



ASHENHURST RANCH, INC.

182 IBLA 218

Decided June 12, 2012



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

ASHENHURST RANCH, INC.

IBLA 2012-89

Decided June 12, 2012

Appeal from a decision of the Montana State Office, Bureau of Land Management, dismissing a protest of a decision approving the Nance-Brown Fee Coal Exchange. MTM 99236.

Affirmed.

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

Section 510(b)(5) of SMCRA, 30 U.S.C. § 1260(b)(5) (2006), requires an exchange of alluvial valley floor (AVF) fee coal to be processed in accordance with section 206 of FLPMA, 43 U.S.C. § 1716 (2006). Under 43 C.F.R. §§ 2200.0-6(c) and 3436.2-3, Federal coal to be exchanged for AVF fee coal shall be of equal value or equalized in accordance with the methods set forth in 43 C.F.R. § 2201.6, and an exchange of lands or interests shall be based on market value as determined by the Secretary through appraisals. A party has not successfully challenged a BLM decision approving an exchange of Federal coal for AVF fee coal when it neither submits its own appraisal establishing fair market value nor shows error in the methodology used in determining fair market value.

APPEARANCES: Alan Joscelyn, Esq., Helena, Montana, for Ashenhurst Ranch, Inc.; Morris W. Kegley, Esq., Englewood, Colorado, and Charles L. Kaiser, Esq., and Charles A. Breer, Esq., Denver, Colorado, for Westmoreland Coal Company (Intervenor); A. Clifford Edwards, Esq., and A. Christopher Edwards, Esq., Billings, Montana, and Philip McGrady, Esq., Park City, Montana, for Jay Nance, Joseph P. Hayes, Patricia Hayes Rodolph, Brett Boedecker, and Brown Cattle Company Shareholders Coal Trust (Intervenor-Proponents); Bryan P. Wilson, Esq., Office of

the Field Solicitor, U.S. Department of the Interior, Billings, Montana, and Emily D. Morris, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Ashenhurst Ranch, Inc. (Ashenhurst), has appealed from a December 21, 2011, decision of the Montana State Office, Bureau of Land Management (BLM), dismissing its protest against the Nance-Brown AVF Coal Exchange (the Exchange). For the reasons set forth below, we affirm BLM's decision.

#### I. BACKGROUND

Jay Nance, Brett A. Boedecker as Personal Representative for Suzanne N. Boedecker, Joseph P. Hayes, Patricia Hayes Rodolph, and the Brown Cattle Company Shareholders Coal Trust (collectively, Nance-Brown, or the Proponents),<sup>1</sup> have owned a fee interest in the coal beneath their ranches in the Tongue River Valley in Montana since before the passage of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (2006). Section 510(b)(5) of SMCRA, 30 U.S.C. § 1260(b)(5) (2006), prohibits certain surface coal mining operations in alluvial valley floors (AVFs). That same provision of SMCRA, however, provides that under certain conditions owners of coal located in AVFs can seek to exchange their coal for Federal coal. *Id.*

On May 19, 1986, the Montana Department of State Lands issued a Declaratory Ruling that a portion of Nance-Brown's coal was AVF fee coal that could not be mined under section 510(b)(5) of SMCRA. *See* BLM's Answer at Ex. 2. On December 19, 1994, Nance-Brown submitted a proposal for an AVF fee coal exchange to BLM (MTM 99236). After conferring with Montana, by decisions dated February 26, 1996, and October 10, 1997, BLM determined that approximately 3,379.55 acres of Nance-Brown coal qualified for an exchange under section 510(b)(5) of SMCRA. BLM has been in negotiations with Nance-Brown for a possible exchange since that time.

Nance-Brown brought a citizen suit pursuant to section 520(a)(2) of SMCRA, 30 U.S.C. § 1270(a)(2) (2006), against the Secretary of the Interior for an alleged failure to perform the mandatory, nondiscretionary action of completing an exchange of Federal coal for their AVF fee coal in accordance with section 510(b)(5) of SMCRA. *See Nance v. Kempthorne*, No. CV-06-125-BLG-RFC (D. Mont. filed Aug. 29,

---

<sup>1</sup> By order dated Mar. 19, 2012, the Board granted Nance-Brown's motion to intervene in the current proceeding.

