

BELCO PETROLEUM CORP.

IBLA 94-684

Decided December 5, 1997

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying a proposed coal lease exchange. WYW0322794.

Reversed and remanded.

1. Act of October 30, 1978—Coal Leases and Permits: Leases—Exchanges of Land: Generally

Under the regulations at 43 C.F.R. Subpart 3435, which were promulgated to implement, *inter alia*, the Act of Oct. 30, 1978, Pub. L. No. 95-554, 92 Stat. 2073, a coal lease exchange proposal shall be evaluated in terms of whether the exchange is in the public interest. A decision by BLM rejecting an exchange proposal submitted under that Act because the tracts are not of equal value and, therefore, not in the public interest, based on BLM's assessment of the bonus bid value for each tract, will be reversed where the record establishes that neither tract would attract a bonus bid.

2. Act of October 30, 1978—Coal Leases and Permits: Leases—Exchanges of Land: Generally

When the public interest in completing a coal lease exchange is evaluated based upon the seven factors established by BLM in its Manual at 3435.06A Appendix 1, page 1, and the cumulative effect of those factors is positive, an exchange is appropriate.

APPEARANCES: Thomas E. Ebzery, Esq., Billings, Montana, for Appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On March 11, 1987, this Board issued a Decision, Belco Petroleum Corp., 96 IBLA 126 (1987), vacating and remanding a May 3, 1985, Decision of the Wyoming State Office, Bureau of Land Management (BLM), denying a proposal by Belco Petroleum Corporation (Belco) to exchange Federal coal

lease WYW0322794, known as the Belco tract, in Johnson County, Wyoming, for land known as the Hay Creek tract in Campell County, Wyoming. Belco had made its proposal pursuant to the Act of October 30, 1978, Pub. L. No. 95-554, 92 Stat. 2073 (the Act or Pub. L. No. 95-554). The Board found that BLM's denial was arbitrary and capricious and remanded the case for BLM to make a public interest determination regarding the proposed exchange.

In a Decision dated June 10, 1994, the Acting Wyoming State Director, BLM, again denied Belco's proposal finding that the proposed exchange was not in the public interest for the principal reason that the tracts proposed for exchange were not of equal value. Belco has appealed.

#### Background from Lease Issuance to Board Remand in 1987

Although the background of the applicable legislation and regulations is discussed extensively in our earlier Belco Decision, we will briefly summarize it here. The United States issued, effective January 1, 1970, preference right Federal coal lease WYW0322794, a part of which was crossed by Interstate Highway 90 (I-90). Belco obtained its interest in the lease by assignment approved by BLM, effective July 1, 1970. Under Pub. L. No. 95-554, Congress, in 1978, authorized the Secretary of the Interior, inter alia, to issue a lease for coal in the State of Wyoming to the owner of Federal coal lease WYW0322794 upon the surrender and relinquishment of such lease or portion thereof.

The rationale for Congress' action is found in the following language in the Congressional Record:

[This] exchange would permit several Wyoming leaseholders to surrender all or portions of existing leases which underlie Interstate Highway 90 and two State highways. This exchange will eliminate a dispute, possible litigation, and costly rerouting of the existing roads which might occur if the existing leases were developed.

124 Cong. Rec. 33,283 (1978). Congressional action was precipitated by the passage, on August 7, 1977, of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1994), section 522(e)(5) of which effectively precluded surface coal mining operations within 100 feet of the outside right-of-way of a public road, subject to valid existing rights. 30 U.S.C. § 1272(e)(5) (1994).

Section (1)(c) of Pub. L. No. 95-554 required that any lease issued by the Secretary be of equal value with the lease or portion thereof to be exchanged or be within 25 percent of equal value such that funds could be received or paid out to equalize values. However, section (1)(e) provided that the Secretary was not required or obligated "to take any action or to make any commitment to a lessee or lease applicant with respect to issuance, administration, or development of any lease." 92 Stat. 2073 (1978).

Subsequently, BLM, the United States Geological Survey, and Belco entered into an agreement (Agreement), executed in final form on March 2, 1982, which provided for "an evaluation and full examination of the need for and possible merits and benefits which might flow from issuance of a coal lease" in exchange for relinquishment of WYW0322794 pursuant to Pub. L. No. 95-554. The Agreement specifically provided in section 1(a) that the parties would "proceed in a diligent manner and in good faith to make such an exchange by December 1, 1983, subject to a finding by the BLM that the exchange is in the public interest."

Regulations at 43 C.F.R. Subpart 3435 promulgated by the Department to implement several Federal statutes, including Pub. L. No. 95-554, have as their stated objective

to provide methods for exchange of coal resources when it would be in the public interest to shift the impact of mineral operations from leased lands or portions of leased lands to currently unleased lands to preserve public resource or social values, and to carry out Congressional directives authorizing coal lease exchanges.

43 C.F.R. § 3435.0-1.

The regulations at 43 C.F.R. § 3435.2(c) require, even where Congress has authorized an exchange, that the Secretary "evaluate each qualified exchange request and determine whether an exchange is in the public interest."

As we stated in our earlier Belco Decision at 96 IBLA at 131-32,

in one sense Congress in enacting P.L. 95-554 was determining that the public interest would be served by avoiding a "dispute and possible litigation" by allowing exchange of certain leases. However, the legislation did not mandate that any particular exchange be completed and, thus, reserved to the Secretary the discretion whether to proceed. The only standard established by the Secretary to evaluate an exchange proposal was whether it was in the public interest, the standard incorporated in both the Agreement and the regulations at 43 CFR 3435.2(c).

#### Background from 1987 to Issuance of the 1994 BLM Decision

Following remand of the case by the Board, BLM contacted Belco by letter dated May 13, 1987, and inquired whether Belco desired to pursue the exchange. By letter dated May 28, 1987, counsel for Belco informed BLM that Belco desired to pursue an exchange for the Hay Creek tract in an expeditious manner. On July 29, 1987, counsel for Belco met with BLM officials to discuss the proposal and, pursuant to an agreement reached at that time, submitted a letter dated August 28, 1987, to the Wyoming State Director providing Belco's input concerning the "method or methods" to be used

by BLM in its evaluation of the tracts. Belco suggested "for comparable sales purposes, or possibly a discounted cash flow analysis," that BLM consider the time at which the Act was passed "and possibly a 1982 period which was the exchange period in the Memorandum of Understanding [(MOU), i.e., the Agreement]." Counsel for Belco further stated that the letter would serve to "trigger" the evaluation, which BLM had indicated would be completed in draft form in approximately 60 days following receipt of his letter.

