



TED LAPIS

178 IBLA 62

Decided July 30, 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

TED LAPIS

IBLA 2009-50

Decided July 30, 2009

Appeal from a decision by the Wyoming State Office, Bureau of Land Management, denying a protest of the Cow Creek Land Exchange. WYW151576.

Affirmed.

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

Pursuant to section 206(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716(a) (2006), BLM may dispose of land by exchange where it determines that the public interest will be well served by making the exchange. In determining whether a proposed exchange is in the public interest, the Secretary shall consider the factors contained in section 206(a) of FLPMA and in 43 C.F.R. § 2200.0-6(b). BLM bears the responsibility of determining what is in the public interest, and has discretion in balancing the stated factors in making a public interest determination. 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.

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

A party challenging an appraisal determining fair market value for land selected for an exchange pursuant to FLPMA 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.

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

Property that is the subject of a Federal land acquisition must be appraised at fair market value in order to provide just compensation for land taken. The market value which is sought is not merely theoretical or hypothetical; it represents, insofar as it is possible to estimate it, the actual selling price.

APPEARANCES: Ted Lapis, Sheridan, Wyoming, *pro se*; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Ted Lapis¹ has appealed an October 7, 2008, decision of the Acting State Director, Wyoming State Office (WSO), Bureau of Land Management (BLM), dismissing his protest of the proposed Cow Creek Land Exchange,² approved by the Field Manager for the Buffalo (Wyoming) Field Office, BLM, in a Decision Record and Finding of No Significant Impact (DR/FONSI) issued on July 25, 2008. The proposed exchange would convey eight parcels of public land totaling 893.82 acres, located in Sheridan and Campbell Counties, Wyoming, to the Cow Creek Holding Company (CCHC). In exchange, CCHC would convey a 684.14-acre contiguous tract of land (the Groeschel tract) located in Campbell County, Wyoming, to the United States, and would remit to the government a cash equalization payment of \$72,610.

In determining the value of the public land selected for the exchange, BLM relied on two Appraisal Reports developed by Gary L. Lay and reviewed and approved by Kim Klostermeier, members of the Department's Appraisal Services Directorate (ASD) certified in Montana as general appraisers. Lay appraised the Federal parcels for a total of \$927,610. The Groeschel tract was valued at \$855,000

¹ Lapis, a resident of Sheridan County, asserts that his access to public lands in the County will be diminished by the exchange.

² Both Lapis and the Public Land Users Committee (PLUC) timely protested the Cow Creek Land Exchange. On Oct. 7, 2008, BLM issued separate decisions to Lapis and PLUC denying their protests. Both parties appealed. On May 26, 2009, the Board summarily dismissed PLUC's appeal because it failed to comply with Departmental regulations governing appeals to this Board. *Public Land Users Committee*, IBLA 2009-207, Order dated May 26, 2009.

by John Widdoss, an appraiser in private practice in Spearfish, South Dakota; his appraisal was also reviewed and approved by Klostermeier. DR at 3-4.

Lapis claims that the proposed exchange undervalues six of the Federal parcels and that it is against the public interest. We have thoroughly reviewed the record and appellant's claims and, as discussed below, do not find that he has met the burden of discrediting the appraisals (by showing error in BLM's appraisal methodology or providing another appraisal of the parcels demonstrating that the ASD appraisal undervalued the six parcels), or of establishing that the exchange fails to serve the public interest.

I. Factual Background

On June 24, 2002, the Field Manager, Buffalo Field Office, and the Wyoming Land Exchange, LLC (WLE), entered into an "Agreement to Initiate a Land Exchange" (Agreement). The Agreement contemplated that WLE would create a holding company to purchase the Groeschel tract, and that the holding company would in turn proffer it to the United States in exchange for various publicly owned parcels. Agreement at ¶ 3. Accordingly, CCHC was formed in late 2002. See Letter from Sean P. Durrant, Esq., to BLM dated Dec. 5, 2002; Memorandum to Paul Lowham, WLE, from Durrant dated Nov. 21, 2002. On December 18, 2002, Peter Groeschel deeded the offered parcel, located in secs. 1, 2, and 11, T. 52 N., R. 71 W, 6th P.M., Campbell County, Wyoming, to CCHC, and in an Addendum to the Agreement effective May 31, 2005, CCHC was identified as WLE's successor-in-interest. Warranty Deed dated Dec. 18, 2002; May 31, 2005, Agreement Addendum.