2006). The U.S. District Court for the District of Montana ruled that Nance-Brown is entitled to such an exchange. *See Nance v. Kempthorne*, No. CV-06-125-BLG-RFC, (Order Denying Motion to Dismiss dated Dec. 21, 2007) (The Secretary “must conduct fee coal exchanges for qualified exchange proponents.”). The District Court ordered BLM to proceed with an exchange of Proponents’ coal, but the Court expressly left with BLM the discretion to choose the Federal coal for exchange. *Id.* at 15. Following a Court order issued on December 9, 2008, and revised on May 19, 2009, which mandated a schedule for completion of the exchange, the parties entered into a stipulation on November 19, 2009, and revised on January 29, 2010, pursuant to which BLM would follow the regulatory process for completing an AVF exchange in an expeditious manner.

Nance-Brown agreed to exchange their AVF fee coal for Federal coal underlying one of three possible tracts: the Bridge Creek Tract, the Pearson Creek Tract, or the Ashenhurst Tract. On March 2, 2010, Nance-Brown identified the Ashenhurst Tract as the only Federal coal they would consider for exchange. *See Nance v. Kempthorne*, No. CV-06-125-BLG-RFC (Plaintiffs’ Status Report dated Mar. 2, 2010). The Ashenhurst Tract is comprised of five sections of Federal coal arrayed in a Federal/private checkerboard pattern. The surface and other mineral interests within the Ashenhurst Tract are owned by private parties. Ashenhurst represents that it owns the surface overlying four of the five sections.

In accordance with 43 C.F.R. § 3436.2-3(c), BLM began the statutory and regulatory process for effecting an exchange of the Federal coal underlying the Ashenhurst Tract for the Nance-Brown AVF fee coal. Among other steps, an agreement to initiate (ATI), authorized by 43 C.F.R. § 2201.1, was signed with Nance-Brown on March 29, 2010, and a notice of exchange proposal was published in two local newspapers for four consecutive weeks in April 2010, as required by 43 C.F.R. § 2201.2.

On October 6, 2010, BLM released its Environmental Assessment (EA) for the Exchange (DOI-BLM-MT-C020-2011-0005-EA). On August 24, 2011, BLM issued a Revised EA responding to three sets of comments and other input gathered during a series of public meetings. Ashenhurst provided comments concerning the potential effect of the exchange on the surface lands of the Ashenhurst Tract.

On August 26, 2011, the Deputy State Director, Division of Resources, Montana State Office, BLM, signed the Decision Record and Finding of No Significant Impact (DR/FONSI) approving the Exchange. A Notice of Decision (NOD) was published on September 1, 2011, in the *Miles City Star* and *Forsyth Independent* newspapers, notifying the public of the decision to approve the proposed exchange. The NOD provided details of the coal lands involved and instructions on how to

obtain a copy of the Decision Record. The NOD contained the procedures for filing a protest within 45 days of the date of publication.

On October 12, 2011, Ashenhurst filed a timely protest of BLM's DR/FONSI. On December 21, 2011, the Montana State Office, BLM, dismissed the protest, and this appeal followed.

## II. ARGUMENTS OF ASHENHURST

Ashenhurst's primary argument on appeal is that Montana Code Annotated (Mont. Code Ann.) § 82-2-203 "creates a surface owner consent right" that BLM "was required to recognize in any deed exchanging the federal coal underlying the Ashenhurst surface, and that the Agency needed to ensure its appraisal of that coal considered the effect of the state-law right." Statement of Reasons (SOR) at 5. Ashenhurst states that it raised with BLM the issue of including a "deed covenant to recognize the right," contending that "it was imperative that BLM's appraisal of the coal to be exchanged include the effect on coal underlying the Ashenhurst Ranch of a deed restriction continuing the surface owner consent protections." *Id.* at 5-6. Ashenhurst points out that BLM "has an explicit statutory duty to ensure equal valuation of the two coal parcels considered for exchange." *Id.* at 6 (citing 43 U.S.C. § 1716(b) (2006); 43 C.F.R. §§ 2201.5 and 3436.2-3(e)). Ashenhurst argues:

In the absence of a determination of the effect of [Mont. Code Ann.] § 82-2-303, the Agency has not met, and cannot meet, its statutory obligation to ensure equal valuation, because the value of the federal coal underlying the Ashenhurst tracts will be significantly lower if the appraisal recognizes a surface owner consent right than if it does not.

