



PETER J. MEHRINGER

177 IBLA 152

Decided April 22, 2009



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

PETER J. MEHRINGER

IBLA 2008-86

Decided April 22, 2009

Appeal from a decision of the Oregon State Office, Bureau of Land Management, dismissing a protest of a Finding of No Significant Impact/Decision Record issued by the Burns District Office, which approved the Rock Creek Ranch, Inc. Land Exchange (OR-63956).

Appeal dismissed in part; decision affirmed.

1. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

BLM may dispose of lands by exchange under section 206(a) of the Federal Land Policy and Management Act, 43 U.S.C. § 1716(a) (2000), where it determines that the public interest will be well served by making the exchange. When making a determination of the public interest, BLM has discretion to decide how to balance all of the statutory factors. A decision approving a land exchange will be affirmed where the exchange will result in more logical and efficient management of the BLM lands in the area and is in accordance with existing land-use planning documents.

2. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

In its consideration of the broad range of factors it is required to review in determining whether the public interest will be well served by a land exchange, BLM has discretion to decide how to balance all of the statutory factors when making a public interest determination.

3. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--Appraisals

A party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value.

4. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Assessments

Under section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2000), the sufficiency of an Environmental Assessment will be determined by whether the agency took a “hard look” at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, considering all relevant matters of environmental concern. The EA must fulfill the primary mission of section 102(2)(C), which is to ensure that BLM, in exercising its substantive discretion to approve or disapprove an action, is fully informed of the environmental consequences of such action.

APPEARANCES: Tyler Smith, Esq., Canby, Oregon, for Peter J. Mehringer; Bradley Grenham, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE M<sup>c</sup>DANIEL

Peter J. Mehringer has appealed <sup>1</sup> the December 28, 2008, decision (Decision) of the State Director, Oregon State Office, Bureau of Land Management (BLM), dismissing his November 15, 2007 protest (Protest) of the October 3, 2007, Finding of No Significant Impact/Decision Record (DR), issued by the Burns District Manager, approving the Rock Creek Ranch, Inc. Land Exchange (the Exchange or the Land Exchange). The District Manager based the DR on an Environmental Assessment (EA) (OR-03-027-034), prepared pursuant to section 102(2)(C) of the National

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<sup>1</sup> Though Appellant notes in his Statement of Reasons (SOR) that another landowner adjacent to parcels C and D “requested to join in our appeal,” Appellant states both in his Notice of Appeal (NOA) and SOR that he “brings this appeal on his own behalf.” SOR at 2; NOA at 1. For this reason and because he has not shown compliance with 43 C.F.R. § 1.3, we do not address issues raised on behalf of the other landowner.

Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), to analyze the environmental impacts of the Exchange.

### *I. BACKGROUND*

Gary Miller, owner and president of Rock Creek Ranch, Inc., is the Exchange proponent, who offered to convey to BLM a 233.25-acre parcel of private land he purchased in July 2002, located in Harney County, southeastern Oregon, 1.5 miles north of Mann Lake (Mann Lake Parcel), in exchange for 1,124.09 acres of Federal land in 3 parcels (B, C, and D), located in the same county, pursuant to section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716 (2000).

In his protest, Mehringer objected to the transfer of parcels C and D, but also raised certain issues (e.g., appraisal valuation) relating to all three of the Federal parcels involved in the Exchange. On appeal, he again objects to transfer of parcels C and D to Miller. See NOA at 1:

Mr. Mehringer currently owns and operates Celestial Horse Ranch on his property and the use and value of his property is directly related to the aesthetics of nearly pristine high desert native vegetation and wildlife and to the public access to public lands for recreation purposes that exist if parcels D and C are owned by BLM.

However, because he continues to pursue arguments related to all three Federal parcels involved in the Exchange, we consider his appeal to relate to all three of those parcels.<sup>2</sup>

The Federal lands (parcels B, C, and D) are located within the boundaries of existing grazing allotments for which Miller holds grazing permits. Upon transfer to Miller, the allotments would be zoned for Exclusive Farm Range Use under County ordinances. BLM expects no change in grazing use and management of this land following the Exchange. Parcels C and D are located about 11.25 miles northeast of parcel B in the northern end at Catlow Valley. While the Federal lands are located outside of the Steens Mountain Cooperative Management and Protection Area

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<sup>2</sup> The DR also approved conveyance of 240 acres of additional Federal land (parcel A), not as part of the Exchange but by direct sale to Miller to settle a trespass (OR-63956-01). DR at 3, 14. Although in his protest and appeal Mehringer also raises issues concerning the direct sale of parcel A, he has failed to show that he is adversely affected by the direct sale of that parcel within the meaning of 43 C.F.R. § 4.410(d), and, therefore, he lacks standing under 43 C.F.R. § 4.410(a) to appeal the DR in that regard. Thus, we dismiss the appeal to the extent that it relates to parcel A.