The members of CCHC are ranchers holding Federal grazing leases on land surrounded by their private holdings.³ CCHC Operating Agreement at 1; Agreement at 2. By initiating the exchange they hoped to obtain title to the isolated public parcels they currently lease. *Id.* BLM saw the proposed exchange as a way to facilitate management of the public lands and enhance recreational opportunities for a rapidly growing population in and around Gillette. Oct. 12, 2007, *Cow Creek*

³ The members of CCHC are Daly Livestock Co., George and Mary Harper, Hidden Valley Ranch, Inc., Peters Grazing Association, Trembath Land Co., and Ron Mischke. Several of these persons or entities were members of WLE. In May 2007, the member list included Seven Brothers' Ranch. At some point, Seven Brothers' Ranch withdrew and Trembath Land Co. was added to the roster. See Daly Letter dated May 11, 2007; Appraisal Report for "Six Individual Parcels," (Appraisal I), prepared by Gary Lay, effective June 19, 2007, at 7.

Holding Company (Groeschel) Land Exchange Environmental Assessment, No. WY-070-07-EA07-198 (EA) at 4. None of the Federal parcels contains water resources, and all require BLM to expend management resources that could more effectively be used elsewhere. *Id.* at 4, 7, 9. In contrast, the tract that the United States would acquire is accessible from State Highway 59 pursuant to an easement across private land, and harbors a reservoir, one or more intermittent streams, and approximately two miles of cottonwood riparian vegetation. Cow Creek Appraisal Report entitled “684.14 Acres Campbell County, Wyoming” (Cow Creek Appraisal), at 4; DR at 2.

The Federal parcels. The six remote parcels comprise about 854 acres--all but approximately 37 acres--of the public land proposed for conveyance. They are currently leased for livestock grazing and oil and gas exploration and development. EA at 4. BLM determined that they are “either small, isolated, [or] unmanageable,” have limited use for wildlife habitat or recreation, and “would be better suited in private ownership.” *Id.* The appraiser determined that the highest and best use for the remote parcels would be as add-on grazing land to adjacent ranching operations because they are not “economically viable stand alone agricultural units.” Appraisal I at 29. The remote parcels were appraised at a value of \$225 per acre, for a total of \$192,110. Appraisal I at 43; DR at 4. The remaining two parcels (Parcels A and B) are located approximately 1½ miles south of the Gillette, Wyoming, city limits and front on State Highway 59. Appraisal Report entitled “39.99 Acres Located in Campbell County, Wyoming,” effective Apr. 16, 2007 (Appraisal II), prepared by Lay, at 27. Lay determined that their highest and best use would be as separate commercial lots. Review Appraisal for Appraisal II at 26-27; DR at 4. He appraised Parcel A (3.47 acres) for \$170,500, and Parcel B (33.24 acres) for \$565,000, or a total of \$735,500 for both lots. *Id.* at 3, 49. Lapis has not appealed BLM’s denial of his protest with respect to the valuation of Parcels A and B.

The private land. The Groeschel tract is located along Cow Creek, approximately 25 miles northeast of Gillette. Cow Creek Appraisal at 4, 14. An easement across private land for 1-2 miles from Cow Creek Road and State Highway 59 provides access. *Id.* It is bounded on three sides by land acquired by BLM in the “60 Bar Exchange,” WYW 143315. EA at 5. A 40-acre inholding containing a house and outbuildings is reserved by Groeschel. EA at 7. The “wetland and riparian areas” provide habitat for a more diverse and populated wildlife habitat than exists on the remote Federal properties. *Id.* Widdoss considered the overall desirability of the tract, which is 30 minutes from Gillette, borders public land providing recreational opportunities, and is marketable for “rural residential purposes as a single homesite,” and determined that on February 1, 2007 (the effective date of value), the property was worth \$1,250 an acre. Cow Creek Appraisal at 15, 25.

II. *The Decision Record Rationale*

BLM determined that the public interest favored the proposed exchange, which conformed with both the objectives of the 1985 Buffalo Resource Management Plan, as amended in April 2000, and the “equal value requirements” for land exchanges under FLPMA, and on July 25, 2008, approved the exchange. DR at 2-4.