*Id.* Ashenhurst notes that under 43 C.F.R. § 3436.2-3(e), the Secretary is instructed, "in determining value of the private coal unmineable due to AVF restrictions, to proceed as though there were no prohibition on surface coal mining operations on the property." *Id.*

Ashenhurst complains that "the appraisal conducted for BLM as part of the exchange process apparently was done on the assumption that there is no surface owner consent right created by state law." *Id.* at 6-7. According to Ashenhurst,

it seems apparent the appraisal assumed no state-law created surface owner consent right burdening the federal coal underlying the Ashenhurst tracts, because: (1) we know the private tracts were appraised as though there were no restrictions on surface mining, as a

matter of statute; and (2) the comparative per-ton values reflected by the appraisal summary in the Decision Record are nearly equivalent.

*Id.* at 7.

Ashenhurst objects to the statement in BLM's decision dismissing its protest that, "of course, to the extent state law protections apply to the property following transfer, any state-law protections would continue to apply if the Federal coal is transferred to a private party." *Id.* (quoting Dec. 21, 2011, Decision at 4). In Ashenhurst's view, "[t]his statement damns the entire decision, because to the extent state law does indeed include a surface owner consent provision, BLM is conceding that it applies." *Id.* The result of BLM's failure to "giv[e] heed to the effect of the state law protections" is that BLM "has critically overvalued the federal coal, meaning the exchange fails to meet statutory and regulatory equal value requirements." *Id.* at 7-8.

Ashenhurst next argues that in ordering BLM to complete the proposed exchange, the U.S. District Court deprived BLM of its "lawful powers and discretion, in violation of the separation of powers doctrine, and depriv[ed] Ashenhurst and its owners of due process." *Id.* at 8. Ashenhurst claims that "[t]he Court's mandate raises significant questions about the Agency's determination of public interest." *Id.* at 9. Ashenhurst asserts that the EA prepared by BLM "was one of the foundations for the Agency's ultimate determination that the proposed exchange is in the public interest," but that "appraisals were not completed until long after the EA was completed and have not been made available to the public or to Ashenhurst, despite Ashenhurst's longstanding FOIA request seeking the appraisals, among other things." *Id.* "Without the appraisals," Ashenhurst argues that BLM "was unable to take a hard look at the consequences of the proposed exchange in the EA." *Id.*

Ashenhurst challenges the provision in the ATI executed by Nance-Brown and BLM in which BLM agreed "not to take any action which would diminish or negate either the market value or resource values to the coal, except as agreed to by both parties 60 days in advance of any such action being taken." *Id.* at 11 (quoting ATI § 2.05). Ashenhurst argues that "[b]y making this agreement, the Agency improperly contracted away its discretion to include deed restrictions and covenants required by 43 CFR § 2200.0-6(l), and expressly requested by Ashenhurst." *Id.* Ashenhurst again concludes that the effect of this agreement is to deny it due process.

### III. ANALYSIS

[1] Under section 510 (b)(5) of SMCRA, 30 U.S.C. § 1260(b)(5) (2006), an AVF fee coal exchange is required to be processed in accordance with section 206 of

FLPMA, 43 U.S.C. § 1716 (2006). The regulation implementing section 510(b)(5) of SMCRA provides that “[a]fter the authorized officer and the owner of the coal deposit underlying an alluvial valley floor identify Federal coal deposits that are suitable for consideration for disposition through exchange, the exchange shall be processed in accordance with part 2200 of [43 C.F.R.]” 43 C.F.R. § 3436.2–3(c). In turn, FLPMA coal exchanges are governed by 43 C.F.R. Parts 2200, 2201, and 2203.

BLM may dispose of lands by exchange pursuant to section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (2006), where it determines that the public interest will be well served by making the exchange. Section 206(a) of FLPMA states:

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.

*See also* 43 C.F.R. § 2200.0-6(b).