(CMPA), established by the Steens Mountain Cooperative Management Protection Act of 2000 (Steens Act), 16 U.S.C. §§ 460nnn to 460nnn-122 (2006), the Mann Lake Parcel is located within the CMPA.<sup>3</sup> The subject Federal lands are classified as appropriate for voluntary exchange in the relevant land use plans, *i.e.*, the 2005 Andrews Management Unit Resource Management Plan (Andrews RMP) and Record of Decision (ROD) and the Steens Mountain CMPA RMP/ROD (CMPA RMP) (collectively RMPs).<sup>4</sup> SOR, Ex. 3, DR at 2, 5. Also, the impacts of the Exchange on resources within the Federal lands were individually analyzed in the EA and were not considered significant. *Id.* at 7-8; SOR, Ex. 5, EA at 7-12. BLM determined that the transfer of parcels B, C, and D would result in little effect on recreational opportunities because there has been limited public access to these parcels. DR at 8.

The Mann Lake Parcel, which is completely surrounded by Federal lands and located within the Steens Mountain CMPA, is identified for acquisition under the CMPA RMP due to its high resource values. DR at 1-4, 6. Upon acquisition, the land would be managed under the Steens Act, protected from residential development, and included in the mineral withdrawal area established by that Act. *Id.* at 6, 8. Acquisition of this land would augment and “block up” lands within the bighorn

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<sup>3</sup> Congress enacted the Steens Act, establishing the CMPA “to conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations.” 16 U.S.C. § 460nnn-12(a) (2006). BLM states:

Within the CMPA, the Steens Act created a 170,000-acre Steens Mountain Wilderness Area; added 29 miles to the federal Wild and Scenic River System; withdrew approximately 1 million acres from mining and geothermal development; established a Wildlands Juniper Management Area for experimentation, education, interpretation, and demonstration of juniper management and restoration of native vegetation; and designated the nation’s first Redband Trout Reserve.

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Section 111(b) of the Steens Act, 16 U.S.C. § 460nnn-21(b) (2006), requires development of a Management Plan for the CMPA. BLM completed this requirement through completion of the [CMPA RMP]. On July 15, 2005, BLM issued the [CMPA ROD] adopting the final [RMP].

BLM’s Answer (Answer) at 4-5.

<sup>4</sup> These documents, as well as the associated environmental impact statement, are contained in the Administrative Record (AR) at tab no. 169 and in electronic format on compact disc in a separate folder. The BLM Burns District Office oversees two resource areas, the Andrews Resource Area and the Three Rivers Resource Area, and manages 3,275,694 acres of public land located primarily in Harney County. CMPA RMP at 1; Answer at 3.

sheep winter range on the east side of Steens Mountain, which enhances management capabilities. *Id.* at 7. Mann Lake comprises approximately 200 acres and is largely managed for hunting, fishing, and camping. *Id.* at 16; SOR Ex. 5, EA at 14.

In the EA, BLM considered a range of alternatives. The “No Action Alternative,” which would prevent the Exchange, was rejected because it would not promote multiple-use values, “block up” Federal land for wildlife habitat, provide recreation opportunities, or protect the east Steens Mountain viewshed from development. DR at 4. BLM also considered an alternative in which it would purchase the non-Federal land outright. However, lack of a willing seller after failed attempts at negotiation led to the proposed land exchange. *Id.* at 5.

The Exchange proposal was developed as a result of a scoping process, which included obtaining a recommendation to proceed with the exchange process from the Steens Mountain Advisory Council in 2003, consultation with the Burns Paiute Tribal Council (BPTC) in 2004, and obtaining concurrence of the State Historic Preservation Office in 2004. In 2005 BLM published a Notice of Exchange Proposal in the local newspaper and provided notice directly to, among others, State and Federal Government agencies and officials, all adjacent landowners, utilities providers, and the BPTC. DR at 11.

BLM contracted through the Department’s Appraisal Services Directorate (ASD) for an appraisal of the Federal and private lands in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA or Yellow Book). Elwood Wirth (ASD Appraiser), a licensed and experienced appraiser, prepared the appraisal and certified its conformity with the above standards. *See* SOR Ex. 4, ASD Appraisal at unpaginated 1, 2, and paginated 65. It was approved by ASD and accepted for use by BLM. DR at 9. Upon acceptance of the appraisal, BLM and Miller agreed on the lands selected for the Exchange with a 15.15 percent Equalization Payment of \$17,500 from Miller to BLM to equalize the difference in values between the lands exchanged. *Id.* at 2.<sup>5</sup>

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<sup>5</sup> The parcels to be exchanged, their appraised values, and the payment are listed at pages 2 and 3 of the DR and are paraphrased as follows:

Federal lands to be conveyed to Miller with a 15.15 percent Equalization Payment of \$17,500.00 from Miller to BLM, as corrected by BLM’s Memorandum dated Mar. 4, 2008:

(continued...)