BLM’s Public Interest Determination. BLM found that several resource values would be favorably affected by the exchange. The DR states that the acquisition supports the consolidation of “over 19,000 acres of public lands in Campbell County,” where “[i]ncreasing rural development and growth in the area continue to limit and decrease access to Federal lands.” DR at 2. The public interest will be well served, BLM concluded, because the acquisition “will add 684 acres of non-Federal lands that are bordered on three sides” by land acquired in a previous exchange, and the additional lands will “significantly enhance opportunities for hunting, fishing, hiking,” and other public recreation in rapidly growing Gillette and Campbell Counties. *Id.* In comparing the multiple use values of the private land to be acquired with the public land selected for exchange, the DR states that “the benefits to the public for access for recreation and for riparian watersheds outweigh the loss of the small, isolated, Federal land parcels, largely without public access”; that “[d]isposal of the selected Federal lands in the exchange will allow better utilization of the scattered land within the ranching operations of grazing lessees in Campbell and Sheridan Counties”; and that “[t]he Federal parcel[s] south of Gillette . . . will most likely be developed for commercial use, which was determined to be the highest and best use of the land.” *Id.*

BLM’s Equal Value Determination. The Decision Record found that the appraisals prepared by Lay and Widdoss and the reviews undertaken by Klostermeier were completed “in compliance with BLM regulations and in accordance with the *Uniform Appraisal Standards for Federal Land Acquisition* (UASFLA), published by the Department of Justice, and the *Uniform Standards of Professional Appraisal Practice*” DR at 3. The DR states that reasonable efforts were made to equalize values, and that CCHC will make a cash equalization payment of \$72,610 at closing. *Id.* at 4.

III. *Lapis’ Protest and BLM’s Decision Rejecting It*

In his protest, Lapis argued that all parcels of public land offered for sale were undervalued. Lapis Protest at 1. He argued that BLM did not “take into consideration the values of road access, views and other intangibles when arriving at land values,” stating that “some of the land in Sheridan County has views of the

Big Horn Mountains” and that a comparable State exchange valued State land at \$4,100 per acre. *Id.* at 1-2. He further states that acquisition of the private parcel is not in the public interest, arguing that the stated basis for the acquisition is to provide public access to Federal land which, he claims, is “in the middle of BLM land that is already accessible” via State land. *Id.* at 1.

In its October 7, 2008, decision denying Lapis’ protest, BLM described the management and recreational benefits of the exchange and rejected Lapis’ claim that the Federal parcels are undervalued, stating that “the market value of the lands being exchanged has been determined for appraisals prepared by a qualified appraiser” in accordance with uniform professional appraisal standards. Decision at 1-2. The decision concluded that Lapis’ protest failed to show error in the methodology of the appraisals, and that Lapis failed to provide an appraisal establishing a higher fair market value for the parcels. *Id.*

IV. Arguments of the Parties on Appeal

Lapis’ primary quarrel on appeal is with the alleged “gross undervaluation” of the six Federal parcels that Lay classified as “remote” and “agricultural.” Arguing that the appraiser erred (1) in determining the highest and best use of the land; (2) in selecting properties for comparable value; and (3) in concluding that lack of access is a major, value-limiting factor, Lapis concludes that the appraised value of \$225 per acre for the remote parcels is “unreasonably low.” Statement of Reasons (SOR) at 1. Lapis challenges the exchange of the 39.99-acre commercial parcel as also not satisfying the public interest requirement, claiming that Sheridan County residents will suffer diminished access to wetlands and the public will not be justly compensated for the alleged loss.⁴ SOR at 9; Notice of Appeal at unpaginated 4. Finally, Lapis challenges the exchange process, as “rigged,” and declares that “such lands should be sold at public auctions.” SOR at 9.

BLM responds that as Lapis has failed to provide either proof of error in the appraiser’s valuation methodology or another appraisal demonstrating that the ASD

⁴ Lapis did not raise either of these arguments in his Protest. Regulation 43 C.F.R. § 4.410(c) governing appeals to this Board provides that a party who has participated in a decisionmaking process before BLM may raise on appeal only those issues it raised in its prior participation before BLM. As neither of these arguments were raised in the Protest, they are not now properly before us, and we do not address them.

appraisal undervalued the six parcels, he has not satisfied his burden of proof. Answer at 12-19.