On September 9, 1987, the State Director acknowledged receipt of counsel's letter and stated that BLM intended to complete economic evaluations of the tracts. He stated, "To this end, we appreciate your suggestions on various approaches to our economic evaluation." In a letter dated February 18, 1988, the State Director assured counsel that "evaluating this exchange is the very top priority for the Northwest Regional Evaluation Team [NRET] and for BLM employees in our Casper District Office." <sup>1/</sup>

By memorandum dated August 11, 1988, the Casper District Manager forwarded to the State Director a "preliminary [environmental] assessment" of the exchange. As explained in the memorandum, "this document is preliminary to the site specific environmental assessment which will be prepared once the economic determinations have been made." The assessment itself stated that "[t]he purpose of this assessment is to identify appropriate options that could be considered if the exchange is determined to be in the public interest, one of which may be obtained by BELCO in exchange for the 190 lease." (Preliminary Assessment at 1.) <sup>2/</sup>

On October 13, 1988, counsel for Belco sent a letter to the State Director stating that it had "been 2 1/2 months since I received your letter explaining the delays involved in preparing the required evaluations of the Belco and Hay Creek Tracts." <sup>3/</sup> He explained that Belco had fulfilled all its obligations, including submitting comparable sale data, and he voiced his frustration with the slow pace of the evaluation process. He also appended a copy of his August 28, 1987, letter in which he had proposed various evaluation methods. In response, the Associate State

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<sup>1/</sup> The State Director stated that this letter was in response to counsel's letter to BLM dated Dec. 23, 1987. We did not find the Dec. 23, 1987, letter in the administrative record forwarded to this Board by BLM. Within 10 working days of receipt of the notice of appeal, BLM is required to transmit to the Board the complete, original record. Michael E. Burns, 139 IBLA 7, 8 (1997); Great Western Onshore, Inc., 133 IBLA 386, 396 (1995); BLM Manual 1841.15 A, Release 1-1571, Dec. 4, 1989.

<sup>2/</sup> Following comments by the Wyoming State Office, the Casper District Office prepared the "Preliminary Environmental Assessment Belco Lease Exchange," dated November 1988.

<sup>3/</sup> We did not find the State Director's letter explaining the delays in the administrative record forwarded to this Board by BLM.

Director informed counsel by letter dated December 7, 1988, of the progress regarding the environmental assessment and that "[c]urrent plans are to have the geologic report for Belco completed by December 9, 1988 and the Hay Creek geologic report in early January." No mention was made of the economic evaluations.

Having heard nothing further from BLM, counsel for Belco, by letter dated February 28, 1989, requested a status report on the exchange from the State Director. The Casper District Office responded to that letter on March 28, 1989, apologizing for "the delay of the scheduled completion of the geologic reports," which it predicted would be completed by May 1, 1989.

On May 3, 1989, the Acting Casper District Manager forwarded the geologic reports to the Wyoming State Director, along with Belco's economic evaluation report completed by an independent engineering firm, IntraSearch, Inc., in May 1983. Also, by letter of the same date, the Acting Casper District Manager informed counsel for Belco that the BLM geologic reports had been forwarded to the State Office.

On June 2, 1989, this Board issued an Order in Belco Petroleum Corp., IBLA 87-199, requesting a status report on the exchange proposal so that it could determine whether the appeal docketed as IBLA 87-199 was ripe for review.<sup>4/</sup> The BLM responded in a letter dated June 23, 1989, detailing its progress in completing the evaluations and serving a copy on counsel for Belco.

On September 5, 1989, counsel for Belco wrote to the State Director stating that he had not heard anything regarding the exchange since his receipt of a copy of the June 23, 1989, letter. He inquired regarding the status of "economic reports on the offered and selected coal." He also enclosed a copy of his August 28, 1987, letter discussing various evaluation methods and asked, again, that it be considered.

By letter dated September 18, 1989, BLM responded: "Please be advised that the Bureau's Northwest Regional Evaluation Team (NRET) is actively preparing a preliminary economic evaluation on Belco's proposed coal lease exchange."

In a letter to the Wyoming State Director, dated November 22, 1989, counsel for Belco raised, inter alia, two matters. First, he explained that, in an August 22, 1983, letter to BLM, Belco had proposed that "the 400 million plus [ton] Hay Creek Tract be redelineated in view of the fact that Belco would be requesting significantly less tonnage," based on the fact that a "5:1 stripping ratio would reduce our economically viable reserve calculation to the 170 million ton range." Thus, Belco had proposed an exchange of 170 million tons of coal from the Belco tract with

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<sup>4/</sup> In the appeal docketed as IBLA 87-199, Belco appealed a Nov. 24, 1986, Decision denying its application for suspension of coal lease WYW0322794 and extension of the due diligence requirements.

100 million Hay Creek tons. Counsel stated: "We never received a response to this proposal, so for the record I am renewing this 1983 proposal."

Second, counsel referenced the economic evaluation prepared for Belco in 1983 by the independent engineering firm, IntraSearch, Inc., of Billings, Montana. He stated that the report, which had been submitted to the Casper District Office, "apparently got lost in the shuffle and was apparently never reviewed or formally acknowledged. I am formally requesting once again that this report be reviewed as part of the economic evaluation." He offered to have the report revised to reflect conditions as of the date of passage of SMCRA and as of the date of Pub. L. No. 95-554. He asked to be advised if BLM wanted the revisions to be done or "whether you are able to extrapolate 1977 and 1978 assumptions from it."

On December 11, 1989, the Wyoming Associate State Director responded:

As you may be aware, there is no provision for tract redelineation required by the Belco/Departmental agreement of 1989 [sic]. Step 9 of that agreement calls for a preliminary economic evaluation of the Hay Creek tract, without mention of redelineation. The practicality and appropriateness of any redelineation of the Hay Creek tract is yet to be determined because it is somewhat dependent upon the preliminary economic evaluation of the entire Hay Creek tract.

Tract redelineation may or may not be appropriate in the future.

The Associate State Director also stated that the IntraSearch report had not been lost and was being considered by NRET as part of the economic evaluation.