Mehring has, in both his protest and appeal, opposed the Exchange of parcels C and D because he owns and operates a horse ranch on his own private land adjacent to Federal parcels C and D and enjoys the aesthetics and wildlife of the Federal parcels and alleged public access to them for educational, agri-business, recreational, and scientific activities. He claims the Exchange is not in the public interest, is based on an invalid appraisal, would negatively affect recreation, wildlife, scenery, and other resources, and would harm the use, enjoyment, and value of his land by eliminating access to public lands. SOR at 2-3; Protest at 6. Appellant contends that the DR violates FLPMA and regulatory appraisal standards. He also contends that the DR violates NEPA because of the inadequacy of BLM's findings as a matter of law and "BLM's failure to cite significant evidence and inconsistent selection of which evidence to discuss." SOR at 4.

## II. ANALYSIS

### A. The Land Exchange Complies with FLPMA and Is in the Public Interest

[1] BLM may dispose of lands by exchange pursuant to section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (2000), where it determines that the public interest will be well served by making the Exchange. Section 206(a) of FLPMA states:

<sup>5</sup> (...continued)

Parcel B (800 acres X \$100.00 = \$80,000.00):		Acres
T. 33 S., R. 30 E., W.M.	sec. 15, S $\frac{1}{2}$ ; sec. 22, N $\frac{1}{2}$ , N $\frac{1}{2}$ S $\frac{1}{2}$ .	800.00
Parcel C (237.46 acres X \$100.00 = \$26,000.00 rounded down):		
T. 32 S., R. 32 E., W.M.	sec. 30, lots 1 and 2, W $\frac{1}{2}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ .	237.46
Parcel D (86.63 acres X \$100.00 = \$9,500.00 rounded down):		Acres
T. 32 S., R. 31 E., W.M.	sec. 25, lot 2, SW $\frac{1}{4}$ NE $\frac{1}{4}$ .	86.63

Containing a total of 1,124.09 acres

Non-Federal Land to be conveyed by Miller to the United States:

Mann Lake Parcel (233.25 acres X \$420.00 = \$98,000.00):		Acres
T. 32 S., R. 35 E., W.M.	sec. 31, lot 4, SE $\frac{1}{4}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ .	154.08
T. 32 S., R. 35 E., W.M.	sec. 6, lots 1 and 2.	79.17

Containing a total of 233.25 acres

A tract of public land or interests therein may be disposed of by exchange by the Secretary [of the Interior] under this Act . . . where the Secretary . . . determines that the public interest will be well served by making that exchange: *Provided*, That when considering public interest the Secretary . . . shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary . . . finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

BLM is responsible for determining what is in the public interest in accordance with 43 C.F.R. § 2200.0-6(b), which provides that it

[s]hall give full consideration to the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that:

(1) The resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired; and

(2) The intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

[2] It is well established that

[i]n its consideration of the broad range of factors it is required to review in determining whether the public interest will be well served by the exchange, BLM has discretion to decide how to balance all of the statutory factors when making a public interest determination.” *Wade Patrick Stout*, 153 IBLA at 19; *Anthony Huljev*, 152 IBLA at 135; *Donna Charpied*, 150 IBLA at 332; see *National Coal Ass’n v. Hodel*, 825 F.2d 523, 532 (D.C. Cir. 1987); *Lodge Tower Condominium v. Lodge Properties, Inc.*, 880 F. Supp. 1370, 1380 (D. Colo. 1995); *National Coal Ass’n v. Hodel*, 675 F. Supp. 1231, 1245 (D. Mont. 1987), *aff’d*, 874 F.2d 661 (9th Cir. 1989); *Burton A. McGregor*, 119 IBLA 95, 103 (1991); *John S. Peck*, 114 IBLA 393, 397 (1990).

*Shasta Coalition For The Preservation of Public Land (Shasta Coalition)*, 172 IBLA 333, 341 (2007)(brackets in quoted decision). As discussed below, we are convinced that BLM properly exercised that discretion here and that the Land Exchange is clearly in the public interest.

Appellant argues that “BLM failed to consider three major factors that have an important impact in the public interest determination,” and that it “cannot exchange away federal lands that are of more value to . . . public objectives than the lands which they are acquiring.” SOR at 5-6. He argues that the Exchange will result in a net loss of wildlife habitat (including habitat identified for the introduction of new bighorn sheep populations into the Oregon Department of Fish and Wildlife (ODFW) Bighorn Sheep Herd Management Area (HMA)). In addition, he claims that BLM ignored the prospect that parcels C and D may be sold as home sites by Miller following the Exchange, which Appellant argues will adversely affect the viewshed.<sup>6</sup> *Id.* at 6. He further argues the transfer of parcels C and D to Miller will cause a legal struggle because Miller will seek access to these parcels through the Appellant’s property. *Id.*

In the DR, BLM listed 11 specific reasons why the Exchange serves the public interest, which include: compliance with RMP planning decisions to acquire certain property; consolidation of Federal land ownership patterns in the CMPA to provide for more efficient Federal land management; promotion of the principle of multiple use values, including the acquisition and consolidation of wildlife habitat within mule deer and bighorn sheep winter range and pronghorn yearlong range; protection of