V. Analysis

[1] Section 206(a) of FLPMA provides that BLM may dispose of lands by exchange where it determines that the public interest will be well served by making the Exchange. 43 U.S.C. § 1716(a) (2006). That statute provides, in pertinent part, that when considering whether a land exchange is in public interest, the Secretary “shall give full consideration to better Federal land management and the needs of State and local people, including, among other things, needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife” *Id.* 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 . . . for more logical and efficient management and development; . . . expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs.

In weighing whether the exchange is in the public interest, BLM must ensure that “[t]he 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. . . . 43 C.F.R. § 2200.0-6(b)(1). BLM has discretion to determine how to balance all of the statutory factors, as implemented by this regulation, when making a public interest determination. *Peter J. Mehringer*, 177 IBLA 152, 159 (2008), and cases cited; *Charles W. Nolen*, 166 IBLA 197, 204 (2005), and cases cited; *Daniel E. Brown*, 153 IBLA 131, 135 (2000).

[2] Section 206(b) of FLPMA, 43 U.S.C. § 1716(b) (2006), provides that the values of lands exchanged by the Secretary under the Act shall be equal, or if not equal, shall be equalized by the payment of money to the grantor or to the Secretary, as the circumstances require, so long as payment does not exceed 25 percent of the

total value of the lands or interests transferred out of Federal ownership, provided that “the Secretary . . . shall try to reduce the amount of the payment of money to as small amount as possible.” Section 206(f) of FLPMA required the Secretary to promulgate “comprehensive rules and regulations governing exchanges of lands and interests therein,” that reflect “nationally recognized appraisal standards, including, to the extent appropriate, the [UASFLA].” 43 U.S.C. §§ 1716(f)(1) and (2) (2006). Accordingly, Departmental regulations have adopted many of the requirements for appraisals set forth in the uniform standards, some of which are relevant to this appeal. For instance, the regulations require that an appraiser of property considered for a land exchange pursuant to section 206 of FLPMA undertake a comparative market analysis meeting standard analytical requirements in order to determine the fair market value, as of specific date, of the properties proposed for exchange. 43 C.F.R. §§ 2201.3, 2201.3-2, 2201.3-3. In estimating fair market value, appraisers must, among other things,

- (1) Determine the highest and best use of the property to be appraised;
- (2) Estimate the value of the lands and interests as if in private ownership and available for sale in the open market;
- (3) Include historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities that are reflected in prices paid for similar properties in the competitive market

43 C.F.R. § 2201.3-2(a).

Appraisers must provide the parties to an agreement to initiate an exchange with written appraisal reports that must contain, among other things, the following information: (1) “A summary of facts and conclusions;” (2) “The purpose and/or the function of the appraisal, a definition of the estate being appraised, and a statement of the assumptions and limiting conditions affecting the appraisal assignment, if any;” (3) “An explanation of the extent of the appraiser’s research and actions taken to collect and confirm information relied upon in estimating value;” (4) “An adequate description of the physical characteristics of the lands being appraised; a statement of all encumbrances; title information, location, zoning, and present use; an analysis of highest and best use; and at least a 5-year sales history of the property;” (5) “A comparative market analysis and, if more than one method of valuation is used, an analysis and reconciliation of the methods used to support the appraiser’s estimate of value;” (6) “A description of comparable sales, including a description of all relevant physical, legal, and economic factors such as parties to the transaction, source and method of financing, effect of any favorable financing on sale price, and verification by a party involved in the transaction;” (7) “An estimate of market value;” (8) The

effective date of valuation, date of appraisal, signature, and certification of the appraiser; (9) “A certification by the appraiser signing the report to, [among other things,] the following: . . .” (a) “The appraiser personally examined the subject property and all comparable sale properties relied upon in the report;” (b) “The appraiser has no present or prospective interest in the appraised property;” and (c) “The appraiser has not, and will not, receive compensation that was contingent on the analysis, opinions, or conclusions contained in the appraisal report.” 43 C.F.R. § 2201.3-3 (a)-(d), (f)-(j).

In addition, appraisal reports that have not been prepared by agency appraisers must be reviewed by a qualified review appraiser.⁵ 43 C.F.R. § 2201.3-4. The review appraiser must determine whether the appraisal report “(1) Is complete, logical, consistent, and supported by a market analysis; (2) Complies with the standards prescribed in § 2201.3-3 . . . ; and (3) Reasonably estimates the probable market value of the lands appraised.” 43 C.F.R. § 2201.3-4(b).