In a letter dated July 3, 1990, counsel for Belco stated that he was in receipt of a recent letter from BLM, "which in effect is a response to my questions of May 16, 1990 regarding BLM's progress in calculating the reserves in both tracts, and preparing a preliminary economic evaluation. Both steps are required by the 1981-82 MOU and provide for Belco comment on each." <sup>5/</sup> In its letter, BLM had apparently informed counsel for Belco that it would be using 1990 economic data to evaluate the tracts. Counsel responded:

Section 9 [of the MOU] does indeed state that the ". . . preliminary evaluations shall be conducted in accordance with Departmental regulations and appraisal procedures in use at the time the evaluations are conducted."

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<sup>5/</sup> We did not find counsel's letter of May 16, 1990, or BLM's letter responding thereto in the administrative record forwarded to this Board by BLM.

My first response is that the MOU contemplated and even required that U.S.G.S./BLM complete its work within 12 months and would value those lands either on the date of execution of the MOU, or passage of P.L. 95-554, October 1978). The Whitney decision [Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394 (Cl.Ct. 1989), aff'd, 926 F.2d 1169 (Fed. Cir. 1991)] makes a compelling case for date of taking, which in our case is August 3, 1977 (the date SMCRA was passed containing Section 522(e), 30 U.S.C. §1272(e) [sic] (1982), which prohibits mining within 100 feet of a public highway).

The same M.O.U. required that preliminary economic evaluations be conducted by July 1, 1982. To now come back 8 years later and say the agency will conduct a preliminary economic evaluation of two coal tracts 12 years after Congress deemed that one of those tracts would be adversely affected by I-90 makes little sense and [is] contrary to the intent of P.L. 95-554.

It is now apparently your position that the evaluations be conducted in 1990 under guidelines you have recently adopted.

The BLM responded on July 16, 1990, by providing counsel for Belco with a copy of a preliminary economic evaluation and copies of the two BLM geologic reports. <sup>6/</sup> It also enclosed a copy of the BLM Manual guidelines for coal exchanges, which had been issued effective November 2, 1987, stating: "Please understand that this enclosed manual, as well as 43 CFR 3435, call for public interest determinations in the present tense, so the Bureau is not willing to conduct economic evaluations or public interest determinations for historical dates in time as you suggest." <sup>7/</sup>

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<sup>6/</sup> The copy of the preliminary economic analysis in the record bears no title. It is undated, unsigned, and is 19 pages in length.

<sup>7/</sup> The BLM Manual provision, 3435.06A Appendix 1, page 1, Release 3-184, set forth seven public interest factors to be considered in a coal lease for coal lease exchange. Under that provision, the "offered lease tract," i.e., the tract offered in exchange for relinquishment of the existing Federal lease, would be considered acceptable for exchange if the "cumulative effect" of the seven factors is "positive." Those factors are: (1) tracts are of equal value or have values within 25 percent of the existing Federal lease; (2) the exchange serves a natural resource management or protection need; (3) the exchange would not result in the acquisition by the Federal Government of a lease with no present value; (4) the offered lease tract does not have significant competitive coal leasing potential; (5) public comments generally support the exchange as filling a public need, such as environmental protection or local economic development; (6) the exchange conforms to the National Environmental Policy Act (NEPA) goals, policies, and objectives, "as determined through the environmental analysis process, including a full examination of all available alternatives to the exchange;" and (7) both tracts are located in the same state.

On October 17, 1990, counsel for Belco filed 28 pages of comments on BLM's preliminary economic evaluation. In a cover letter, dated October 12, 1990, accompanying the comments, he summarized Belco's objections to the analysis and its concerns with the geologic reports. Specifically, he raised objections to BLM's selection of 1990 as the date of evaluation of the tracts, its failure to acknowledge the 1983 IntraSearch economic report, and its failure to consider redelineation. Counsel stated:

BLM appears to conclude and continues to insist that the tract not be redelineated until a later date. Why? However, Belco was advised by BLM that Hay Creek would be redelineated as its current configuration was the work of the RCT [Regional Coal Team] in preparation for the 1982 lease sale. We were told by BLM in 1980 and 1981 to select a tract simply as a reference point to utilize in the MOU process. We selected Hay Creek with two other alternatives. The MOU itself actually mentions a portion of the tract which clearly verifies our position that it would be redelineated and downsized. This is precisely the reason Belco agreed to expend sums to drill additional Hay Creek holes. Finally, we submitted a tract delineation proposal in August of 1983 and to this date, BLM has failed to acknowledge the proposal. To go one step further, we even renewed this to BLM after BLM was overturned by IBLA. Still no acknowledgement. For the third time we renew it once again. Belco also suggests in view of the size of the tracts, that the tracts be valued on a per acre or per ton basis. Once the number is obtained, it can be compared with Hay Creek on the same basis. Then, if a disparity results, it can be reflected in an exchange of acres or tons weighted in number according to value.

On January 28, 1991, counsel for Belco wrote to the Wyoming State Director, BLM:

I am in receipt of your letter of December 14, 1990 which is in response to my letter of November 6, 1990 expressing continued concerns about the preliminary economic evaluation conducted by the NRET as well as the dates for evaluation. [8/]

Although you continue to argue for use of the present tense for valuing the properties involved in the exchange, I respectfully disagree and believe the arguments I have raised in this matter will be compelling, if not before the BLM, then another tribunal.

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8/ We did not find counsel's Nov. 6, 1990, letter or the State Director's Dec. 14, 1990, response in the administrative record forwarded to this Board by BLM.

I again urge you to look at the history of this exchange, why the exchange was made; the importance of alternative methods of coal development in the early 1980's and the strong market for coal in the region. If BLM would have completed its requirements in 1982 and 1983 as the MOU executed between the parties dictated, this would be a moot point.

We are pleased that you did acknowledge the geologic discrepancies in the preliminary geologic report.

On April 22, 1991, counsel for Belco again wrote to the Wyoming State Director to inform him regarding a meeting that Belco's independent consulting geologist, Arnold Cunningham, had had with Casper District Office personnel on February 20, 1991. Counsel enclosed a copy of a March 5, 1991, letter from Cunningham, following his meeting, in which Cunningham outlined a proposed course of action. Counsel stated: "In reference to 'BLM Proposed Course of Action' on page 3 of the [Cunningham] letter, I would concur in same and stand willing to discuss this matter with you or designees in Cheyenne at your convenience." The Cunningham letter discussed the "BLM Proposed Course of Action," as follows:

As previously discussed, our meeting concentrated on the Belco Buffalo Tract reserves in order to come to a Buffalo Tract reserve base which could be used for negotiation of reserves of a negotiated similar nature in the Gillette area.