<sup>6</sup> As stated, parcels C and D, which Appellant and customers of his horse ranch use and enjoy, are adjacent to his land. SOR at 2-3.

the east side of the Steens Mountain viewshed from development;<sup>7</sup> and enhancement of the potential for casual recreational activities, such as hunting, fishing, and camping in connection with Mann Lake (which meets recreational needs of local people, furthering the purposes of the Steens Act). DR at 10, 15-16. Moreover, the Federal lands are designated for disposal by exchange in the relevant land use plans;<sup>8</sup> residential development is unlikely on parcels C and D (DR at 13) because they would be incorporated into the existing and surrounding Rock Creek Ranch permitted grazing operations and managed in compliance with County zoning;<sup>9</sup> and the Federal parcels are difficult and uneconomical to manage. DR at 15-16; *see* Answer 6-7; *see also* DR at Ex. C, Map (showing parcels and topographic features); Answer at Attach. B (map showing private and Federal lands); SOR at Ex. 12, Map of parcels C and D and Mehringer land).

BLM carefully considered wildlife habitat and explained that the Exchange would be in the public interest because it would consolidate habitat in the CMPA. BLM noted that, after transfer to private ownership, the other Federal parcels will continue to be used as livestock grazing lands and that a change in habitat values is unlikely. DR at 13. After consultation with and a request from the ODFW to protect lands closest to Pickett Rim located within the proposed Bighorn Sheep HMA, BLM excluded those lands from the Exchange. Declaration of Karla Bird at ¶ 5. Moreover, the public will gain 233.25 acres above Mann Lake on the east side of the Steens Mountain as big game habitat for species, including Bighorn sheep, which have been present in the CMPA and the adjacent Sheephead Mountains (northeast of the CMPA) for several decades. *Id.*; DR at 13.

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<sup>7</sup> Declaration of Karla Bird, the Andrews Resource Area Field Manager in BLM's Burns District, Answer at Attach. D, ¶ 4. As BLM states, the heightened risk of private development on the Mann Lake Parcel and the considerably lower risk of future home sites and development on the Federal parcels led BLM to reasonably conclude that it was in the public interest to protect the Steens viewshed through the Exchange.

*See* Answer at 8.

<sup>8</sup> Appellant claims the Exchange would remove parcels C and D as a buffer between bighorn sheep at Pickett Rim and his domestic sheep in violation of the Andrews RMP. SOR at 21. As BLM responds, that RMP "contains no such buffer requirement." Answer at 25. *See* AR, tab no. 169, Andrews RMP/ROD at 38.

<sup>9</sup> We find Appellant's arguments that the transfer of parcels C and D to private ownership likely would result in development as homesites that would affect the viewshed and cause a way-of-necessity legal struggle are speculative. Those parcels are expected to remain part of Miller's grazing operations since they are zoned for "Exclusive Farm Range Use" and are located within the boundaries of his existing grazing allotment permits. *See* DR at 5; Answer at 10.

In sum, Appellant has not shown that BLM improperly exercised its discretion in deciding the Exchange should proceed. “A difference of opinion as to what is in the public interest is no basis for reversal of a BLM decision that is otherwise supported by the record.” *Charles W. Nolen*, 166 IBLA 197, 204-205 (2005), and cases cited. The record shows that BLM carefully evaluated the controlling question of whether the public interest will be well served by the Exchange, and properly considered whether Federal land management would be improved by approving it. We conclude that BLM’s decision complied with its obligations under section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (2000) and 43 C.F.R. § 2200.0-6(b). *See, e.g., Charles W. Nolen*, 166 IBLA at 203-205; *Wade Patrick Stout*, 153 IBLA at 20.

*B. BLM Complied with Federal Regulations Governing Appraisals*

[3] Appellant contends that “BLM failed to adhere to the Federal regulations governing the standards of appraisals set forth in 43 C.F.R. §§ 2201.3 to 2201.3-4,” citing UASFLA and USPAP. SOR at 7-8. Under 43 C.F.R. § 2201.3:

The Federal and non-Federal parties to an exchange shall comply with the appraisal standards set forth in §§ 2201.3-1 to 2201.3-4 of this part and, to the extent appropriate, with the Department of Justice “Uniform Appraisal Standards for Federal Land Acquisitions” when appraising the values of the Federal and non-Federal lands involved in the exchange.

“It is well established that a party challenging an appraisal determining fair market value is generally required to either show error in the *methodology* used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value.” *Shasta Coalition*, 172 IBLA at 349 (emphasis added); *see also, e.g., Daniel E. Brown*, 153 IBLA 131, 136 (2000); *San Carlos Apache Tribe*, 149 IBLA 29, 48 (1999); *Voice Ministries of Farmington, Inc.*, 124 IBLA 358, 361 (1992). Appellant has challenged the methodology of the ASD Appraisal by filing on appeal a review prepared by a professional appraiser, Robert T. Bancroft (Bancroft Review), which was “not intended to be a stand alone valuation.” SOR at Ex. 1, Bancroft Review at 1-2. In response, BLM submitted a second review of the ASD Appraisal and the ASD Review, and a review of the Bancroft Review, all by ASD appraiser, Answer at Ex. C, Steven Herzog (Herzog Review), who had not been involved in the ASD Appraisal, the Bancroft Review, or the ASD Review prior to his review of them. Answer at 11; *see Answer at Attach. C.*