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. *Peter J. Mehringer*, 177 IBLA at 161; *Charles W. Nolen*, 166 IBLA at 208, and cases cited; *Daniel E. Brown*, 153 IBLA at 136.

Having set forth the legal framework governing this appeal, we now turn to Lay’s June 19, 2007, Appraisal of the six remote Federal parcels.

Description of locale. Sheridan and Campbell Counties are located in northeastern Wyoming and encompass over 7,000 square miles. Appraisal I at 17. They are known for large ranching operations and extensive reserves of coal. *Id.* They are bounded to the northwest by the Big Horn Mountains and to the east by the Black Hills of South Dakota. The climate is “primarily semi-arid,” averaging 10 to 14 inches of precipitation annually, but areas along the Big Horn are more moderate. *Id.* Coal demand in the past several years has “had a huge economic influence” on the area, and “demand for housing and commercial growth around and near” Sheridan, Buffalo, and Gillette are “unprecedented.” *Id.* at 18.

Land values, including rural and agricultural land values, in the area steadily increased over the past several years, “especially along any of the well known mountain fronts.” Appraisal I at 17. The appraiser attributed this increase to

⁵ All appraisals for the Cow Creek exchange were reviewed by Klostermeier.

“investment and recreational type buyers” rather than “the traditional agricultural interest of the past.” *Id.* at 17-18. He stated that “[t]he demand for rural properties continues to be on the increase, with very little skepticism. . . . [A]gricultural properties are selling for an all time high, along with an active market. This trend is expected to continue” *Id.* at 18. “However,” he emphasized, “the increases in the rural land values are not a result of any agricultural influence. . . .” Due to increases in operating costs, “the net receipts on most livestock operations have been on the decrease, while the value of the associated land . . . ha[s] been on the increase.” *Id.* He attributed the increase in land values to “an accumulation of economic factors,” including “the discovery of coal bed methane,” an “influx of buyers . . . seeking employment,” families desiring “the rural lifestyle of the Rocky Mountain States,” and “investment type buyers whose interests vary from recreation to purely investment purposes.” *Id.*

Physical Characteristics of the Parcels. For purposes of determining value, the appraiser grouped smaller land units into larger parcels based on the ranch using them for grazing, and listed them as Parcel 1, the Daly Unit (296.33 acres); Parcel 2, the Peters Grazing Association Unit (120 acres); Parcel 3, the Harper Unit (120 acres); Parcel 4, the Belus Unit (120 acres); Parcel 5, the Mischke Unit (37.5 acres), and Parcel 6, the Trembath Unit (160 acres). Appraisal I at 29-31. All six parcels are currently used for livestock grazing, have low livestock carrying capacity (six or less animal unit months (AUMs)),⁶ have no reliable sources of surface water other than seasonal run-off, and physical and legal access to the parcels is strictly under control of the ranching operation that BLM has authorized to use the land. *Id.* at 19-24.

The appraiser verified that the six parcels are under grazing permits with 10-year renewal periods at BLM’s discretion; that they are zoned “agricultural” under Sheridan and Campbell County zoning resolutions; that under those resolutions “agriculture” means that the primary use will be for the production of agricultural products and the husbandry of animals associated with such production; and he reasoned that the purpose of agricultural zoning is to “control the dividing of the current agricultural land and to encourage the continuation of the agricultural community.” Appraisal I at 25-26.

Highest and Best Use. The appraiser then analyzed the parcels’ “highest and best use,” applying the definitions in 43 C.F.R. § 2200.0-5 (“Highest and best use

⁶ An AUM is “the amount of forage necessary for the sustenance of one cow or its equivalent for a period of one month.” 43 C.F.R. § 4100.0-5.

means the most probable legal use for a property, based upon market evidence as of the date of valuation, expressed in an appraiser's supported opinion"), and the UASFLA, § B-3 ("Highest and best use" is "[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future"). Appraisal I at 26. He stated that there are five broad categories of use: agricultural, residential (single-family and multifamily), industrial, commercial and retail, and special purpose. *Id.* at 27. In determining which category of use would qualify as the "highest and best use" for the parcels, the appraiser limited his consideration to those uses that would be (1) legally possible, (2) physically possible, (3) financially feasible, and would (4) maximize productivity. *Id.*