Such negotiable reserves would be determined by arriving at a reasonable reserve base with a number somewhere between the BLM (April 1989) Geologic Report, Table 17, Comparison of Coal Reserve Estimates, page 25. Such a number would ideally be an average between the BLM 137,059,450 tons and Belco study 184,500,000 tons. Consideration for quality would be determined by the information discussed in the "Additional Discussion" supplement to the April, 1989 geologic report prepared by BLM on December 21, 1990. Both the BLM representatives and I believe that further negotiations based on these basic assumptions would provide for a much less complicated manner in which a reserve of "like coal reserves" could be delineated and designated for exchange in the Gillette area.

I believe further negotiations in the spirit of our Casper meeting would result in a positive and agreeable solution to this long overdue exchange process.

On August 26, 1991, the Board again issued an Order in IBLA 87-199, Belco Petroleum Corp., directing that BLM file a status report concerning progress on the exchange proposal. In a letter to the Board, dated September 26, 1991, the Wyoming Associate State Director, BLM, stated that he expected the NRET to complete its economic evaluation by October 30, 1991, and that the public interest determination would be completed in

FY 1992. <sup>9/</sup> Although that letter indicated that a copy had been sent to counsel for Belco, counsel stated in a letter to BLM dated December 5, 1991: "Two months ago, I requested that you send me the status report that you sent to IBLA pursuant to IBLA's August 26, 1991 Order for a Status Report. To date, this has not been received." The BLM responded in a letter dated December 20, 1991, that it had sent the report to counsel and that

[w]e now expect to complete the evaluation by December 26, 1991. BLM will then \* \* \* schedule formal public hearings to acquire the required public input to aid BLM in a determination of public interest. Our report, and notification of the hearings, will be made available to you and the general public for comment and review at the same time. Item #11 of the MOU neither provides for, nor suggests the opportunity for a review of BLM's final evaluation by Belco prior to public release.

After the public hearings, BLM will then make the "public interest" determination required by IBLA.

On January 13, 1992, BLM provided counsel for Belco with "advanced notification of BLM's internal schedule" for issuance of a public interest determination, which it stated could be finalized by September 1992 following two public hearings in April 1992. <sup>10/</sup>

On April 2, 1992, the Wyoming Associate State Director sent a letter to counsel for Belco stating: "Thank you for your letter of March 13, 1992. <sup>11/</sup> I will try to answer all of your questions." The Associate State Director proceeded to explain, *inter alia*, the necessity for public hearings, the timing of the public interest determination, and the timing of any environmental assessment compliance. He also enclosed a copy of the BLM Manual public interest factors.

In March 1992, BLM mailed out its Preliminary Public Interest Determination (PPID) to interested parties, provided notice of its availability to the public and provided notice of two public hearings on the determination, one in Buffalo, Wyoming, on May 6, 1992, and one on May 7, 1992, in Gillette, Wyoming.

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<sup>9/</sup> In a letter to counsel for Belco, dated Oct. 1, 1991, the Wyoming State Director stated that BLM had considered counsel's request that BLM "submit selected correspondence to the Interior Board of Land Appeals (IBLA)." The BLM found it unnecessary to do so. We did not find in the administrative record forwarded to the Board by BLM any "request" by counsel for Belco to which the State Director may have been responding.

<sup>10/</sup> The BLM's advance notice quotes from a letter from counsel for Belco, which we did not find in the administrative record forwarded to this Board by BLM.

<sup>11/</sup> We did not find a copy of counsel's Mar. 13, 1992, letter in the administrative record forwarded to this Board by BLM.

On May 6, 1992, counsel for Belco wrote to BLM: "I have received your fax letter dated May 5, 1992, in which you have taken the allowed 10 day extension under 43 CFR 2.17(c)." This is apparently a reference to a Freedom of Information Act (FOIA) request filed by counsel for Belco. Neither that request nor BLM's letter dated May 5, 1992, responding thereto are part of the administrative record forwarded to this Board by BLM. However, it is apparent from the May 6, 1992, letter that BLM initially refused to allow Belco to inspect the documentation supporting the PPID, that Belco subsequently filed an FOIA request, and that BLM then proposed offering some documents. Counsel for Belco states in his letter: "In view of your extension and the fact that we will likely narrow our request for documents dramatically in view of your response, I am formally advising you that we will be delaying the commitment to your proposal until May 18 and a revised request will be submitted to you." The BLM responded on May 18, 1992, stating that it was discontinuing the collection of documents to answer the FOIA request "[u]ntil receipt of additional guidance from you." In a letter dated May 20, 1992, counsel for Belco revised his FOIA request, as set forth therein.

On May 22, 1992, counsel for Belco filed written comments to the PPID asserting that the public interest would be served by the authorization of an exchange for a redelineated Hay Creek tract. 12/

On June 8, 1992, BLM acknowledged receipt of the May 28, 1992, letter withdrawing the revised FOIA request and stated: "As you are aware, we provided Mr. Cunningham an area to work in and the public records related to this exchange which are available in our office."

In a letter to counsel for Belco, dated June 19, 1992, the Wyoming State Director stated: "We received your latest letter dated June 3, 1992, in which you infer that you are renewing your previous FOIA requests (page 2, paragraph 3). Therefore, we are treating this letter as a new FOIA request." 13/ The State Director continued:

We complied with your request to allow Mr. Arnold Cunningham to review our public files, and thereby saved you the considerable expense of having BLM perform that task. However, your request, as we understand it (e.g., page 2, paragraphs 1 and 3), indicated that this FOIA is only for the two NRET documents addressed in your June 3, 1992, letter (page 2, paragraph 1).

The State Director denied the request for "the Belco Tract and Hay Creek Tract Economic Evaluations."

On March 13, 1993, the Wyoming State Director wrote to counsel for Belco:

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12/ Belco, through its counsel and Cunningham, also provided oral comments at the public hearings held by BLM in May 1992 on the PPID.

13/ We did not find counsel's June 3, 1992, letter in the administrative record forwarded to this Board by BLM.