In addition, section 206(b) of FLPMA provides in relevant part:

The values of the lands exchanged by the Secretary under this Act . . . either shall be equal, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary concerned as the circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership.

43 U.S.C. § 1716(b) (2006). Under 43 C.F.R. § 2200.0-6(c), “lands or interests to be exchanged shall be of equal value or equalized in accordance with the methods set forth in § 2201.6 of this part,” and “[a]n exchange of lands or interests shall be based on market value as determined by the Secretary through appraisals . . . .” *See also* 43 C.F.R. § 3436.2-3 (“Exchanges shall be made on an equal value basis . . . .”); 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.”).

In *National Parks & Conservation Ass’n v. BLM*, 606 F.3d 1058 (9th Cir. 2010), the Court of Appeals for the Ninth Circuit reviewed whether an appraisal complied with section 206 of FLPMA and the implementing regulations, and stated that an appraisal used in an exchange must

set forth an opinion regarding the market value of the lands “supported by the presentation and analysis of relevant market information.” 43 C.F.R. § 2200.0-5(c). Market value “means the most probable price . . . that lands or interests in lands should bring in a competitive and open market . . . where the buyer and seller each acts prudently and knowledgeably.” 43 C.F.R. § 2200.0-5(n). “In estimating market value, the appraiser shall: (1) Determine the highest and best use of the property to be appraised”; and “(2) Estimate the value of the lands and interests as if in private ownership and available for sale in the open market.” 43 C.F.R. § 2201.3-2(a)(1)-(2). “Highest and best use means the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser’s supported opinion.” 43 C.F.R. § 2200.0-5(k).

606 F.3d at 1066; see BLM Answer at 10.

Alan K. Stagg, of Stagg Resource Consultants, Inc., and his multi-disciplinary team of mineral economists, mining engineers, and other appraisal professionals (the Stagg Team), prepared comprehensive multi-volume appraisals of the Ashenhurst Tract and the Nance-Brown Tract. The Stagg Team determined that the highest and best use of the property was to lease the Federal coal estate underlying the Ashenhurst Tract to Westmoreland Coal Company (Westmoreland), the owner and operator of the adjacent Rosebud Mine. See Ashenhurst Appraisal at 31, Appended as Ex. C to Westmoreland’s Answer.<sup>2</sup> After considering the sales comparison, cost, and

---

<sup>2</sup> By order dated Feb. 28, 2012, the Board granted Westmoreland’s motion to intervene. Westmoreland states that “[t]he appraisal information may not be disclosed except pursuant to 43 C.F.R. [§] 4.31.” Westmoreland’s Answer at 4 n.2. By order dated Apr. 5, 2012, the Board granted the Stipulated Motion for Limiting Disclosure of Confidential Information submitted by Ashenhurst, Westmoreland, and Nance-Brown pursuant to 43 C.F.R. § 4.33 concerning two categories of information: the appraisals of the Ashenhurst Tract and the Nance-Brown Tract and a cultural  
(continued...)

income valuation methods for appraising the Ashenhurst Tract, the Stagg Team concluded that the income approach provided the best valuation method in these circumstances. *Id.* at 28; *see* BLM Answer at 11. The income valuation approach relies on a cash flow projection for mining the coal and then discounts the flow to account for the time value of money and associated risk. *Id.* at 27. Of significance to Ashenhurst’s arguments on appeal, the Stagg Team’s cash flow analysis “assumed the operator would be paying . . . surface disturbance royalties for production.” *Id.* at 80. Those “[s]urface disturbance royalties were assumed to be 2.0 percent of the selling price.” *Id.* at 81; Appendix L (incorporating 2% royalty into projection). The Stagg Team valued the Federal coal estate in the Ashenhurst Tract at \$5,573,000 and valued the AVF fee coal in the Nance-Brown tract at \$5,536,000, creating a difference of \$37,000. *See* DR/FONSI at 17, appended to Westmoreland’s Answer as Ex. D. BLM’s Review Appraiser, Phillip Perlewitz, approved the Stagg Team’s appraised values for the Ashenhurst Tract and the Nance-Brown tract. *Id.*

Ashenhurst has not submitted its own appraisal showing what it would consider to be the fair market value of the Federal coal underlying the Ashenhurst Tract. “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.” *E.g., Ted Lapis*, 178 IBLA 62, 70 (2009); *Shasta Coalition*, 172 IBLA 333, 349 (2007); *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).