Appellant advances numerous arguments in an effort to show that the ASD Appraisal uses flawed methodology<sup>10</sup> in violation of the regulations and USPAP,

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<sup>10</sup> Appellant argues the appraisal is flawed, in part, because it is not “self-contained,”  
(continued...)

claiming that it fails to accurately describe: parcels B, C, and D; zoning; the highest and best use<sup>11</sup> of those parcels; legal access; the combination of parcels C and D into a larger parcel; Federal road right-of-way reservations; neighborhood analysis; market analysis; and development in the immediate area. SOR at 9, (citing the Bancroft Review at 7-10). However, we find Appellant's arguments misplaced in light of the record. The ASD Appraisal provides property descriptions that satisfy the UASFLA and the regulations by providing an adequate description of physical characteristics of the lands being appraised. See ASD Appraisal at 1-11, with attached maps and photographs; Answer at 13-15 (citing Herzog Review at 6). The ASD Appraisal clearly specifies the zoning of the land. ASD Appraisal at 2.

We disagree with Appellant's claim that the ASD Appraiser erred in describing the parcels in relation to existing easements, legal access, and new development.

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<sup>10</sup> (...continued)

as set forth in the UASFLA and the USPAP. SOR at 9, (citing USFLA at 9; Ex. 4 at 59, ¶ 7). He does not explain what he means by "self-contained" or provide legal authority for his interpretation of that term. We note that the Introduction to Part A of the UASFLA, entitled "Data Documentation and Appraisal Reporting Standards," states:

USPAP provides for three types of appraisal reports: self-contained, summary, and restricted use. Appraisers are required by USPAP to specifically identify the *type* of appraisal report prepared. [Citing, in footnote, USPAP, Standards Rule 2-2.] For a number of reasons, the *restricted use report*, as defined by USPAP, is unacceptable for government land acquisition purposes. [Footnote omitted.] Much confusion exists in the appraisal industry regarding what constitutes a *self-contained* report as opposed to a *summary report*, and the terminology used by appraisers varies on a regional basis. However, *for the purpose of these Standards any appraisal report, whether identified by the appraiser as a self-contained report or a summary report, will be considered as meeting the USPAP requirements for a self-contained report if it has been prepared in accordance with these Standards.*

UASFLA at 8-9 (emphasis in last sentence added). Thus, the question is whether the ASD Appraisal was prepared in accordance with 43 C.F.R. §§ 2201.3-1 to 2201.3-4 and the UASFLA. For most of his arguments in support of the assertion that the ASD Appraisal is not "self-contained" (as well as for some of his other arguments), Appellant does not explain what provisions of the regulations allegedly were violated or what requirements of the UASFLA were not met.

<sup>11</sup> Appellant states "the appraisal 'shall . . . determine the highest and best use of the property appraised.' 43 C.F.R. § 2201.3-2(a)(1); 43 C.F.R. § 2201.3-3(d)." SOR at 10.

Appellant alleges there is legal road access to parcels B, C, and D, but, as clearly established by the ASD Appraisal, there is none. SOR at 8; ASD Appraisal at 9-11. BLM reserved a road right-of-way on parcel B in case the Government obtains access over surrounding private land to the county road, but it does not currently hold such a right-of-way on lands adjacent to parcel B. Answer at 12; ASD Appraisal at 10. The ASD Appraisal clearly explains that the highest and best use of parcel B is “agriculture (livestock grazing) and assemblage into adjoining ownership [due to] lack of legal access, outlying location, no fences, and lower overall grazing capacity.” ASD Appraisal at 10.

The determination of highest and best use for parcels C and D is also grazing, not residential, for much the same reasons, and the size of parcel D (86.63 acres) is “below the outright zoning standard of 160 acres for dwellings.” *Id.* at 10-11. However, Appellant claims the ASD Appraisal’s “description of parcel C omits value added factors such as its proximity to Frenchglen and the Steens . . . Act boundary and omits a relevant analysis that legal access by road currently exists or is likely.” SOR at 9. He relies on a historic wagon trail (Road to Happy Valley) through parcel C or a possible future “way of necessity” legal action to gain access, and claims these factors were omitted, resulting in a flawed highest and best use determination for these parcels. SOR at 6, 9, (citing Bancroft Review at 8). We disagree. As BLM states, “Parcel C has a highest and best use of grazing, which is unaffected by proximity to the CMPA or the small settlement of Frenchglen.” Answer at 15, (citing Herzog Review at 9). Furthermore, “there is no foreseeable expectation of rural residential development” since parcels C and D are located within the boundaries of the grazing allotments permitted to Rock Creek Ranch, access to them is controlled by Rock Creek Ranch, and sale of the parcels is extremely doubtful. DR at 10. Also, these parcels currently have no road access, nor is there a right-of-way to build a road. ASD Appraisal at 10; Answer at 16-17; Answer at Ex. Attach., Map. Herzog agrees, pointing to resistance to and lack of new development in the area, the availability of alternate sites with frontage access on public roads, and the difficulty in gaining legal access.<sup>12</sup>