This letter responds to your July 13, 1992, Freedom of Information Act (FOIA) appeal based on our denial of your request for two BLM appraisal reports entitled, "Belco/Hay Creek Proposed Exchange Appraisal of Selected Hay Creek Tract," and "Belco/Hay Creek Proposed Exchange Appraisal of Offered Belco Tract." [14/ In accordance with direction from the Department of the Interior, Director of Administrative Services, we have reexamined the documents in question. Attached are those portions of the two reports which contain factual information and analytical information which was publicly released in a BLM document entitled, "Preliminary Public Interest Determination of the Proposed Belco/Hay Creek Coal Exchange."

On March 17, 1993, BLM received an acknowledgement from counsel for Belco that he had received the information noted in the March 13, 1993, letter. Counsel requested that he be allowed until May 1, 1993, to comment on the new material. On March 31, 1993, the Wyoming State Director responded as follows:

Although we are not accepting any further comments from the public on this issue, and are in the process of finalizing the public interest determination, we are willing to delay this work for your comments to be submitted no later than May 3, 1993. Please realize that this will also delay our decision, which we expected to complete before the end of spring, as our letter to you, dated January 13, 1993, stated.

On May 3, 1993, counsel for Belco submitted additional comments, dated April 30, 1993, stating therein that "Mr. Cunningham's comments are included." Cunningham's comments consist of a letter from Cunningham to counsel for Belco, dated April 26, 1993, drafted following Cunningham's review of the information released by BLM on March 13, 1993. (Statement of Reasons (SOR), Ex. H.) In that letter, Cunningham offered a commentary on that information. He found the material to have been severely edited:

In reviewing the most recent submitted material, I find that the "Appraisal of Offered Belco Tract" consists of 55 pages including the Introduction and References. Of this 55-page report, 32 net pages have been omitted including the omission of 5 of 9 figures and 5 of 6 tables. Specific comments follow below but I would hasten to comment that one of the 5 of the omitted tables, according to the Table of Contents, is a Figure 3, "Belco Tract Idealized Columnar Section," page 7. Inasmuch as all the geological data was developed by Belco on the Buffalo Tract and all of this data has never been classified or restricted, it is amusing that such a heavy hand has been applied to the editing of the subject material.

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14/ We did not find counsel's July 13, 1992, appeal in the administrative record forwarded to this Board by BLM.

Appendix A "Geologic and Engineering Data Report for the Belco Offered Lease Tract" consists of 45 pages including the Table of Contents and References. Of the 44 pages of text, 43 3/4 pages have been omitted. \* \* \* As previously mentioned, Belco, at its own expense, developed all of the geological data on the subject tract. \* \* \* It is difficult for me to see why this information is so highly classified.

He also found that 73 of the 103 pages included in Appendix B "Economic Data Report for the Belco Offered Leased Tract" had been omitted. For the documents relating to the Hay Creek tract, he stated that BLM had omitted 36 of 60 pages in the "Appraisal of the Selected Hay Creek Tract," 54 pages of the 55-page Appendix A "Geologic and Engineering Data Report for the Hay Creek Selected Tract," and 46 pages of the 75 pages in Appendix B "Economic Data Report for the Hay Creek Tract." He characterized BLM's information as "boiler plate" and found it difficult to comment intelligently thereon, given the "numerous omissions." 15/

In a letter to counsel for Belco, dated November 10, 1993, the Wyoming State Director stated: "We received your letter dated October 29, 1993, and will try to answer your questions." 16/ Counsel had apparently inquired regarding the status of the public interest determination. The State Director stated that an analysis of that determination had been forwarded to the Director, BLM, and that it was still under review in the Washington Office. The State Director also forwarded certain requested documents to counsel.

Counsel for Belco wrote to the Wyoming State Director on March 3, 1994, requesting a "prompt update" on the status of the public interest determination, noting that he had not heard anything since the November 10, 1993, letter. On March 23, 1994, BLM responded that comments and suggestions had been received from the Washington office in late February and that it expected to issue a decision on the exchange proposal "by the end of June."

On June 10, 1994, BLM issued its Decision denying the proposed exchange. Belco filed this timely appeal.

#### Decision on Appeal

In the Decision now before us on appeal, the Acting Wyoming State Director observes that, under Pub. L. No. 95-554, the leases proposed for exchange were required to be of approximately equal value. He denied the exchange because he found that the tracts proposed for exchange were "not

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15/ We did not find any of the documents referenced by Cunningham, either in their original or their expurgated version, in the administrative record forwarded to this Board by BLM.

16/ We did not find the referenced letter dated Oct. 29, 1993, in the case record forwarded to this Board by BLM.

now of equal value nor have they ever been." (Decision at 4.) He recited coal quality specifications and discussed projected mine models in the context of the local coal market. He concluded that the tract offered by Belco contained coal of such poor quality that it would "almost certainly never be mined," whereas the Hay Creek tract, containing higher quality coal, had "substantial present value because mining within the next 20 years is a realistic possibility." (Decision at 4.) In response to Belco's economic evaluation, which included a mine mouth power generating plant, he stated that such a possibility had been analyzed, but that BLM "found that possibility unrealistic in any rational economic sense." (Decision at 5.) The Acting State Director gave three reasons for that finding. First, he stated that there were "many other existing coal mines, as well as potential mines in the Eastern Powder River Basin with much better coal than Belco." Id. Second, he asserted that "it is very unlikely that any power company would have any interest in using poor coal to build a mine mouth power plant to compete in an already saturated market." Id. Third, he stated that "there was no present demand for power that would cost as much to produce as Belco's would," because of the capital costs of constructing such a plant to burn high sulfur coal. Id.

The Acting State Director stated that the marketplace confirms that the coal in the Belco tract has no value. "There is no market for such poor coal nor has there ever been." (Decision at 6.)

The Acting State Director further noted that

the most sincere statement of [Belco] coal's lack of value comes from Belco itself. The BLM has suggested more than once that it would be willing to exchange coal of similar or identical quality in the very area of the Belco lease. This exchange would have been consummated long ago had Belco shown any interest in the coal adjacent to its own lease. Belco has, however, adamantly refused and repeated that it only has an interest in the much better coal in the eastern Powder River Basin. Clearly, Belco is well aware of the difference between its poor coal in the western Powder River Basin and the better coal in the eastern Powder River Basin near Gillette, Wyoming.

The Hay Creek tract which Belco has insisted it wants has superior coal to Belco's offered coal.

(Decision at 6.)