The appraiser concluded that there are two major legal impediments that limit the highest and best use for the parcels: (1) zoning that restricts the parcels to agricultural use and associated residential development, and (2) a lack of legal access. Appraisal I at 28. The appraiser concluded that "[w]ith no legal access from any public roadway, residential housing is not considered a legal use; [therefore] . . . agricultural use is the only legally permissible use." *Id.* The appraiser determined that since the only legally permissible use is agriculture, the physically permissible uses are also limited to those agricultural. *Id.* As the physical limitations of the parcels "prohibit any type of crop production as an agricultural unit, . . . the physical use of the properties is [limited] to livestock grazing." *Id.*

The appraiser explained that "financial feasibility" addresses supply and demand; *i.e.*, is there a reasonable likelihood that a property will satisfy an investor's needs and objectives? Appraisal I at 28. A property's "maximum value," he stated, is defined in terms of "its maximum economic use from an income producing ability." *Id.* The appraiser reasoned that because of their remoteness and lack of legal access, the six parcels "are not considered feasible residential sites," and their "location, size, terrain, and soil capabilities" suggest "they are not economically feasible stand alone ranching operations." *Id.* at 29. Given their physical characteristics, their "maximally productive use" would be "as add-on (assemblage) grazing units to adjacent, economically sized ranching operations," which is what they are presently used for, he stated. Thus their present use, he concluded, is their highest and best use. *Id.*

The sales comparison. The appraiser used the sales comparison approach for determining the value of the parcels, because it "best demonstrates the relationship between the buyers and sellers in a particular market," and because the cost or income methods are not suited to properties with few improvements that are incapable of producing income as stand-alone units. Appraisal I at 31-33. He reviewed 47 sales in the northeastern Wyoming and southeastern Montana markets,

from which he chose the 5 most comparable. *Id.* at 33. The sales he selected as most comparable encompassed land located in the general market area of the six parcels and predominantly used for native rangeland. *Id.* at 33-34, 37. He eliminated from comparison sales that were “dated, had a high degree of recreational influence, or would need a large locational adjustment to be considered comparable.” *Id.* at 33.

Adjustments. After selecting the five most comparable sales, the appraiser adjusted their sales price by applying percentage multipliers to reflect increasing value due to the accumulation of time (appreciation), and decreasing value due to the lack of access. Appraisal I at 35-36. The appraiser determined the discount for lack of access by performing a “matched pair analysis” between sales of 3 properties between 2000 and 2500 acres having legal access that ranged in price from \$275 to \$332 per acre, and 1 sale of approximately 2000 acres lacking legal access that sold for \$208 per acre. *Id.* at 36. He computed a -32% adjustment for lack of legal access using “the mean of the matched paired analysis, giving equal weight to each comparison.” *Id.* To account for appreciation, the appraiser compared properties in Sheridan and Johnson Counties that had been sold and resold “within the last several years,” and arrived at an average appreciation rate of 1.06% per month, which he used as a multiplier. *Id.* at 35. The appraiser did not find a correlation between size and sales price; he therefore made no adjustment for size in his analysis. *Id.* at 35-36.

Calculations. After applying these adjustments, the appraiser found that the five properties most comparable to the six Federal parcels ranged in value from \$171 per acre to \$273 per acre. Appraisal I at 37.⁷ The appraiser calculated that the dollar per acre value for Sale 1 (northeast of Buffalo) was \$273; for Sale 2 (southeast of Buffalo), \$213; Sale 3 (south of Kendrick), \$268; Sale 4 (north of Gillette), \$171; and sale 5 (near the Montana/Wyoming border (Fence Creek)), \$183. *Id.* He then concluded that the six parcels were properly appraised at \$225 per acre, taking into account the “imperfection of the market and the entire sales group.” *Id.* That amount, he reasoned, “is the mid point between the low group, Sales #4 & #5 at \$180/ac, and the high value group, Sales #1 & #3 at 270/ac. Furthermore, the value of \$225/ac is closely supported by Sale #2, which has an adjusted value of \$213/ac.” *Id.* The dollar-per-acre valuation translated into the following cash values: Daly Unit (296.33 acres), \$66,670; Peters Grazing Association (120 acres), \$27,000; Harper Unit (120 acres), \$27,000; Belus Unit (120 acres), \$27,000;

⁷ Those properties were described in detail in the Appraisal Report at pages 38-43; the important factors for purposes of the comparable analysis were summarized in the Table at page 37.