Rather, as noted, Ashenhurst’s central argument is that the Stagg Team overvalued the Federal coal underlying the Ashenhurst Tract because it failed to take into account Montana’s statute regarding surface owner consent. BLM asserts that “[t]his allegation is conclusory and is not supported by any proof of error in the appraisal methodology,” and that “the Ashenhurst appraisal took into account the cost of acquiring the consent of the surface owner in determining the value of the coal, to the extent required by generally accepted appraisal standards.” Answer at 10. As discussed below, we agree with BLM’s conclusion that the Stagg Team

---

<sup>2</sup> (...continued)

resources survey. The Board ordered copies of the appraisals to be served on Ashenhurst. In its Reply to the Answers submitted by Westmoreland and Nance-Brown, Ashenhurst does not point to any shortcoming in the two appraisals, other than to reiterate its view that the appraisal of the Ashenhurst Tract was deficient in not taking into account Mont. Code Ann. § 82-2-203. We reject Ashenhurst’s surface owner rights argument in this decision.

properly accounted for Ashenhurst's surface owner rights in arriving at the market value of the Federal coal underlying the Ashenhurst Tract.

In applying the income approach, the Stagg Team specifically considered production damage payments to the surface owner for the temporary loss of the surface of the Ashenhurst Tract.<sup>3</sup> Ashenhurst Appraisal, Vol. I, at 80-81; Ashenhurst Appraisal, Vol. III, Appendix L, at 7-8. Using "standard appraisal methodology," BLM states that "those payments were included in the derivation of the coal selling price." Answer at 11; Ashenhurst Appraisal, Vol. I, at 119 (Table 23). The Ashenhurst Appraisal calculates the "production royalty" at 14.5%, which is comprised of a royalty of 12.5% to the owner of the coal plus 2% for production damage payments to the surface owner.

BLM contends that the Stagg Team "used the appropriate standard to calculate the surface disturbance royalties, which valued the compensation due the surface owners for the temporary loss of their surface." Answer at 11. BLM states that the Ashenhurst Appraisal, in setting surface disturbance royalties, "did not assign, and should not have assigned, any value for the coercive leverage Ashenhurst Ranch claims because of an alleged surface owner right to extract such concessions." *Id.* BLM asserts that "[t]he Department has expressly rejected such an expansive argument." *Id.* (citing Opinion of the Solicitor, *Coal Leasing Program – Relationship of the Cost of Surface Owner Consent to Receipt of Fair Market Value for Federally Owned Coal*, 86 I.D. 28 (M-36909 Jan. 15, 1979). In that Opinion, the Solicitor concluded "that the indirect limitation of surface owner consent prices—through assumption of a limited consent cost in the computation of the fair market value of the coal which must be bid before a lease can be issued—would be completely consistent with SMCRA." 86 I.D. at 36. BLM notes that the Solicitor's Opinion was drafted in the context of Federal coal leasing, but states that "the analysis is the same—the BLM must ensure the United States receives fair market value for the coal estate, either through a Federal coal lease or an equal value exchange."<sup>4</sup> Answer at 12. We agree. The

<sup>3</sup> BLM notes that these payments are referred to in the appraisal as both "surface disturbance royalties" and "production damage payments-surface leases." BLM Answer at 11.

<sup>4</sup> BLM notes that the Solicitor's Opinion was eventually adopted in the regulations. See 43 C.F.R. § 3427.0-3(b). Compare BLM's coal leasing regulations at 43 C.F.R. § 3400.0-5(n) ("Fair market value means that amount in cash, or on terms reasonably equivalent to cash, for which in all probability the coal deposit would be sold or leased by a knowledgeable owner willing but not obligated to sell or lease to a knowledgeable purchaser who desires but is not obligated to buy or lease.") with BLM's exchange requirements at 43 C.F.R. § 2200.0-5(n) ("*Market value* means the  
(continued...)