The Acting State Director discussed the coal mining activity in the eastern Powder River Basin. He stated that the Hay Creek coal was not yet minable at a profit due to weak market conditions. Nevertheless, he found:

Current economic predictions suggest that near or shortly after the turn of the century the Hay Creek coal will become competitive with existing mines. That potential is reflected in the fact that sales of comparable coal deposits suggest a present

bonus bid value of 3 [cents] to 4 [cents] per ton. This gives the entire Hay Creek tract an approximate present value of \$28,000,000.

(Decision at 7.) On the other hand, according to the Acting State Director, the estimated bonus bid value of the Belco tract is "\$ zero (0) by both a DCF [discounted cash flow] analysis and a comparable sales analysis." Id. at 4.

The Acting State Director noted that BLM also considered, whether, according to paragraph 13 of the Agreement, a portion of the Hay Creek tract could be exchanged for the Belco tract. He stated, however, that such an exchange would require BLM to put a minimum value, such as \$.001 per ton or \$25 per acre, on the Belco tract, and "[t]his involves unwarranted assumptions as to value, which are contradicted by the fact that coal comparable to Belco's is available from the State of Wyoming for no bonus bid at all. Thus, the requirement of equal value imposed by Congress in the exchange statute \* \* would not be met." (Decision at 7.)

Moreover, he found that it would not be

in the public interest to break up the integrity of the existing Hay Creek tract by carving out a small nugget, as the entire tract has future value for competitive sale. The carved out portion would have no value as a stand alone mine, as far more coal reserves would be necessary to open a stand alone mine. The only value of a small tract would be the nuisance value in preventing other operators from gaining control of the Hay Creek tract. Creating such a nuisance is not in the public interest.

(Decision at 7.)

Under the caption "FURTHER FINDINGS," the Acting State Director evaluated the proposed exchange on the six remaining public interest factors or criteria listed in the BLM Manual. See note 7, supra. He judged the exchange to be negative based on the criteria that the exchange would not serve national resource protection or management because the market for coal was saturated; the exchange would result in the United States acquiring a coal lease tract having no net present value; the offered lease tract does not have significant competitive coal leasing potential; and the public comment did not support an exchange.

The Acting State Director found that "[t]he exchange conforms with NEPA" and because there was little difference between the tracts "[i]n an environmental sense," the NEPA criterion is "neutral." (Decision at 9-10.) The last criterion was positive because both tracts are located in the State of Wyoming.

Under the caption "OTHER CONSIDERATIONS," the Acting State Director addressed the assertion by Belco "at various times that BLM should use the standards and time frames which are used for determining whether a 'taking' has occurred in the Fifth Amendment sense." (Decision at 11.) He stated:

"BLM assumes that this suggestion is argumentative and not entirely serious." Id. He provided four reasons for rejecting such an assertion. First, he stated that both Pub. L. No. 95-554 and the applicable regulations are "couched in the present tense," thereby indicating that BLM "is to look to the present in making its determination." Id. Second, he found BLM has no authority to determine Fifth Amendment takings. Third, even if it did, he concluded there was no taking, citing Wyoming law. Fourth, he stated that since Belco's acquisition of the lease, there has never been a time when the tracts were of equal value and "Belco's coal remains as valueless as it has always been." Id.

#### Discussion

We have set forth in detail the history of BLM's dealings with Belco since our remand of this case in 1987 for a purpose. That is to show that, when read with our 1987 Decision, it is hard to avoid the conclusion that BLM has treated Belco, as the Governor of Wyoming characterized it, in an "extremely unfair manner." (SOR, App. B.) The clear thrust of the record is that at some point following execution of the Agreement, BLM decided that it no longer desired to pursue an exchange in this case. For the reasons set forth below, its 1994 Decision is reversed.

In accordance with the Agreement, which was executed by the Assistant Secretary, Land and Water Resources, and the Acting Director, U.S. Geological Survey, the parties agreed to "proceed in a diligent manner and in good faith to make such an exchange by December 1, 1983, subject to a finding by the BLM that the exchange is in the public interest." It was BLM's failure to make the required public interest determination that caused this Board to remand the case to BLM in 1987. Section 2(b) of the Agreement provided that the lands to be studied for exchange were the "Hay Creek Tract" lands in Campbell County, Wyoming. If those lands were deemed unacceptable for exchange purposes after review of environmental considerations and coal resource data, section 16 provided that BLM and Belco could pursue a lease exchange for other tracts in the general location of the Hay Creek tract, including the "Calf Creek" and the "Rockpile" tracts. Section 13 of the Agreement contemplated that the parties could complete an exchange for the Hay Creek tract "or a portion thereof."

In his Decision, the Acting State Director faults Belco for not accepting BLM's suggestion that it would be willing to exchange coal of similar quality in the area of the Belco lease. The Acting State Director states that BLM made such a suggestion "more than once," and that the exchange would have been "consummated long ago" had Belco accepted such an offer, but Belco "adamantly refused and repeated that it only has interest in the much better coal in the eastern Powder River Basin." (Decision at 6.) This is an apparent attempt by the Acting State Director to rewrite history.

First, the administrative record forwarded to this Board by BLM does not contain any document offering such an exchange to Belco. Second, even assuming BLM did offer such an exchange, Belco unquestionably was within

its rights to insist that BLM respect the terms of the Agreement, which expressly set forth the areas to be studied for exchange, none of which included lands in the Buffalo area. Third, by offering the opinion that an exchange in the area of the Belco tract would have been completed "long ago," BLM implies that it unnecessarily delayed action on the present proposal only because of the tract sought, even though that tract was identified in the Agreement.

Moreover, it was Belco's completion of its obligations under section 4 of the Agreement to drill, core, and log to establish the quantity and quality of the coal reserves in the Hay Creek tract which disclosed to BLM that the Hay Creek tract contained more reserves with a higher British thermal unit (Btu) content than the Federal Government had previously thought existed in that tract. Based on that fact and the fact that Belco realized that the coal in its tract was of a lower quality than the Hay Creek coal, it requested, as early as 1983, that BLM redelineate lands in the Hay Creek tract so that 170 million tons of coal on the Belco tract could be exchanged for 100 million tons of coal on the Hay Creek tract. Belco repeated that request on numerous occasions. Finally, BLM responded that redelineation would only be considered once it concluded its economic evaluation. In his Decision, the Acting State Director determined that Belco's coal was "valueless." Thus, he found no reason to redelineate the Hay Creek tract because a smaller tract, which he estimated would be less than 60 acres, would break up "the integrity of the existing Hay Creek tract," and "[t]he only value of a small tract would be the nuisance value." (Decision at 7.)