Appellant further argues that the appraiser was required by the ASD Statement of Work to combine the value of the Federal lands as a “larger parcel” for their

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<sup>12</sup> Herzog states “BLM . . . acknowledged that there is a reference to an old road that goes through Parcel C [in a] map dating from around 1880. . . . None of the more recent maps, including the Master Title Plat, display this road.” Herzog Review at 9. He also refutes Appellant’s “way of necessity” argument, explaining that appraisal standards prohibit reliance on speculative potential use, e.g., valuing property on the speculative outcome of a lawsuit to gain access; particularly since a prospective buyer is not likely to purchase a landlocked parcel requiring a potentially expensive lawsuit when other parcels with road access are available. Herzog Review at 10.

highest and best use, including residential home sites. SOR at 8. However, BLM explains that the ASD Appraisal is consistent with the Statement of Work and appropriately addresses the parcels as required in the Agreement to Initiate (ATI) the appraisal. AR at tab no. 151. As stated by BLM, citing the Herzog Review:

The only parcels that are contiguous are Parcels C and D. . . . [The ATI] provides separate descriptions for Parcels C and D . . . because BLM needed separate valuations so that it could add or subtract parcels as necessary to carry out the exchange. . . . [C]onsidering both the Yellow Book and BLM regulations, BLM has considerable discretion as to how parcels being appraised are described. Thus, the appraisal was indeed done in the manner intended by BLM . . . so there is no basis for rejecting the appraisal on this point.

Answer at 13 citing the Herzog Review(citations omitted). Thus, Appellant has not shown error in the ASD Appraiser's highest and best use determinations that the subject parcels are likely to remain outlying, lightly settled, grazing lands, with little development. *See* ASD Appraisal at 5-11.

Appellant also contends that the comparative market analysis in the ASD Appraisal is incomplete and erroneous. For example, he argues that, in setting the value of the larger parcel B, the ASD Appraisal failed to consider the sales of larger comparable properties, closer in size to parcel B. SOR at 8-10, 12. However, as BLM responds, larger comparable properties were not listed in the ASD Appraisal due to their lack of similar characteristics, such as no legal access.<sup>13</sup> In addition, because the highest and best use is grazing and assemblage, the difference in size between parcel B and the comparables used would not likely affect value since forage is available on a per acre basis. Answer at 17-18, (citing Herzog Review at 14-15). Appellant also contests the ASD Appraisal's exclusion of market data from sales that involved out-of-state sellers and out-of-state buyers while it included data from sales with only one of the parties from out of the market area, arguing that, since the former sales generally involved higher prices, their exclusion undermined the appraisal. SOR at 9, 11, 13. The appraiser, however, explained the rejection of these sales, pointing to likely speculation by uninformed non-local sellers and buyers with certain organizations seeming to specialize in such transactions.<sup>14</sup>

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<sup>13</sup> Though the Bancroft Review offers several transactions of larger and potentially comparable parcels, since the terms for these transactions are unknown, it is uncertain whether these sales would be suitable comparables. Herzog Review at 14.

<sup>14</sup> He also noted that these sales ranged from \$40 to \$275 per acre and "[i]n virtually every case, these sales are between out of state sellers and buyers with very likely neither party actually finding or viewing the tract." ASD Appraisal at 14. This

(continued...)

Finally, Appellant claims the ASD Appraisal violates the USPAP requirement for a self-contained report because the valuations are expressed in a summary format, but he provides no specifics. SOR at 12.<sup>15</sup> As BLM points out, the ASD Appraisal “carefully details the comparable property values and market conditions” and provides the resulting valuations with a full explanation of how they were determined. Answer at 19; *see* ASD Appraisal at 13-20, 36-54; Herzog Review at 15.<sup>16</sup> Because Appellant has not shown error in the methodology used in the ASD Appraisal, we find no cause to reject it.

### C. BLM Complied with Federal Regulations Regarding Value Equalization

Appellant contends that BLM violated the applicable law by failing to make “all reasonable efforts to equalize the values by adding or excluding lands,” citing inaccuracies in the appraised valuations that we have rejected. SOR at 14 (quoting 43 C.F.R. § 2201.6(a)(2)). He also argues that, even if the valuations were accurate, BLM could have easily reduced the \$17,500 (15.15%) equalization payment by excluding parcel D, valued at \$8,000 (7.5%), or reducing the size of the Federal parcels. SOR at 14. However, we agree with BLM’s response. The 15.15% equalization payment from Miller is well within the 25% limit on such payments established by 43 C.F.R. § 2201.6(b). In addition, BLM acted properly to negotiate terms for the Exchange that were satisfactory to Miller in order to further a Steens Act policy of acquiring private lands through exchange for inclusion in the CMPA.<sup>17</sup> *See* 16 U.S.C. § 460nnn, note (2006), (Purposes). While Mehringer’s argument supports his interest in protecting his ranch’s (apparently unauthorized) use of the adjacent Federal lands, Miller was interested in exchanging his private land near Mann Lake only if he could acquire sufficient lands in Catlow Valley to make the

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<sup>14</sup> (...continued)

is a reasonable judgment for the appraiser to make. *See* Herzog Review at 11.