Solicitor's reasoning, quoted below, undercuts Ashenhurst's argument that the Stagg Appraisal's approach to assigning a monetary value to Ashenhurst's rights as surface owner of the Ashenhurst Tract was improper:

Since the fair market value is calculated prior to the opening of bids in order to set the minimum acceptable bid, the actual consent price would be unavailable to the Department at the time of the calculation. It follows that, in the procedure contemplated by the Senate Committee, *an amount other than actual consent cost **must** be used to find fair market value. The natural method of computing this alternative amount is appraisal of the surface estate, its likely damages and losses to the surface operation.* Determination of the losses and costs to be incurred by the surface owner due to the mining operation is the economically sound method of assigning a value to the consent, and what we must conclude the Senate committee had in mind in this scenario.

86 I.D. at 36-37 (emphasis added). The Solicitor concluded that to "ensure a fair return to the public from federally leased coal under privately owned surface," the Secretary may "use, *as the cost of surface owner consent, the amount of damages resulting from disruption of the surface estate or a similar figure rather than the actual payment which a surface owner has received or may receive for his consent.*" *Id.* at 37 (emphasis added).

We agree with BLM that, in order to assign a market value to both the Federal and non-Federal properties, the Ashenhurst Appraisal was based upon the expert opinion of the Stagg Team in establishing surface disturbance royalties. That Appraisal properly accounted for the likely damages and loss of use of the surface estate in determining the market value of the Federal coal estate of the Ashenhurst Tract. We find no authority for Ashenhurst's argument that its surface estate should command a higher premium than that assigned in the Ashenhurst Appraisal. Ashenhurst relies upon section 714(g) of SMCRA, 30 U.S.C. § 1304(g) (2006), in arguing that the price for obtaining their consent should reduce the value of the Federal coal underlying their surface estate. Section 714(g) of SMCRA provides that "[n]othing in this section shall be construed as increasing or diminishing any property rights by the United States or any other landowner." *Id.* Based upon the

---

<sup>4</sup> (...continued)

most probable price in cash, or terms equivalent to cash, that lands or interests in lands should bring in a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence.").

Solicitor's Opinion just discussed, we agree with BLM that any leverage this section may provide to the surface owner in obtaining a higher price for their consent should not be reflected in a reduced market value of the Federal coal estate. As stated in the Protest Dismissal, section 714(g) of SMCRA does not provide the type of property right that Ashenhurst appears to claim should have been uniquely valued. Decision at 3-4. We agree with BLM that section 714(g) of SMCRA does not provide a basis for valuing Ashenhurst's surface differently than the Nance-Brown Tract. BLM Answer at 14.

Similarly, we reject Ashenhurst's argument, relying upon section 714(g) of SMCRA, that BLM should have included a deed provision carrying the claimed surface owner protections forward in the proposed exchange. As the Montana State Director observed in his Decision, Ashenhurst raised "these same concerns throughout the exchange process, both in formal comments submitted to the BLM and in informal meetings and conversations with the BLM staff." Decision at 3. BLM addressed Ashenhurst's concerns both in the EA and the Decision Record. In the Decision Record, BLM explained the significance of a transfer of ownership of Federal coal through sale or exchange, as opposed to a lease of the Federal coal:

When Federal coal is considered for a lease, Section 714 of SMCRA and the implementing regulations require the submission of evidence of written owner consent to enter and commence surface mining from a qualified surface owner. 30 U.S.C. § 1304(c); 43 CFR subpart 3427. However, if the Federal coal estate is transferred to a private owner through exchange or disposed of in a manner other than a Federal coal lease, a qualified surface owner may not have the same protections under state law.

Decision Record at 6 (footnote omitted). BLM further explained that "Congress did not intend to create any property right for the surface owner when it enacted Section 714(g) of SMCRA." *Id.* In the Opinion previously discussed, the Solicitor addressed this very point, stating: "The danger foreseen was that the surface owner could, in effect, assert through the consent provision an interest very much like a salable property interest in the mineral estate. This is an interest which the surface owner has never had in Federal coal and which Congress did not intend to transfer to the surface owner under sec. 714(g) of SMCRA." 86 I.D. at 34.