Mischke Unit (37.5 acres), \$8,440; and the Trembath Unit (160 acres), \$36,000. *Id.* at 43.

The appraisal review. Klostermeier found Lay's choice of properties for comparison, adjustments to value for appreciation and lack of access, and methods of analysis to be reasonable and well-supported. Appraisal I at 4-10.

We now turn to Lapis' arguments that the Federal parcels are undervalued and that the exchange is not in the public interest.

Lapis' valuation argument. Having considered Lay's appraisal and Klostermeier's review, we reject Lapis' argument that the six remote Federal parcels are undervalued. The record indicates that all six remote parcels are zoned agricultural by county zoning resolutions, that those zoning restrictions eliminate development of the parcels for residential purposes except in furtherance of agricultural use, and that the parcels are remote and have no legal access, making residential development in furtherance of agricultural use infeasible. The appraiser's determination of the highest and best use for the parcels is well-reasoned, the parcels selected for comparison are similar in all material aspects, and the appraiser's methods for arriving at valuation are logical, reasonable, and well-supported, and conform with acceptable Federal practice and applicable regulatory standards.

Lapis argues that lack of legal access is not an impediment to buyers seeking rural residential property. Citing a provision of Wyoming law establishing a procedure for obtaining legal access to landlocked property (Wyo. Stat. Ann. § 24-9-101, and § 24-9-103 *as amended*),⁸ he asserts there is no basis for concluding that any property is inaccessible. SOR at 6-7. Lapis contends that when access legally cannot be denied, as is the case in Wyoming, it is appropriate for appraisers to treat the land as if it has access. *Id.* In support of this contention, Lapis has submitted an appraisal valuing a State parcel designated for conveyance by exchange at \$4,100 per acre. "*Uniform Agricultural Appraisal Report (UAAR) File No. # 2-5280*," appended to Lapis' SOR. Lapis claims that the appraiser for the State valued the parcel as if it had legal access, acknowledging that in doing so, he was making a "hypothetical assumption." *Id.* at 7. "When access cannot be denied," Lapis argues, "treating the value of the property as if [it] has legal access may be a prudent choice." *Id.*

⁸ Wyo. Stat. Ann. § 24-9-103 was most recently amended by 2009 Wyo. Sess. Laws ch. 188 § 1, eff. July 1, 2009; those amendments, however, do not bear upon our discussion here.

An examination of the appraisal upon which Lapis relies, however, exposes the fallacy of his argument. The appraiser was required by the “client” to assume that the parcel being appraised had access, and when considering “comparable” parcels with superior access to the subject parcel, the appraiser made no adjustment for the differences in access. The evidence presented by Lapis fails to demonstrate error in BLM’s decision, as the agency is required to base *its* appraisals on fact, not fiction.

Indeed, even where legal access exists, we have recognized that it is appropriate for an appraiser to make adjustments to the sales of comparable properties to reflect measurable differences in the quality of access to property that is the subject of the appraisal. *Daniel E. Brown*, 153 IBLA at 137-39; *Regina B. Perry*, 142 IBLA 278, 282 (1998). In *Peter J. Mehringer*, the appellant similarly argued that BLM had undervalued parcels in a proposed exchange by failing to use certain tracts as comparables, but we found that BLM properly disregarded those parcels because of their lack of similarity of characteristics such as access. 177 IBLA at 163-64. We referred to a statement by a reviewing appraiser 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. *Id.* at 163 n.12.

In this case, we must also observe that access is not legally enforceable until it is obtained, and the process of obtaining it does not come without the potential for substantial expense. Under Wyo. Stat. Ann. § 24-9-103(d), the applicant for access to landlocked property shall pay “any damages to be suffered by the affected parties having an interest in the land through which the access shall be provided” and shall “be responsible for obtaining and for paying for any engineering and construction costs incurred concerning the location and construction of the road.” Given the potential costs to the buyer of obtaining legal access, the appraiser’s conclusion that land with access is worth substantially more than land without it is reasonable.