<sup>15</sup> As noted above, a “summary report” – even assuming, *arguendo*, that the ASD Appraisal were regarded as one – meets the USPAP for a self-contained report if it is prepared in accordance with the UASFLA.

<sup>16</sup> We do not find Appellant has shown that failure to comply with the UASFLA for labeling the photographs in the ASD Appraisal is grounds for rejecting its conclusions. SOR at 13. They are labeled and numbered to correspond with locations on the maps of the properties. Minor technical non-conformance with the Standards is not cause for disapproval of an appraisal, unless the deficiency affects the reliability of the value estimate. Herzog Review at 11, (citing the Yellow Book).

<sup>17</sup> The exchange of these specific parcels also complies with the RMPs’ designations of public lands for disposal and private lands for acquisition through exchange. *See* Declaration of Karla Byrd at ¶ 2.

Exchange beneficial for him and his grazing operations located there. Answer at 20-21, (citing Declaration of Karla Byrd at 2-3).

*D. The Environmental Assessment Complies with NEPA.*

[4] Appellant argues that the EA, upon which BLM relied in making the Exchange decision, is inaccurate, insufficient, and violates NEPA by failing to take a “hard look” at the impacts of the Exchange. SOR at 4, 15-23. Under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), the sufficiency of an EA will be determined by whether BLM has taken a “hard look” at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, and considered all relevant matters of environmental concern. *E.g.*, *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998); *Shasta Coalition* 172 IBLA at 343; *Wade Patrick Stout*, 153 IBLA at 20; *Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997). It is well established that

[t]he Board will evaluate the EA in accordance with the following standard:

In general, the EA must fulfill the primary mission of that section, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action, that the resource values to be lost by the deeding of Federally-owned lands are balanced against the values to be gained from the transfer of the acreage, and that the transfer has not violated any provision of NEPA.

*Wade Patrick Stout*, 153 IBLA at 20-21; *Donna and Larry Charpied*, 150 IBLA 314, 321 (1999).

In determining whether an EA promotes informed decisionmaking, a “rule of reason” will be employed. *Colorado Environmental Coalition*, 149 IBLA 154, 157 (1999). The query is whether the EA contains a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the proposed action and the alternatives thereto. *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). “In those instances where BLM has satisfied the procedural requirements of section 102(2)(C) of NEPA by taking a ‘hard look’ at all the likely significant impacts of a proposed action, in this case the Combined Alternative, it will be deemed to have complied with the statute, regardless of whether a different substantive decision could have been reached by some other

decisionmaker.” *Wade Patrick Stout*, 153 IBLA at 21; *see Oregon Natural Resources Council*, 116 IBLA 355, 361 n.6 (1990).

For the appellants to overcome BLM’s decision to proceed with the Exchange, they must carry the burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to consider, or to adequately consider, a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. *See Colorado Environmental Coalition*, 142 IBLA at 52.

*Shasta Coalition*, 172 IBLA at 343-44. Our review of the record makes clear that Appellant has failed to meet this burden.

Appellant argues that the EA, which shows the date April 12, 2005, on the cover page, should not have referred to the subsequent July 2005 Steens Mountain CMPA, RMP, and ROD and that the EA fails to mention the Pickett Rim ACEC, located adjacent to parcels C and D. SOR at 17. But, as BLM states, the EA was accurate inasmuch as it was actually made available to the public in December 2005, after the Steens Mountain planning documents had been completed and after the ACEC designation had been removed for Pickett Rim. Answer at 22. Appellant also asserts that the Federal lands description is inaccurate and overlooks certain resources. SOR at 17. But as BLM notes, the EA considers the specific resources, including wildlife, tied to the legal description and location of each parcel of the Federal lands. Answer at 22; *see EA at 2, 7, 12*. Appellant further argues the EA fails to properly consider the future use of parcels C and D, claiming they will either become future home sites or the entire area will be subject to greater grazing pressure if Miller provides more livestock water on those parcels after the transfer. SOR at 18. We disagree. As discussed above, BLM considers the low risk of future home sites and development on the Federal parcels and, as BLM responds, Appellant’s assertion about Miller’s activities after transfer is speculative with no objective evidentiary support in the record. *See Answer at 22-23*.