In rejecting Ashenhurst's contention that BLM should have included a deed provision carrying forward its claimed surface owner protection, the Montana State Director stated that "to the extent that state law protections apply to the property following transfer, any state-law protections would continue to apply if the Federal

coal is transferred to a private party.” Decision at 4.<sup>5</sup> Ashenhurst does not cite to any authority for its argument that surface owner protections afforded by Mont. Code Ann. § 82-2-303 should be included in the deed conveying the Federal coal to Nance-Brown. Again, Ashenhurst’s position was considered and rejected in the Decision Record approving the Exchange:

The BLM may attach reservations or restrictions to the deed as needed to protect the public interest. 43 CFR 2200.0-6. BLM policy dictates that these restrictions should generally be used only “on Federal land conveyed into non-Federal ownership . . . where required by law or executive order, clearly supported by the environmental documentation and closely coordinated with the Field or Regional Solicitor.” Land Exchange Handbook, H-2200-1, at 6-4. . . . In this instance, restrictions or reservations are not required by law or executive order . . . .

Decision Record at 7. In denying Ashenhurst’s protest, BLM determined that “deed restrictions are not required by law or executive order,” and that its decision to approve the Exchange “is in conformance with its Land Exchange Handbook.” Decision at 5. Further, BLM stated that its decision is in accordance with 43 C.F.R. § 2200.0-6, which states that reservations or restrictions are to be included when needed “to protect the public interest.” We agree with BLM that the Decision Record “reveals that BLM engaged in a thorough and robust public interest analysis.” *Id.*; see Decision Record at 4-10. “Indeed,” BLM states, “nearly two full pages of the Decision Record are devoted to the public interest aspects of surface owner protection.” Decision at 5. BLM determined that the public interest did not require deed reservations or restrictions, and that “BLM properly considered multiple public interest factors, not just Ashenhurst’s particular interests.” *Id.*

We see no merit to Ashenhurst’s argument that by ordering BLM to complete the proposed exchange, the U.S. District Court deprived BLM of its lawful powers and

---

<sup>5</sup> BLM notes that Montana State law surface owner consent provisions apply whether the coal to be mined is Federally or privately owned. BLM Answer at 14 (citing Mont. Code Ann. § 82-2-303 (“Before commencement of any work or operations on any such lands, such person must first obtain from the surface owner of private land specific written approval of the proposed work or operations.”)). This provision must be read with section 510(b)(6) of SMCRA, 30 U.S.C. § 1260(b)(6) (2006), which requires, as a condition of approval of a permit to conduct surface coal mining operations, “the written consent of the surface owner to the extraction of coal by surface mining methods.”

discretion, and made a sham of BLM's public interest determination. As BLM explained in its Decision Record, and again in the decision on appeal, the District Court mandated a schedule for the completion of the exchange, but left to BLM "all of its discretion with respect to the mechanics of the exchange." Decision at 6. In fact, as pointed out by BLM, because the Court's initial scheduling order did not leave BLM sufficient time to consider the public interest as required by the regulations, the Government requested the Court to amend its order. See Ex. 5 to BLM Answer, *Nance v. Kempthorne*, No. CV-06-125-BLG-RFC, Motion to Reconsider Scheduling Order (D. Mont. Apr. 20, 2009 (unpublished)). The Court granted the motion.

In responding to Ashenhurst's contention that the District Court's order made a sham of BLM's public interest consideration, BLM made the following observation:

By making AVF fee coal exchanges mandatory, Congress effectively determined that the acquisition of the non-Federal AVF fee coal is in the public interest. See *Nance v. Kempthorne*, No. CV-06-125-BLG-RFC at 17 (D. Mont. May 29, 2008) (order re motions for summary judgment) ("The idea that SMCRA coal exchanges must first be declared to be in the public interest is in direct conflict with the fact that [AVF] fee coal exchanges are mandatory."); see also *Texaco Inc. v. Andrus*, Civil No. 79-2448 (D.D.C. August 15, 1980) (holding that the Secretary could not decline to consummate an exchange . . . because the exchange would not serve the public interest.). Indeed, BLM removed a previous regulatory requirement that required the Secretary to determine whether the acquisition of AVF fee coal was in the public interest. See 46 FR 61390, 61400 (Dec. 16, 1981) (proposed rule); 47 FR 33114 (July 30, 1982) (final rule). Thus, BLM need not make a public interest determination of the non-Federal AVF fee coal as it is deemed to be in the public interest.