[3] More importantly, the cumulative nature of the legal and physical limitations of the parcels and the surrounding agricultural use militate against finding a highest and best use other than that selected by the appraiser. Using either of the definitions for “highest and best use” quoted above, the appraiser’s conclusion that a prospective buyer of land that is zoned for agricultural use is unlikely to purchase parcels that are surrounded by ongoing third party agricultural enterprises without an economically feasible agreement in place securing legal access and without a reasonable likelihood of producing income from it, is reasonable.

Property that is the subject of a Federal land acquisition must be appraised at fair market value in order to provide “just compensation” for land taken. UASFLA § B-1; *Kirby Forest Industries, Inc. v. United States*, 467 U. S. 1, 9-10 (1984). “The market value which is sought is not merely theoretical or hypothetical; it represents, insofar as it is possible to estimate it, the actual selling price.” UASFLA at § B-2. The ASD appraiser did not err by discounting the value of the six remote parcels for lack of access.

Lapis asserts that the State exchange parcel and others like it should have been selected as comparables for purposes of appraising the remote Federal parcels. But the UASFLA cautions that “[a]ppraisers have a special responsibility to scrutinize the comparability of all data used in a valuation assignment. They . . . should avoid comparing properties with different highest and best uses, limiting their search for comparables, or selecting inappropriate factors for comparison.” UASFLA at § D-9. The UASFLA requires that, “in selecting the comparable sales to be used in valuing a given property, it is fundamental that all sales have the same economic highest and best use as the property under appraisal and that the greatest weight be given to the properties most comparable to the property under appraisal.” *Id.* at § A-17.

The 160-acre State exchange parcel selected for conveyance into private hands is not a comparable property to the six remote Federal parcels, nor are the parcels on which the State appraiser based his appraisal. Its use was judged to be a “stand-alone rural homesite tract” located five miles from Story, Wyoming, near a historic battleground and monument and intersecting the historic Bozeman Trail. UAAR File No. # 2-5280 at 2 of 47. The property has access to power and buried phone service, and there is “a small stock reservoir in the draw and stock water available at the creek.” *Id.* It is not zoned and could be “legally divided/subdivided into rural/recreation home site tracts.” *Id.* There is no evidence that the remote Federal parcels at issue here have any of these characteristics.

While we can appreciate Lapis’ concern that Federal property selected for exchange should not be undervalued, there is simply no evidence that the six remote parcels selected in this case were not valued according to legal and regulatory requirements governing appraisals of land involved in Federal land exchanges and conveyances. Appellant has not met his burden of establishing error in the methodology the appraiser used to reach his conclusion that the highest and best use for the six remote parcels is as an add-on assemblage to the ongoing surrounding grazing operations. Nor has Lapis established that the appraiser erred in the methodology he used to establish sales comparisons and to calculate the appraised value of the parcels; nor has he provided an appraisal of the six parcels that contradicts the conclusions of the ASD appraiser. *See, e.g., Peter J. Mehringer,*

177 IBLA at 161-65; *Charles W. Nolen*, 166 IBLA at 207-09; *Daniel Brown*, 153 IBLA at 136-39.

Lapis' Public Interest Claims. Likewise, we find no evidence supporting Lapis' claims that the Cow Creek Land Exchange is not in the public interest. The exchange will promote better Federal land management by conveying land that cannot be efficiently managed and/or is more appropriate for commercial development into private hands, and by serving the local community by making available public land that is accessible and appropriate for recreational use. BLM has ensured that "[t]he 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. . . ." 43 C.F.R. § 2200.0-6(b)(1). Lapis has not established that BLM abused its discretion in balancing the statutory factors and making the public interest determination. *Peter J. Mehringer*, 177 IBLA at 159, *Charles W. Nolen*, 166 IBLA at 204; *Daniel E. Brown*, 153 IBLA at 135.

All other arguments raised by the appellant not specifically addressed herein have been considered and rejected.⁹

⁹ Lapis argues that the Department failed to timely address his request for documents pertaining to the Cow Creek Land Exchange in accordance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006). This Board's jurisdiction is limited to reviewing decisions rendered by Department of the Interior officials related to, among other things, the use and disposition of public lands and their resources and is not the proper forum for considering FOIA issues. See 43 C.F.R. § 4.1(b)(3); see also 43 C.F.R. §§ 2.28-2.33 (setting out specific procedures for Departmental FOIA appeals); *Deborah Reichman*, 173 IBLA 149, 160 (2007).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
R. Bryan McDaniel
Administrative Judge