[1] The Acting State Director focuses in his Decision on the statutory requirement that the leases to be exchanged be of equal value. While it is true that section 1(c) of the Act requires that the leases or portions thereof to be exchanged "shall be of equal value," that section further states that if the leases "are not of equal value, the Secretary is authorized to receive, or pay out of funds available for that purpose, cash in an amount up to 25 per centum of the value of the coal lease or leases to be issued by the Secretary in order to equalize the value of the lease \* \* \* to be exchanged."

That distinction is irrelevant from BLM's perspective, however, because the Acting State Director concluded that the tracts were not even close in value. He stated:

The coal on the Hay Creek tract averages 8,126 BTU's with a stripping ratio of 2.8 to 1, sulfur at .27 [percent], and total reserves of 837,630,000 tons. The Belco tract averages 7,086 BTU's with a stripping ratio of 5 to 1, sulfur at 1.96 [percent], and total reserves of 137,059,450 tons. The Hay Creek tract has substantial present value, because mining within the next 20 years is a realistic possibility. The estimated bonus bid of

the Belco tract is \$ zero (0) by both a DCF [discounted cash flow] analysis and a comparable sales analysis. The Belco tract has no present value because coal of such poor quality will almost certainly never be mined.

(Decision at 4.)

On the other hand, the Hay Creek tract, which the Acting State Director characterized as the tract "which Belco has insisted it wants" and which "is not yet minable at a profit due to weak market conditions," (Decision at 6), was found to have "an approximate present value of \$28,000,000," based on "sales of comparable coal deposits" which suggest a present bonus bid value of 3 to 4 cents a ton for Hay Creek coal. (Decision at 7.)

Thus, with a multimillion dollar value for the Hay Creek tract and a value of zero for the Belco tract, there was no reason for BLM to consider a 25-percent equalization payment.

The Acting State Director's Decision, however, is internally inconsistent on the question of value. Although he states that BLM has assigned a present bonus bid value of \$28,000,000 to the Hay Creek tract, he indicates that there is only "some slight possibility that the Hay Creek tract might be competitive after the year 2014." (Decision at 8.)

Section 7(a) of the Mineral Leasing Act, as amended by section 6 of the Federal Coal Lease Amendments Act (FCLAA), 30 U.S.C. § 207(a) (1994), provides, as follows:

(a) Term of lease, annual rentals; royalties; readjustment of conditions

A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated.

(Emphasis supplied.)

Under 30 U.S.C. § 207(b) (1994), and implementing Departmental regulations, a lessee must achieve "diligent development" by the end of the "diligent development period." "Diligent development" is defined at 43 C.F.R. § 3480.0-5(a)(12) to mean "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." The "diligent development period" for any lease issued after August 1, 1976, is the 10-year period commencing on the effective date of the lease. 43 C.F.R. § 3480.0-5(a)(13). "Commercial quantities" is in turn defined as 1 percent of recoverable coal reserves. 43 C.F.R. § 3480.0-5(a)(6). The term "recoverable coal reserves" is defined as "the minable reserve base excluding all coal that will be left, such as pillars, fenders, and property barriers." 43 C.F.R. § 3480.0-5(a)(32).

This Board has held, in accordance with section 6 of FCLAA and 43 C.F.R. § 3452.3(a), that a Federal coal lease is properly terminated for failure to produce coal in commercial quantities at the end of 10 years. Alfred G. Hoyl, 127 IBLA 297, 302 (1993); Utah Power & Light Co., 117 IBLA 271, 272 (1991).

The Acting State Director admitted that any lease issued for the Hay Creek tract in 1994 would need to meet the diligent development requirement on or before 2004, which, based on BLM's own evaluation, was virtually impossible. It does not follow that such a tract could have had a present bonus bid value in 1994 of \$28,000,000. If the Hay Creek tract could not be producing by 2004, its present bonus bid value in 1994 was the same as the value which BLM assigned to the Belco tract—zero. No reasonable prudent coal mining operator would bid \$28,000,000 for a coal lease which would terminate in 10 years.

The BLM's rationale for using present value for its economic evaluation was that net present value was a consideration under its BLM Manual criteria and the applicable regulations were "couched in the present tense."

As we have stated many times, the BLM Manual, while binding on BLM employees, does not have the force and effect of law and is not binding on the Department or this Board. Howard B. Keck, Jr., 124 IBLA 44, 55 (1992); Atlantic Richfield Co., 112 IBLA 115, 127 (1989); Beard Oil Co., 111 IBLA 191, 194 (1989). Moreover, the fact that the applicable regulations are "couched in the present tense" is not dispositive regarding the time frame for which to evaluate whether the exchange proposed in this case is in the public interest. Counsel for Belco argued on numerous occasions that evaluation of the exchange should be made either at the time of passage of SMCRA, the passage of Pub. L. No. 95-554, the execution of the Agreement, or at the latest, the date upon which the Agreement stated an exchange would be completed. The BLM merely declined consideration of any of these dates by stating that present tense meant present value.

While we are in general agreement with BLM that valuations and public interest determinations should reflect conditions at the time of the exchange, there are factors in this case that, arguably, could dictate otherwise. In our previous Decision in Belco, *supra*, at 132-33, we discussed the fact that Congress created an encumbrance on Belco's lease by passage of section 522 of SMCRA, and that Congress acknowledged the conflict between I-90 and development of the lease in the legislative history of Pub. L. No. 95-554. Congress, at the urging of the Department of the Interior, passed this specific legislation in order to avoid the problems associated with having a lessee develop coal property in an interstate highway area. See 124 Cong. Rec. 33,284 (1978). By entering into the Agreement in 1982, the Department led Belco to believe that it would pursue, in good faith, the consideration of an exchange of Belco's lease, and, assuming the Secretary found the exchange to be in the public interest, that such an exchange would be completed by December 1, 1983. Thus, the parties necessarily contemplated a public interest determination would be

made sometime prior to December 1, 1983. However, for purposes of resolving this case, we will accept BLM's position that present value means present value in 1994 rather than 1983. Acceptance of that position, however, does not benefit BLM because as we have held, under BLM's bonus bid evaluation, both tracts are equal in value, i.e., neither tract would have attracted a bonus bid in 1994. Thus, the equal value requirement, specifically relied on by the Acting State Director as the principal basis for denying the proposed exchange, does not support that action.