Decision Record at 5. As held by the District Court, and as BLM acknowledged in its Decision Record, section 510(b)(5) of SMCRA makes mandatory the acquisition of coal determined to be unsuitable for mining because it is AVF fee coal. Moreover, in acquiring the Nance-Brown AVF fee coal, BLM acted pursuant to the District Court's order.

With regard to public interest considerations for exchanging the Federal coal underlying the Ashenhurst Tract, the Decision Record "clearly lays out the regulatory framework for the public interest determination (*id.*, p. 4), and discusses and analyzes the factors used in making the determination regarding the Federal coal to be exchanged (*id.*, pp. 5-10)." Decision at 6. The record in this case, including the documents pertaining to BLM's NEPA review, as well as the multi-volume appraisals

prepared by the Stagg Team, shows that BLM saw its paramount responsibility under section 206 of FLPMA and the implementing regulations as ensuring the Exchange to be in the public interest. As stated in the Decision Record, acquisition of the Nance-Brown AVF fee coal is by definition in the public interest under section 510(b)(5) of SMCRA. The Decision Record then reviews the public interest considerations for exchanging the coal underlying the Ashenhurst Tract, devoting extensive attention to surface owner protection issues and environmental concerns. *Id.* at 5-10. The summary of BLM's public interest determination itself is indicative of the scope and detail of the review it conducted under section 206 of FLPMA, 43 U.S.C. § 1716 (2006). *Id.* at 10.

Ashenhurst challenges the adequacy of BLM's NEPA compliance on the basis that the EA was prepared before the appraisal, which, according to Ashenhurst, means that BLM could not have adequately considered all relevant factors as required by NEPA. However, we agree with BLM that "Ashenhurst Ranch neither identifies any requirement that BLM needed to make the appraisals available for public comment during the NEPA process nor identifies which *environmental* factors in the appraisals BLM allegedly failed to consider in its NEPA analysis." BLM Answer at 20. Ashenhurst raised this same argument in its protest, and BLM properly disposed of the issue in its Decision:

Ashenhurst also asserted that the appraisals are "critical to the agency's public interest determination; and that, while the EA references the importance of the appraisals in the exchange process, "the appraisals were not completed until long after the EA was completed." Letter, p. 3. First, to the extent that the appraisals only value the Federal and non-Federal coal estates to be exchanged, they have little or no bearing on the public interest factor pertaining to surface owner protection, the primary subject of Ashenhurst's protest. At the same time, the BLM did in fact consider the potential loss of value to surface owners as a result of the exchange. DR, pp. 6-7. Of course, the appraisals are critically important to the overall exchange process, but only inasmuch as the exchange properties must be as close as possible to "equal value." The equal value determination has little to do with the public interest determination. Thus, the fact that the appraisals were completed after the EA does not compromise the EA or the NEPA process in any way. There is nothing in the appraisals that the BLM needed to know, or was required by law to consider, in order to take the requisite "hard look" at the proposed action required by NEPA.

Decision at 7. We agree with this analysis.

Ashenhurst fails to identify what information from the appraisals BLM should have considered in the EA. As noted by BLM, the Board has stated:

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.

*Peter J. Mehringer*, 177 IBLA 152, 167 (2009). Ashenhurst has not met this burden. To the contrary, the record shows that BLM was “fully informed regarding the environmental consequences of [its] action, that the resource values to be lost by deeding of Federally-owned lands are balanced against the value 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 13, 20-21 (2000); *see also Shasta Coalition for the Preservation of Public Land*, 172 IBLA 333, 343 (2007).

Ashenhurst requests a fact-finding hearing, outlining in its motion the specific facts that require a hearing and the evidence that must be presented by oral testimony subject to cross-examination. The factual issues enumerated by Ashenhurst are based upon the arguments that we have considered and rejected in this opinion, and that were previously rejected by BLM in the Decision Record approving the Exchange, and in BLM's decision dismissing Ashenhurst's protest. 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)). Ashenhurst identifies no question of material fact that has not or 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).

To the extent not specifically addressed herein, any other arguments raised by Ashenhurst 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 decision appealed from is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge