planning regulations at 43 CFR 1610.5-2. The single protest letter received met these criteria, in part.

The final EIS subject to protest under 43 CFR 1610.5-2 is a land use plan amendment resulting from an application submitted to the BLM for an implementation-level action. As such, the final EIS includes analysis and discussion of both implementation-level decisions and land use

planning decisions. Only the land use planning decisions are subject to protest here. The land use planning decisions included in the Ray Land Exchange FSEIS/PRMPA are:

- A decision to change the established land tenure allocation on the identified “Selected Lands” from ‘retention’ to ‘available for disposal.’
- A decision on the designations, allocations, objectives, and management direction applicable to the identified “Offered Lands” should those lands be acquired.

All other actions included in the FSEIS/PRMPA are implementation-level decisions that are not subject to protest to the BLM Director.

## ***Valid Protest Issues Identified and Responses***

### **NEPA – Scope of Analysis**

#### **Text excerpt:**

*“At the outset, the FSEIS suffers from a fundamental error – an illegal and improper restriction on the scope of its analysis. ... Such a unilateral restriction violates the basic requirements of NEPA and FLPMA, which require BLM to fully analyze all current conditions, alternatives, impacts, etc. ... Despite this, the DSEIS and FSEIS limit their analysis to only issues it believes the Ninth Circuit ordered to be reviewed in its 2010 decision. ... NEPA and FLPMA, however, contain no such self-imposed restriction on the analysis of alternatives, impacts, and other required reviews.” (@ 2).*

#### **Protest Issue Statement:**

The BLM has violated NEPA and FLPMA requirements for establishing a scope of analysis that provides for a full analysis of current conditions, alternatives, and impacts.

#### **Rule:**

The NEPA document must briefly specify the underlying purpose and need to which the agency is responding (40 CFR 1502.13). The analysis of alternatives is guided by the agency’s purpose and need. The BLM has considerable flexibility to define the purpose and need of a project, although it cannot be arbitrarily narrow (BLM NEPA Handbook, H-1790-1, 6.2 Purpose and Need). The BLM, in determining what a reasonable purpose is, must look at the factors relevant to the definition of the purpose (e.g., Congressional directives, statutory authority, policies). Id.

A carefully crafted purpose and need statement controls the scope of the analysis and thereby increases efficiencies by eliminating unnecessary analysis and reducing delays in the process (BLM NEPA Handbook, H-1790-1, 6.2.1 The Role of the Purpose and Need Statement). The purpose and need statement dictates the range of reasonable alternatives, as alternatives are not reasonable if they do not respond to the purpose and need for the RMP (BLM NEPA Handbook, H-1790-1, 6.6.1 Reasonable Alternatives). Purpose and need also influences analysis issues that must be analyzed in detail (BLM NEPA Handbook, H-1790-1, 6.4 Issues).

**Application:**

The BLM has appropriately defined the scope of the land use plan amendment in the 2019 FSEIS/PRMPA through the purpose and need. Agencies have considerable flexibility to define the purpose and need of a project (BLM NEPA Handbook, H-1790-1, 6.2 Purpose and Need). The BLM developed the purpose and need for the land use plan amendment that considered the BLM's decisionmaking authority responsive to the received application, and to address the concerns of the United States Court of Appeals for the Ninth Circuit. The 2019 FSEIS/PRMPA identified the purpose and need as *"The purpose of, and need for, the action remains the same as in the [1999] FEIS (BLM 1999, page S1). Specifically, the purpose of the proposed Ray Land Exchange/Plan Amendments is to exchange ownership of federal lands for private lands and amend the Lower Sonoran, Safford, and Phoenix RMPs to allow for disposal of the Selected Lands. The need for action is to respond to ASARCO's request for a land exchange, while allowing BLM to acquire lands with public values."* (2019 FSEIS/PRMPA @ 2). The BLM analyzed alternatives and issues responsive to this purpose and need in Chapter 4 of the 2019 FSEIS/PRMPA.

**Conclusion:**

The BLM has appropriately used the purpose and need to define the scope of analysis for the land use plan amendment in the 2019 FSEIS/PRMPA. For the reasons described above, this protest issue is denied.

**NEPA – Public Involvement**

**Text excerpt:**

*"At the outset, the FSEIS suffers from a fundamental error – an illegal and improper restriction on the scope of its analysis. "Because the Proposed Action for the Ray Land Exchange/Plan Amendment is largely unchanged from the proposal evaluated in the 1999 FEIS, and the supplemental environmental analysis for the SEIS is limited in scope, the BLM determined that additional scoping for the SEIS was unnecessary." Draft SEIS (DSEIS) at 1. Such a unilateral restriction violates the basic requirements of NEPA and FLPMA, .... Thus, BLM must undertake a full revision of the FSEIS, subject to full public comment under NEPA, without this restriction."* (@ 2).

**Protest Issue Statement:**

The BLM has violated NEPA's requirement for public involvement by failing to provide for scoping on the supplementation of the 1999 FEIS/PRMPA.

**Rule:**

Scoping is a requirement of the NEPA regulations (40 CFR 1501.7) and the BLM planning regulations (43 CFR 1610.2 and 43 CFR 1610.4-1). The intent of the scoping process in land use planning is to identify planning issues to be addressed in the planning process. Planning issues are disputes or controversies about existing and potential land and resource allocations, levels of resource use, production, and related management practices (BLM Land Use Planning Handbook, H-1610-1, p. 19). Agencies shall make diligent efforts to involve the public by providing public notice of hearings, public meetings, and the availability of environmental

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documents so as to inform those persons and agencies who may be interested or affected (40 CFR 1506.6).

A supplemental EIS must provide a basis for rational decision making and give the public and other agencies an opportunity to review and comment on the analysis of the changes or new information (40 CFR 1502.9(c)(4)). Supplementing is used to meet the purposes of the NEPA as efficiently as possible, avoiding redundancy in the process (BLM NEPA Handbook, H-1790-1, 5.3 Supplementing an EIS). Supplemental EISs are prepared, circulated, and filed with the same requirements as EISs, except that supplemental EISs do not require scoping (40 CFR 1502.9).

**Application:**

The BLM has appropriately conducted scoping on the Ray Land Exchange EIS and Plan Amendments consistent with the requirements of NEPA.

The BLM conducted scoping for the Ray Land Exchange EIS and Plan Amendments beginning with a notice of intent published in the *Federal Register* on December 19, 1994. The scoping period was open through February 1995 and included public meetings in Kearny and Mesa, Arizona (1999 FSEIS/PRMPA @ S-3). The BLM reinitiated scoping on the Ray Land Exchange EIS and Plan Amendments through the publication of a new notice of intent in the *Federal Register* on June 20, 1997 (62 FR 33674), to allow for scoping to include information on the notice of exchange proposal that was published the same day (62 FR 33671). This second scoping period included public meetings in Kearny, Mesa, and Kingman, Arizona (1999 FSEIS/PRMPA @ S-3). The BLM used the information from both of these scoping periods to identify the issues to address during the Ray Land Exchange EIS and Plan Amendment process (*Id.*).

NEPA regulations do not require a public scoping process for an SEIS (40 CFR 1502.9(c)(3)(4)). Scoping is the process by which the BLM solicits internal and external input on the issues, impacts, and potential alternatives that will be addressed in an EIS as well as the extent to which those issues and impacts will be analyzed. The BLM evaluated the information available from the two scoping periods when beginning the supplementation process. The BLM determined that additional scoping for the SEIS was unnecessary because the proposed action for the Ray Land Exchange FSEIS/PRMPA was largely unchanged from the proposal evaluated in the 1999 FEIS/PRMPA, and the supplemental environmental analysis for the SEIS is limited in scope (2017 DSEIS/RMPA @ 1; 2019 FSEIS/PRMPA @ 6).

The 1995 Ray Land Exchange scoping mailing list, and a public involvement contact list included as Appendix C in the FEIS, were used as the basis for the preliminary mailing list for the 2017 DSEIS/RMPA. This preliminary list was updated by mailing the contacts a postcard requesting that the BLM be notified of the party's continued interest in the Ray Land Exchange EIS and plan amendment. This preliminary list was updated by mailing the contacts a postcard requesting that the BLM be notified of the party's continued interest in the Ray Land Exchange EIS and plan amendment. The list was revised based on this continued interest and research identifying current agency and interest group addresses and contacts, adjacent property owners, and BLM permittees. The project mailing list has been updated throughout development of the 2017 DSEIS/RMPA and 2019 FSEIS/PRMPA. All public comments and information received

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by the BLM through the public outreach, 2017 DSEIS/RMPA review, and consultation processes were considered during the formulation of the 2019 FSEIS/PRMPA. The public involvement and outreach activities conducted in preparation of the supplemental EISs are detailed in Appendix I of the 2019 FSEIS/PRMPA.

**Conclusion:**

The BLM has appropriately conducted scoping on the Ray Land Exchange EIS and Plan Amendments consistent with the requirements of NEPA. For the reasons detailed above, this protest is denied.

**NEPA – Supplementation**

**Text excerpt:**

*“As outlined in these comments and acknowledged in the DSEIS and FSEIS, there have also been significant new circumstances and information since the FEIS was issued in the late 1990’s. ... Even if a court decision does not require BLM to go back and re-do its EIS analysis in full, the lapse of nearly twenty years and changes in the proposed action or significant new circumstances/information requires BLM to comply with NEPA’s supplementation requirements for this major Federal action that has yet to occur.” (@ 3).*

**Protest Issue Statement:**

The BLM has violated NEPA’s requirement for supplementation due to the presence of significant new circumstances and information since the release of the 1999 FEIS/PRMPA.

**Rule:**

Federal agencies must prepare a supplement to a draft or final EIS if, after circulation of a draft or final EIS but prior to implementation of the Federal action:

- The agency makes substantial changes to the proposed action that are relevant to environmental concerns (40 CFR 1502.9(c)(1)(i));
- The agency adds a new alternative that is outside the spectrum of alternatives already analyzed (see Question 29b, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (March 23, 1981)); or
- There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its effects (40 CFR 1502.9(c)(1)(ii)).

If a new alternative is added after the circulation of a draft EIS, supplementation is not necessary if the new alternative lies within the spectrum of alternatives analyzed in the draft EIS or is a minor variation of an alternative analyzed in the draft EIS. In such circumstances, the new alternative may be added in the final EIS (BLM NEPA Handbook, H-1790-1, 5.3.2 When Supplementation is Not Appropriate).

**Application:**

The BLM has not violated NEPA’s requirements for supplementation of an EIS in the Ray Land Exchange EIS and Plan Amendments. The BLM released the Ray Land Exchange DSEIS/RMPA on November 17, 2017 (82 FR 54408). The BLM released the Ray Land

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Exchange FSEIS/PRMPA on July 12, 2019 (84 FR 33284). The FSEIS/PRMPA states that the supplemental EIS addresses: 1) concerns regarding impact analysis in the 1999 FEIS, 2) amendments to the Lower Sonoran, Safford, and Phoenix RMPs, and 3) significant new circumstances and information (FSEIS/PRMPA @ 1).

**Conclusion:**

The BLM has complied with NEPA in releasing a supplement to the 1999 FEIS/PRMPA to address analysis concerns, amendments to changed RMPs, and significant new circumstances and information. For the reasons described above, this protest issue is denied.

**NEPA - Baseline Conditions/Affected Environment**

**Text excerpt:**

*““The minerals in the 320-acre Gila River at Cochran parcel group, 320-acre Tomlin parcel group, and 120-acre Sacramento Valley parcel group would become subject to disposal under applicable federal laws and regulations.” FSEIS at 117. BLM further admits that “mineral potential for occurrence and potential for development on the Offered Lands have not been assessed.” FSEIS at 85 (this alone violates NEPA’s mandate to determine baseline conditions and an analysis of potential impacts).” (@ 18).*

**Protest Issue Statement:**

The BLM has violated NEPA’s requirement for establishing the affected environment by failing to update information on the proposed lands for acquiring (Offered Lands) since the release of the 1999 FEIS/PRMPA.

**Rule:**

The affected environment section describes the existing condition and trend of issue-related elements of the human environment that may be affected by implementing the proposed action or alternative (BLM NEPA Handbook, H-1790-1, 6.7.1 Affected Environment). The human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all these effects on the human environment (40 CFR 1508.14). Descriptions of the specific elements of the affected environment should be quantitative and of sufficient detail to serve as a baseline against which to measure the potential effects of implementing an action (BLM NEPA Handbook, H-1790-1, 6.7.1 Affected Environment).

The CEQ regulations specify that the environmental information made available to public officials and citizens before decisions are made must be of “high quality” (40 CFR 1500.1(b)). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)). NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)).

**Application:**

The BLM has provided an appropriate level of discussion on the affected environment to inform the land use planning decisions related to the “Offered Lands” in the 2019 FSEIS/PRMPA. The BLM is required to provide a brief description of the environment likely to be affected as it relates to the issues and alternatives identified in the EIS. The BLM is not required to describe everything about the existing conditions of the landscape in question, but is required to describe the information necessary for making the decision at hand. Specific to this protest, the decisions relevant to the “Offered Lands” are about the appropriate land use planning level management on these lands, specifically the Gila River at Cochran, Tomlin, and Sacramento Valley parcels, if acquired.

To evaluate the land use planning decisions for the management of “Offered Lands,” if acquired, the BLM only needs the information necessary to evaluate against the criteria established in the applicable RMP for the management of future acquired lands. The 2019 FSEIS/PRMPA states that “If acquired, the Offered Lands would be managed in conformance with the applicable Kingman and Phoenix RMPs.” (@ 3). The 2019 FSEIS/PRMPA further specifies management within each RMP that would apply to each of the “Offered Lands.” The BLM has not proposed through these land use plan amendments to change the management established in any of the three land use plans under which the “Offered Lands” would be managed.

Neither the 1989 Phoenix RMP nor the 1995 Kingman RMP have “criteria based” land use planning management decisions; but rather, both RMPs establish “geographically based” land use planning management decisions. To know which land use planning management decisions of the 1989 Kingman or 1995 Phoenix RMPs apply, the BLM only needs to know the locations of the “Offered Lands.” For example, the 2019 FSEIS/PRMPA identifies that the Gila River at Cochran parcel would “become part of several special management areas, including the Gila River Riparian Management Area and the Middle Gila Cultural Resource Management Area” and is “within the White Canyon Resource Conservation Area” (@ 11). For each of these areas, no further information than the geographic location of the parcel within the boundary of the areas established by the 1989 Phoenix RMP is needed to determine that the BLM would apply the land use planning management decisions of these three special areas to the Gila River at Cochran parcel, if acquired. The rest of the “Offered Lands” would be subject to management under the 1995 Kingman RMP, and some would fall within geographically established management areas and be subject to those land use planning management decisions, and others are not within any specifically identified management areas but are subject to the general land use planning decisions approved and adopted by the 1995 Kingman RMP.

In all circumstances, the BLM need only to provide a brief discussion of the location of each of the acquired lands relative to the approved management decisions in the 1989 Phoenix and 1995 Kingman RMP to meet the requirements of NEPA for providing the appropriate level of discussion to the affected environment informing the land use planning decisions that would apply to the “Offered Lands,” if acquired. The BLM provided this disclosure in Chapter 1, Appendix F, and Appendix G of the 2019 FSEIS/PRMPA.



**Conclusion:**

The BLM has provided an appropriate level of discussion on the affected environment to inform the land use planning decisions related to the “Offered Lands” in the 2019 FSEIS/PRMPA. For the reasons described above, this protest issue is denied.

**NEPA – Range of Alternatives**

**Text excerpt:**

*“At the outset, the FSEIS suffers from a fundamental error – an illegal and improper restriction on the scope of its analysis. ... Such a unilateral restriction violates the basic requirements of NEPA and FLPMA, which require BLM to fully analyze all current conditions, alternatives, impacts, etc. ... The original Final EIS and ROD were issued in 1999 and 2000. The environmental conditions of the selected and offered lands, the potential alternatives... have significantly changed during these years. Despite this, the DSEIS and FSEIS limit their analysis to only issues it believes the Ninth Circuit ordered to be reviewed in its 2010 decision. ...NEPA and FLPMA, however, contain no such self- imposed restriction on the analysis of alternatives, impacts, and other required reviews. Thus, BLM must undertake a full revision of the FSEIS, ... without this restriction.” (@ 2).*

**Text excerpt:**

*“Reasonable Alternative: Mineral Withdrawal for All Parcels BLM Would Obtain from ASARCO to Protect Resource Values.*

*BLM touts the values of the offered lands, such as being wilderness inholdings and providing important wildlife habitat, including critical habitat, for species like the southwestern willow flycatcher, Category I and II Desert Tortoise Habitat, and desert bighorn habitat. Yet, only a few hundred acres are planned to be segregated and then permanently withdrawn. As a result, the very values of these offered lands would not be secure.” (@ 28).*

**Protest Issue Statement:**

The BLM has violated NEPA by failing to consider any new alternatives in the 2019 FSEIS/PRMPA, and specifically in failing to consider a reasonable alternative to allocate all acquired lands (Offered Lands) as “recommended for withdrawal.”

**Rule:**

All substantive comments received before reaching a decision must be considered to the extent feasible (40 CFR 1503.4). All substantive and timely comments on a draft EIS must be attached or included in a final EIS (40 CFR 1503.4(b)). Comments on a draft EIS may be summarized if they are especially voluminous (see Question 29a, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (March 23, 1981)). Substantive comments do one or more of the following (Questions 29a and 29b, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (March 23, 1981)):

- Question, with a reasoned basis related to the analysis, the accuracy of information in the EIS or EA;
- Question, with a reasoned basis related to the analysis, the adequacy of, methodology for, or assumptions used for the analysis;

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- Present new information relevant to the analysis;
- Present reasonable alternatives other than those analyzed in the EIS or EA;
- Present issues for analysis other than those analyzed in the EIS or EA; or
- Cause changes or revisions in one or more of the alternatives.

The NEPA directs the BLM to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;...” (NEPA Sec 102(2)(E)). You must analyze those alternatives necessary to permit a reasoned choice (40 CFR 1502.14). In determining the alternatives to be considered, the emphasis is on what is “reasonable” rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. “Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant” (Question 2a, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (March 23, 1981)). The purpose and need for action dictates the range of alternatives that must be analyzed, because action alternatives are not reasonable if they do not respond to the purpose and need for action (BLM NEPA Handbook, H-1790-1, 6.2 Purpose and Need, 6.2.1 The Role of the Purpose and Need Statement, 6.6.1 Reasonable Alternatives).

The BLM is required to include a discussion of a range of reasonable alternatives to the proposed action, alternatives which are technically and economically feasible and which meet the purpose and need, and which have a lesser environmental impact (42 U.S.C 4332(2)(C); 40 CFR 1502.14; 40 CFR 1508.9(b); 43 C.F.R 46.420(b)). No specific or minimum number of alternatives is required (43 CFR 46.415(b)).

You may eliminate an action alternative from detailed analysis for any of the following reasons:

- It is ineffective (it would not respond to the purpose and need);
- It is technically or economically infeasible;
- It is inconsistent with the basic policy objectives for the management of the area (such as, not in conformance with the LUP);
- Its implementation is remote or speculative;
- It is substantially similar in design to an alternative that is analyzed; or
- It would have substantially similar effects to an alternative that is analyzed.

If you consider alternatives during the EIS process but opt not to analyze them in detail, you must identify those alternatives and briefly explain why you eliminated them from detailed analysis (40 CFR 1502.14).

The identification of locatable mineral entry status is a land use planning level decision (BLM Land Use Planning Handbook, H-1601-1, p. C-24). The BLM must identify the following for BLM-administered lands consistent with the goals and objectives of mineral exploration and development in concert with the protection of natural resources within a planning area (BLM Land Use Planning Handbook, H-1601-1, p. C-25):

- (1) Areas recommended for closure to the mining laws for locatable exploration or development (that must be petitioned for withdrawal).

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- (2) [For lands identified as open for locatable mineral entry] Any terms, conditions, or other special considerations needed to protect other resource values while conducting activities under the operation of the mining laws.

**Application:**

As discussed above in the response to “NEPA - Scope of Analysis,” the BLM has considerable flexibility to identify the purpose and need for an EIS (BLM NEPA Handbook, H-1790-1, 6.2 Purpose and Need). The BLM appropriately established the purpose and need, which established the scope of analysis for the Ray Land Exchange EIS and Plan Amendment. The purpose and need for action dictates the range of alternatives that must be analyzed, because action alternatives are not reasonable if they do not respond to the purpose and need for action (BLM NEPA Handbook, H-1790-1, 6.2 Purpose and Need, 6.2.1 The Role of the Purpose and Need Statement, 6.6.1 Reasonable Alternatives).

The BLM must document the agency response to all substantive, written comments submitted during the public comment period for the draft EIS (40 CFR 1503.4(b)). The BLM received several recommendations for new alternatives as part of the comments on the 2017 DSEIS/RMPA. However, only one of those alternatives presented an alternative to the land use planning decisions under consideration through this plan amendment to be subject to review under this protest.

The identification of whether BLM-administered lands are open to locatable mineral entry or ‘recommended for withdrawal’ from locatable mineral entry is a land use planning level decision. As the 2019 FSEIS/PRMPA includes the analysis of acquiring the “Offered Lands,” the 2019 FSEIS/PRMPA is also the NEPA analysis through which the BLM is identifying the land use planning level decisions that will apply to those lands. The 2019 FSEIS/PRMPA states “If acquired, the Offered Lands would be managed in conformance with the applicable Kingman and Phoenix RMPs.” (2019 FSEIS/PRMPA @ 3).

In the 2017 DSEIS/RMPA, the BLM identified under all action alternatives that two of the parcels proposing to be acquired (Gila River Parcel at Cochran and Tomlin Parcel #4) would be recommended for withdrawal, and that all other parcels would be allocated as open to locatable mineral entry (2017 DSEIS/RMPA @ 23). In their comments on the 2017 DSEIS/RMPA, protesters presented an alternative that would identify all acquired lands as being ‘recommended for withdrawal’ from locatable mineral entry, not just these two parcels.

The CEQ regulations require that all substantive comments received before reaching a decision must be considered to the extent feasible (40 CFR 1503.4). CEQ guidance provides that a substantive comment includes the presentation of a reasonable alternative other than those already analyzed in the EIS (Questions 29a and 29b, CEQ Forty Most Asked Questions Concerning CEQ’s NEPA Regulations (March 23, 1981)). In order to determine whether an alternative presented is reasonable, the BLM must evaluate the alternative against specific criteria for determining ‘reasonableness,’ including whether or not it meets the purpose and need. For an EIS, if a federal agency considers an alternative during the EIS process but opts not to analyze it in detail, the EIS must identify those alternatives and briefly explain why each was eliminated from detailed analysis (40 CFR 1502.14).

The 2019 Ray Land Exchange FSEIS/PRMPA does not demonstrate that the BLM recognized the substantive comment as the presentation of an alternative for evaluation to determine 'reasonableness.' As noted by the protestor, the BLM's response to this comment states "This comment reflects a concern on equalization of the Selected and Offered Lands. Impacts with regard to Mineral Resources on the Offered Lands has been updated in Section 4.5 of the Final SEIS" (2019 FSEIS/PRMPA @ J-12). Accordingly, because the BLM did not recognize this comment as a new alternative proposal, there is also no discussion of the disposition of this presented alternative considered in the EIS.

**Conclusion:**

As described above, the FSEIS/PRMPA does not demonstrate that the BLM considered or evaluated the presented alternative for 'reasonableness.' As such, this protest issue is remanded back to the state director for consideration, clarification, further planning, or other appropriate action to resolve this protest issue.

**NEPA – Response to Comments**

**Text excerpt:**

*"The FSEIS does not really respond to the Center's concerns about failing to preclude mineral entry/development on all of the offered lands, and simply states that "Impacts with regard to Mineral Resources on the Offered Lands has been updated in Section 4.5 of the Final SEIS." FSEIS at J-11. Yet that section of the FSEIS (or any other section) does not consider the reasonable alternative of precluding entry/development and further admits that "mineral potential for occurrence and potential for development on the Offered Lands have not been assessed." FSEIS at 85." (@ 19).*

**Text excerpt:**

*"In response [to comments proposing an alternative that allocates all acquired lands as "recommended for withdrawal"], the FSEIS simply stated that: "This comment reflects a concern on equalization of the Selected and Offered Lands. Impacts with regard to Mineral Resources on the Offered Lands has been updated in Section 4.5 of the Final SEIS." FSEIS at J-12. Yet the "updated Section 4.5" does not analyze this alternative nor analyze why it is unreasonable, in violation of NEPA." (@ 29).*

**Protest Issue Statement:**

The BLM has violated NEPA by failing to provide a meaningful response to comments provided on the 2017 DSEIS/RMPA that presented a reasonable alternative for the LUP decision of locatable minerals.

**Rule:**

NEPA is a public process (42 USC 4331(a); 40 CFR 1500.1(b); 40 CFR 1501). The BLM must "make diligent efforts to involve the public in preparing and implementing NEPA procedures" to the extent practicable (40 CFR 1501.4(b); Id. 1506.6(a)). The BLM must also solicit appropriate information from the public (40 CFR 1506.6(f)).

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All substantive comments received before reaching a decision must be considered to the extent feasible (40 CFR 1503.4). All substantive and timely comments on a draft EIS must be attached or included in a final EIS (40 CFR 1503.4(b)). Comments on a draft EIS may be summarized if they are especially voluminous (see Question 29a, CEQ Forty Most Asked Questions Concerning CEQ's NEPA Regulations (March 23, 1981)). Substantive comments do one or more of the following (Questions 29a and 29b, CEQ Forty Most Asked Questions Concerning CEQ's NEPA Regulations (March 23, 1981)):

- Question, with a reasoned basis related to the analysis, the accuracy of information in the EIS or EA;
- Question, with a reasoned basis related to the analysis, the adequacy of, methodology for, or assumptions used for the analysis;
- Present new information relevant to the analysis;
- Present reasonable alternatives other than those analyzed in the EIS or EA;
- Present issues for analysis other than those analyzed in the EIS or EA; or
- Cause changes or revisions in one or more of the alternatives.

Federal agencies must respond to all substantive comments provided on a draft EIS in the final EIS (40 CFR 1503.4(a)). The CEQ regulations at 40 CFR 1503.4(a)(1)-(5) recognize several options for responding to comments, including:

- (1) Modify alternatives including the proposed action.
- (2) Develop and evaluate alternatives not previously given serious consideration by the agency.
- (3) Supplement, improve, or modify its analyses.
- (4) Make factual corrections.
- (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

**Application:**

Protestors submitted comments on the 2017 DSEIS/RMPA that requested an alternative that would allocate all acquired parcels as recommended for withdrawal. The CEQ guidance identifies that comments which “[p]resent reasonable alternatives other than those analyzed in the EIS or EA” are substantive comments (Questions 29a and 29b, CEQ Forty Most Asked Questions Concerning CEQ's NEPA Regulations (March 23, 1981)). The CEQ regulations require that all substantive comments provided on a draft EIS must be responded to and their response documented in the final EIS (40 CFR 1503.4(a)). The CEQ regulations allow federal agencies options for responding to comments (40 CFR 1503.4(a)(1)-(5)). In regards to the presentation of new alternatives, the BLM typically responds to these substantive comments by either modifying an existing alternative being analyzed in detail to incorporate the specifics of the request, developing a new alternative for detailed analysis, or documenting the explanation of an alternative considered but not analyzed in detail.

The BLM's response to the protestors' comment presenting a new alternative for consideration does not recognize or respond to the alternative presented. As noted by the protestor, the BLM's response to this comment states “This comment reflects a concern on equalization of the Selected

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and Offered Lands. Impacts with regard to Mineral Resources on the Offered Lands has been updated in Section 4.5 of the Final SEIS” (2019 FSEIS/PRMPA @ J-12). Additionally, the FSEIS includes no modifications to the existing alternatives analyzed in detail, no new alternative for detailed analysis, and no explanation of an alternative considered but not analyzed in detail. The BLM has flexibility in how to respond to this substantive comment, but failed to demonstrate any kind of responsiveness to this presented alternative in the 2019 FSEIS/PRMPA.

**Conclusion:**

As described above, the response to comments does not demonstrate that the BLM responded to the substantive comment received that presented a new alternative for analysis. As such, this protest issue is remanded back to the state director for consideration, clarification, further planning, or other appropriate action to resolve this protest issue.

**NEPA – Effects Analysis – Hard Look**

**Text Excerpt:**

*“During the course of nearly 20 years a number of things have changed that call for a re-analysis of the wildlife analysis. Instead, BLM provides a conclusory sentence that “[g]eneral wildlife and migratory bird habitat on the Selected and Offered Lands has not changed since the 1999 FEIS and the previous impact assessments are considered appropriate.” DSEIS at ES-3. Yet, environmental conditions have changed, whether it is increased recreational use, extended droughts/aridification, continued information gathering (e.g. as directed in the BLM Desert Tortoise Rangeland Management Plan requires, 1999 FEIS Appendix F), or other changes that are applicable to the wildlife impacts the proposed exchange would have. Accordingly, BLM must take the required “hard look” of all current conditions, impacts, and alternatives on wildlife and their habitat. BLM cannot rely on an unsupported statement that the wildlife impact assessment from two nearly decades ago remains accurate without providing evidentiary support and analysis to back that conclusion up.” (@ 31).*

**Text Excerpt:**

*“The acuña cactus was listed as endangered in the fall of 2013. ... Although critical habitat for the acuña cactus is not designated within any of the parcels that are subject to this proposal, there are parcels with suitable acuña cactus habitat, meaning that the species could, in fact, be present within the proposed project area. BA at 23. The BA acknowledges that RM-18, CH-1, CH-5 and all five of the Copper Butte parcels contain the same soil as mapped for the now designated Mineral Mountain critical habitat unit. BA at 23. These parcels are also in the species’ elevation sweet spot: 1,198-3,773 feet. BA at 23. With the proper soil and elevation ranges being present on eight parcels that would be exchanged to ASARCO, it is improper for BLM to rely on the 1999 FEIS, in which only one of these parcels, CB-1, was surveyed for the cactus. BA at 23. ... In the FSEIS, BLM relied on an email contained in a statement from the FWS that “we do not expect that there is any habitat for the Acuna cactus in any of the selected lands.” FSEIS at J-14. Such a cursory review, without detailed habitat analysis violates both the ESA and NEPA.” (@ 34-35).*

**Protest Issue Statement:**

The BLM has violated NEPA's requirement to take a "hard look" at wildlife and the Endangered Species Act listed acuña cactus to inform the land use planning decisions in this amendment because it bases analysis on incomplete information.

**Rule:**

The effects analysis must demonstrate that the BLM took a "hard look" at the impacts of the action (BLM NEPA Handbook, H-1790-1, 6.8.1.2, Analyzing Effects). The CEQ regulations specify that the environmental information made available to public officials and citizens before decisions are made must be of "high quality" (40 CFR 1500.1(b)).

A "hard look" is a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects). The BLM must use information of high quality and scientific integrity in its NEPA analysis, including information provided as part of the public involvement (40 CFR 1500.1(b) and 1502.24). The NEPA documents are to be analytic, rather than encyclopedic (40 CFR 1500.4(b) and 1502.2(a)). NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)).

**Application:**

The BLM has taken an appropriate "hard look" to inform the land use planning decisions with regard to wildlife and the Endangered Species Act listed acuña cactus for the land use plan amendment in the 2019 FSEIS/PRMPA. The BLM is required to take a "hard look" at the potential environmental impacts of the land use plan amendments. A "hard look" does not require the BLM to know everything about the landscape in question, but it does require that it has the information necessary for making the decision at hand. Specific to this protest, the decisions at hand are the decision to change land tenure status for "Selected Lands" from retention to disposal, and the decision about the appropriate land use planning level management on "Offered Lands." Each of these decisions are addressed for each applicable RMP below.

**Land Tenure Adjustment Decisions**

To evaluate the land use planning decision to change the land tenure status for the "Selected Lands," the BLM only needs the information necessary to evaluate against the criteria established in the applicable RMP for placing lands into that land tenure status. The BLM has not proposed through these land use plan amendments to change the criteria for determining land tenure status established in any of the three land use plans under which the "Selected Lands" currently are managed. The criteria for each of the RMPs are:

*Phoenix RMP (applies to Chilito Hayden #5, all Copper Butte parcels, and all Ray Mine parcels except part of #11)*

The 1989 Phoenix ROD/RMP identifies the following criteria for identifying the appropriate land tenure status for BLM-administered lands (@ 1):

- Lands located within the seven resource conservation areas shall be retained.

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- Specific lands adjacent to the Petrified Forest National Park and Tuscon Mountain District of Saguaro National Monument shall be retained pending congressional action.
- Lands within the cooperative recreation management areas shall be retained.
- Specific lands near Holbrook shall be retained to protect sword milkvetch.
- All other lands are available for disposal through sale or exchange.

Therefore, to know whether or not it is consistent with the Phoenix RMP's established criteria to change the land tenure status of the "Selected Lands," the BLM only needs to know whether or not any of the "Selected Lands" are in one of the above-listed categories of lands identified to be retained. Information regarding changes to wildlife habitat or occurrence of Endangered Species Act listed species is not needed for the BLM to take a "hard look" at changing the land tenure status for parcels currently managed under the Phoenix RMP.

*Safford RMP (applies to Chilito/Hayden parcels #1-4 and part of Ray Mine #11)*

The 1992 Safford RMP ROD selects the proposed RMP alternative and "adopt[s] the management prescriptions defined in the Safford District Final Resource Management Plan under the sections titled: Management Guidance Common to All Alternatives (pp. 18-26), Alternative A (Preferred Alternative) (pp. 26-47) and Appendices and maps referenced in these sections..." (@ 3). The 1991 Safford District RMP FEIS/PRMP does not contain any criteria for the identification of land tenure status on the BLM-administered lands within the planning area, and only establishes the following procedural step to occur before identifying lands as available for disposal: "*Lands identified for disposal will be reviewed for the presence of significant natural and cultural resources, threatened and endangered plants and animals, flood hazards and other critical factors. The actual transfer of the land cannot be finalized until these reviews are complete.*" (@ 21).

Consistent with this instruction specific to this protest issue, the BLM only needs to complete a review for the presence of threatened and endangered plants and animals prior to identifying the lands as available for disposal. The BLM completed a review to determine whether any federally proposed or designated critical habitat were documented in the "Selected Lands" for the 1999 FEIS/PMRPA. Within the Chilito/Hayden parcels #1-4 and part of Ray Mine #11 parcel, the BLM found no suitable habitat for the Endangered Species Act-listed species or designated critical habitat at that time (1999 FEIS/PRMPA @ 3-20 to 3-21). For the 2019 FSEIS/PRMPA, the BLM evaluated new listings of Endangered Species Act-listed species and designated critical habitat and found documentation of the desert tortoise (an Endangered Species Act candidate species) in the Chilito/Hayden parcels (2019 Biological Assessment @ 20). Nothing in the process requirement established by the 1992 Safford RMP precludes the BLM from identifying lands as available for disposal, even if species are determined to be present. Having completed the procedural step, the BLM had all needed information to take a "hard look" in determining whether or not allocating these parcels as available for disposal was in conformance with the process established in the 1992 Safford RMP.

*Lower Sonoran RMP (applies to all Casa Grande parcels)*

The 2012 Lower Sonoran ROD/RMP identifies the following criteria for identifying the appropriate land tenure status of BLM-administered lands: "*LR-2: Manage land tenure to meet natural resource management objectives and community needs and to promote agency*



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efficiency.” (@ 2-77). The 2012 Lower Sonoran ROD/RMP contains natural resource specific management actions relevant to the implementation-level approval process for land disposals. For example, the 2012 Lower Sonoran ROD/RMP states:

- *“WL-13.1.4: The BLM will not transfer (dispose of) from federal ownership the following:*
  - *Designated or proposed critical habitat for a listed or proposed threatened, endangered or special status species.*
  - *Lands supporting listed or proposed threatened or endangered species, if such transfer will be inconsistent with recovery needs and objectives or conservation measures or will likely affect the recovery of the listed or proposed species, and lands supporting federal candidate species, if such action will contribute to the need to list the species as threatened or endangered. See also LR-2.1.” (@ 2-66 to 2-67).*

Because of this resource specific management action, WL-13.1.4 presumably establishes that it would be inconsistent with LR-2 to allocate a land tenure status allowing for disposal to any lands containing Endangered Species Act designated critical habitat. Therefore, to be in conformance with the land tenure criteria established in the 2012 Lower Sonoran ROD/RMP, the BLM would not allocate any designated critical habitat to a land tenure status of being available for disposal.

Pertaining to wildlife resources and land tenure, the 2012 Lower Sonoran ROD/RMP further establishes the following management actions:

- *“WL-13.1.3: Acquisitions of non-federal lands and disposals of federal land that have, or potentially have, priority species or habitats will include the potential to:*
  - *Enhance the conservation and management of threatened, endangered, or special status species habitat, riparian habitat, desert tortoise habitat, key big game habitat.*
  - *Improve the overall manageability of wildlife habitat.*
  - *Improve habitat connectivity in and around the WHA and wildlife movement corridors. See also LR-2.1.” (@ 2-66).*
- *“WL-13.1.5: Retain Category I and II tortoise habitat, unless it is in the general public interest to dispose of them and losses in habitat quality and quantity can be mitigated. See also LR-2.1. Exceptions to the above could occur if:*
  - *The recipient of the lands agrees to protect the species or critical habitat under the ESA, such as disposal to a non-federal governmental agency or private organization;*
  - *If conservation of the habitat will still be achieved and ensured; or*
  - *In a land exchange if a net gain in the value of species habitat or protection is achieved.” (@ 2-67).*

As such, to know whether or not it is consistent with the 2012 Lower Sonoran RMP's established criteria to change the land tenure status of the “Selected Lands,” the BLM would need information regarding current habitats for wildlife and Endangered Species Act listed species to take a “hard look” at changing the land tenure status for parcels currently managed under the Lower Sonoran RMP. The BLM completed a review to determine whether any federally

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proposed or designated critical habitat were documented in the "Selected Lands" for the 1999 FEIS/PRMPA. Within the Casa Grande parcels, the BLM found no suitable habitat for the Endangered Species Act-listed species or designated critical habitat at that time (1999 FEIS/PRMPA @ 3-20 to 3-21). In the 2019 FSEIS/PRMPA, the BLM evaluated new listings of Endangered Species Act-listed species and designated critical habitat and found none to be present in the Casa Grande parcels (2019 FSEIS/PRMPA @ 26-27). Upon determining that no suitable habitat or designated critical habitat is present within the Casa Grande parcels, the BLM had all needed information to take a "hard look" in determining whether or not allocating these parcels as available for disposal was in conformance with the criteria established in the 2012 Lower Sonoran RMP.

**Land Use Planning Decisions for the Management of Acquired Lands**

To evaluate the land use planning decisions for the management of "Offered Lands," if acquired, the BLM only needs the information necessary to evaluate against the criteria established in the applicable RMP for the management of future acquired lands. The 2019 FSEIS/PRMPA states that "If acquired, the Offered Lands would be managed in conformance with the applicable Kingman and Phoenix RMPs." (@ 3). The 2019 FSEIS/PRMPA further specifies management within each RMP that would apply to each of the "Offered Lands." The BLM has not proposed through these land use plan amendments to change the management established in any of the three land use plans under which the "Offered Lands" would be managed.

Neither the 1989 Phoenix RMP nor the 1995 Kingman RMP have "criteria based" land use planning management decisions; but rather, both RMPs establish "geographically based" land use planning management decisions. To know which land use planning management decisions of the 1989 Kingman or 1995 Phoenix RMPs apply, the BLM only needs to know the locations of the "Offered Lands." For example, the 2019 FSEIS/PRMPA identifies that the Gila River at Cochran parcel would "become part of several special management areas, including the Gila River Riparian Management Area and the Middle Gila Cultural Resource Management Area" and is "within the White Canyon Resource Conservation Area" (@ 11). For each of these areas, no further information than the geographic location of the parcel within the boundary of the areas established by the 1989 Phoenix RMP is needed to determine that the BLM would apply the land use planning management decisions of these three special areas to the Gila River at Cochran parcel, if acquired. The rest of the "Offered Lands" would be subject to management under the 1995 Kingman RMP, and some would fall within geographically established management areas and be subject to those land use planning management decisions, and others are not within any specifically identified management areas but are subject to the general land use planning decisions approved and adopted by the 1995 Kingman RMP.

In all circumstances, information regarding changes since 1999 to wildlife habitat or occurrence of Endangered Species Act listed species is not needed for the BLM to have taken a "hard look" at determining which land use planning decisions to apply under either RMP.

**Conclusion:**

The BLM has taken an appropriate "hard look" to inform the land use planning decisions with regard to wildlife and the Endangered Species Act listed acuña cactus for the land use plan amendment in the EIS. For the reasons described above, this protest issue is denied.

## **Endangered Species Act – Section 7 Consultation**

### **Text Excerpt:**

*“BLM and FWS must also address inadequacies with their ESA compliance and analysis for two species that have been listed and received designated critical habitat since 1999.” (@ 31).*

### **Text Excerpt:**

*“The acuña cactus was listed as endangered in the fall of 2013. ... In the BA for the proposed project, BLM concluded, and FWS concurred, that “[t]he proposed action may affect, but is not likely to adversely affect acuña cactus individuals with or without an MPO.” BA at 30. ... In the FSEIS, BLM relied on an email contained in a statement from the FWS that “we do not expect that there is any habitat for the Acuna cactus in any of the selected lands.” FSEIS at J-14. Such a cursory review, without detailed habitat analysis violates both the ESA and NEPA.” (@ 34-35).*

### **Text Excerpt:**

*“Gila chub’s listing as endangered was also accompanied with the designation of critical habitat. Fish & Wildlife Serv. Endangered and Threatened Wildlife and Plants; Listing Gila Chub as Endangered with Critical Habitat, 70 Fed. Reg. 66664 (Nov. 2, 2005). ... BLM’s BA and FWS concurrence determined that “the proposed action may affect, but is not likely to adversely affect Gila chub with or without the land exchange.” BA at 31.” (@35-36).*

### **Protest Issue Statement:**

The BLM has violated the Endangered Species Act by failing to adequately consult on the impacts of the land use planning decisions on the two new listed species: acuña cactus and Gila chub.

### **Rule:**

Section 7(a)(2) of the Endangered Species Act requires Federal agencies to ensure that their proposed actions will not be “likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of the critical habitat of such species” (16 USC § 1336(a)(2)). The BLM is required to “consult under Section 7 of the Endangered Species Act with the USFWS and/or NOAA-Fisheries for all actions that may affect listed species or designated critical habitat or confer if actions are likely to jeopardize the continued existence of a proposed species or result in the destruction or adverse modification of proposed critical habitat (see 50 CFR 402.14 and 402.10; and BLM Handbook H-6840).” (BLM Land Use Planning Handbook, H-1601-1, p. C-4).

### **Application:**

Consistent with the Endangered Species Act, the BLM must determine whether the proposed action may effect listed species or critical habitat and comply with the Endangered Species Act and its implementing regulations, as appropriate. The BLM completed consultation for the Ray Land Exchange EIS and Plan Amendment prior to signing the ROD/RMPA in 2000. Since receiving the biological opinion from the U.S. Fish and Wildlife Service in March 2000,

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however, two new species, the acuña cactus and Gila chub, were added to the threatened and endangered species list.

The BLM submitted a biological assessment to consult on these two new listed species to the U.S. Fish and Wildlife Service re-initiating the consultation on the Ray Land Exchange EIS titled *Re-initiation of Consultation of the Proposed Ray Land Exchange, Pinal and Gila Counties, Arizona* in June 2013.

Neither the 2013 biological assessment prepared by the BLM nor 2019 FSEIS/PRMPA include adequate documentation of how the BLM complied with section 7 of the Endangered Species Act for the land use planning decisions. Accordingly, the BLM has not documented any evidence of undergoing section 7 consultation on the land use planning decisions considered in the EIS for acuña cactus and Gila chub.

**Conclusion:**

As such, this protest issue is remanded back to the state director for consideration, clarification, further planning, or other appropriate changes to resolve this protest issue.