The record does not support Appellant’s contention that BLM’s consideration of the No Action and Proposed Action Alternatives failed to take into account protection of “bighorn sheep, sage grouse, and pygmy rabbit habitat in parcels C and D.” SOR at 18-19. The EA considered the effects of both of these alternatives as to habitat (EA at 6-7, 12, 14-16), and, in particular, surveys completed during the exchange process found no threatened and endangered species on these parcels and did not indicate the presence of sage grouse or pygmy rabbits. EA at 6, 7; *see Answer*

at 23.<sup>18</sup> Also, Appellant's concerns about protection of bighorn sheep under the Exchange proposal were considered by BLM, as discussed above. In any event, we find that the EA took a thorough look at the effects on such habitat under both alternatives.

Appellant further argues that the EA does not adequately consider the social values of parcels C and D, as compared to those of the non-Federal land, referring to hunting within, and the "incredible views of Steens Mountain, Beatty Butte, and Hart Mountain" from those parcels. SOR at 20. To the contrary, the EA states that "[t]he social value of the Federal land consists primarily of activities centered around limited hunting and perhaps bird watching," due to limited public access. EA at 10; see EA at 17; DR at 8. And, as BLM explains, Appellant asserts the popularity of hunting on parcels C and D based on a mistaken reliance on information about hunting occurring along Pickett Rim rather than within those parcels. Answer at 24. Also, the EA describes the visual resources of the Federal lands as primarily flat to rolling with gray-green sagebrush and considers the scenery to be non-critical and likely of little social value. EA at 10, 11-12. Also, as BLM responds, Appellant's assertion fails to consider that such views are not unique, as they are prevalent throughout the area. Answer at 24.

In addition, Appellant contends the cumulative effects discussion in the EA is inadequate for failure to consider "the probably negative impacts and net loss of environment for the bighorn sheep, pygmy rabbits, or sage grouse" or "changed uses, increased grazing, residential use, impact on special status species, or groundwater." SOR at 22. Appellant's conclusory statements are not supported by objective evidence in the record. He also repeats concerns he previously expressed in his SOR that we have already rejected.<sup>19</sup> The EA includes a cumulative effects section considering, *inter alia*, changes in ownership patterns in the subject area since 1980. EA at 19; see Answer at 25. The EA then explains how its cumulative effects analysis complies with the June 24, 2005, guidance of the Council on Environmental Quality

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<sup>18</sup> As BLM states, Appellant's reliance on general statements about the presence of these species in parcels C and D is suspect because those statements were contained in EAs that cover much larger areas around Pickett Rim in the surrounding allotment and do not necessarily apply to every acre in the allotment. Answer at 23.

<sup>19</sup> Appellant argues that the EA should have been supplemented when ODFW decided to consider bighorn sheep reintroduction near Pickett Rim. SOR at 23. However, we have addressed this concern by noting BLM's consultation with ODFW and BLM's resulting decision to modify the Exchange proposal to retain property near Pickett Rim to support the reintroduction. As BLM states, "The EA carefully notes the habitat gained and exchanged [and the plan] to introduce bighorn sheep do[es] not invalidate BLM's discussion of habitat or BLM's hard look at environmental consequences." Answer at 26.

by focusing on the current aggregate effects of past actions. EA at 19. The EA states that scoping for this project did not identify any need to exhaustively list or analyze individual past actions in order to complete a useful analysis for illuminating or predicting the effects of the proposed action. EA at 20. In conclusion, it states that “there are no known further cumulative effects which would result from enactment of either alternative.” *Id.* at 19. Despite his difference of opinion, we conclude that Appellant has not carried his burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA.

### III. CONCLUSION

Appellant requests a fact-finding hearing, claiming that based on the SOR and Answer “there appears to be a number of material facts in dispute.” Request for Hearing dated May 22, 2008. BLM filed an opposition, arguing the appeal can be resolved on the record. Noting that “the Department [is] not required to conduct an evidentiary hearing at the request of those who protested an exchange,” we have held that “[a]lthough the Board has discretionary authority to order a hearing before an Administrative Law Judge pursuant to 43 CFR 4.415, a hearing is necessary only when there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.” *Las Vegas Valley Action Committee*, 156 IBLA 110, 128 (2001), (citing *LaRue v. Udall*, 324 F.2d 428, 432 (D.C. Cir. 1963)). Appellant identifies no question of material fact that cannot be resolved by the record, nor does a review of the record reveal such a question. The hearing request is thus denied. See *NATEC Minerals, Inc.*, 143 IBLA 362, 373 (1998); *Jesse B. Knopp*, 133 IBLA 263, 267 (1995).

Our record review shows BLM carefully evaluated the controlling question of whether the public interest will be well served by the Exchange and fully considered the environmental impacts of, and reasonable alternatives to, the proposed action. In so doing, it decided to acquire the Mann Lake parcel to consolidate habitat and improve management within the Steens Mountain CMPA, rather than retain in Federal ownership parcels B, C, and D, which are mostly flat to rolling remote grazing lands with management problems and surrounded by similar lands within the same grazing allotment. We find Appellant has failed to show that BLM improperly exercised its discretion and conclude that the Exchange will clearly serve the public interest.

To the extent not specifically addressed herein, Appellant’s other arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal is dismissed in part, and the decision appealed from is affirmed.

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

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Geoffrey Heath  
Administrative Judge