[2] We now turn to the Acting State Director's "FURTHER FINDINGS," which consist of his analysis of the other six criteria or factors set forth in the BLM Manual that BLM is required to weigh in considering a coal lease exchange. The Acting State Director found that the proposed exchange would not serve any national resource management or protection needs. That finding is in error. The legislative history of the Act indicates that the I-90 lease exchanges would "eliminate a dispute, possible litigation, and costly rerouting of the existing roads which might occur if the existing leases were developed." 124 Cong. Rec. 33,283 (1978). In addition, its purpose was described as "authoriz[ing] the exchange of existing coal rights for Federal coal leases in areas where the social, economic, and environmental aspects of development will be more acceptable \* \* \*." *Id.* In agreeing to consider the proposed exchange for the Hay Creek tract in the eastern Powder River Basin, the Department was conceding that national resource management favored locating coal mining operations in the area near Gillette, Wyoming, rather than around Buffalo, Wyoming. While it is true, of course, that development of the Belco tract is no longer a threat, this is arguably directly related to the failure of BLM to proceed with consideration of the exchange in conformity with the Agreement, resulting in Belco's relinquishment of its lease in 1986.

Evaluating the next criterion, the Acting State Director concluded that the exchange would not be in the public interest because it would result in the acquisition by the Federal Government of a coal tract of no net present value. Because Belco relinquished its lease, any exchange at this time would technically not result in acquisition of a lease with no net present value. More importantly, however, as indicated above, neither the Hay Creek tract nor the Belco tract had any net present value in 1994 based on a bonus bid evaluation. At best, this factor must be considered neutral.

The Acting State Director continued:

The fourth criterion for an exchange is stated as follows.

The offered lease tract does not have significant competitive coal leasing potential.

At the present time coal in the area of the Belco offered tract is not competitive. Thus, under this criterion, the proposed exchange is not in the public interest."

(Decision at 8.)

It is clear that the Acting State Director misinterpreted the thrust of this BLM Manual provision. Although the Agreement states at section 2(a) that the Belco tract would be referred to as the "offered lands," the BLM Manual defines the "offered lease tract" as "the lease tract to be offered in exchange for the relinquishment of the existing Federal coal lease," i.e., in this case, the Hay Creek tract. The value of the Belco tract is an irrelevancy under this criterion, and the Acting State Director's analysis is intrinsically flawed. <sup>17/</sup> Thus, under the criterion properly applied, it is a positive element in favor of an exchange if the offered lease tract does not have significant competitive coal leasing potential. With regard to the Hay Creek tract, the Acting State Director stated that "there are some projections which indicate some slight possibility that the Hay Creek tract might be competitive after the year 2014," but because of the due diligence requirements of the Mineral Leasing Act, 30 U.S.C. § 207 (1994), requiring the production of coal within 10 years of date of lease issuance, "[a]ny lease issued for Federal coal today would need to be producing by 2004, which is still a decade short of the estimated 2014 date." (Decision at 8.) This criterion is a positive because the Hay Creek tract does not have significant competitive coal lease potential.

The next criterion evaluated by the Acting State Director relates to public comment. He stated that "[t]here was more opposition than support for the exchange of the Belco tract for the Hay Creek tract during the public comment period," and for that reason, the exchange was not in the public interest. (Decision at 9.) He stated that in oral comments at the Buffalo hearing "[a] representative from the Sierra Club and a State Representative of Johnson County spoke against the exchange, as did another private citizen, while the proponent and his contractor spoke in favor of the exchange." (Decision at 9.)

The transcript of the May 6, 1992, Buffalo, Wyoming, hearing shows that, prior to the receipt of comments, the BLM hearing officer was asked by one Mike Riley: "Would the BLM consider only leasing part of Hay Creek tract? In other words, if they were going to exchange it, there's a big difference in the tonnages. Would they trade a smaller amount of the Hay Creek tract?" (Tr. 20.) The Hearing Officer responded: "Right now we're looking at the exchange on the basis that was in the memorandum of understanding, which is Hay Creek for Belco. I think, you know, we would move through that process and then potentially go to other alternatives." *Id.* He identified those alternatives as the Calf Creek and Rockpile tracts. Thus, the impression left for people attending the hearing who were not familiar with the language of the Agreement, which provided at section 13 for partial exchanges, was that BLM was, at that time, only considering an exchange of all the Belco coal for all the Hay Creek coal.

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<sup>17/</sup> Moreover, we would point out that if the reference to "offered lease tract" was a reference to the Belco tract, the fact that the Belco tract was worthless would be a positive factor under the plain meaning of the language of the BLM Manual.

Counsel for Belco and Cunningham, Belco's consultant, each spoke in favor of an exchange, both referring to Belco's request that the Hay Creek tract be redelineated because of the difference in the Btu content of the coal. (Tr. 35, 38.) The private citizen who offered comment stated:

I think that Belco got short-changed on the interstate ruling when they said you can't mine within a hundred feet of it. I don't think that's right, but I don't believe the public interest is served by trading less than a million BTUs for another tract that has over 6,000,000 BTUs, using the figures given by the BLM gentleman here.

(Tr. 45.) Thus, his comments were addressed to an exchange of the entire Hay Creek tract, an exchange not contemplated by Belco at any time after 1983.

The representative of the Sierra Club expressed the opinion of the Club that the "Belco/Hay Creek exchange is not in the public interest." (Tr. 48.) The other commenter, who identified himself as Bill Bense, Sheridan County representative, while expressing cynicism regarding coal exchanges in general, equivocated on the proposed exchange in question: "I'll restate -not making a direct stand on the issue, whether I am for or against it \* \* \*." (Tr. 49.)

At the May 7, 1992, hearing in Gillette, Wyoming, one individual spoke against the proposed exchange; counsel for Belco spoke in favor of it.

The Acting State Director represented that "[l]etters or comments were received from six persons or agencies." (Decision at 9.) He did not detail any of those written comments, except to quote from a June 11, 1992, letter from Mike Sullivan, the Governor of Wyoming.

The Acting State Director stated that the Governor of Wyoming did not believe the proposed exchange was in the public interest and "suggested that some consideration be made of exchanging for coal in the area of the offered tract, a suggestion which BLM supports and Belco adamantly opposes." (Decision at 9.) However, on appeal, Belco filed the September 26, 1994, Affidavit of the Governor for inclusion in the record wherein the Governor clarified his position and made clear that he never suggested an exchange in the area of Belco's lease:

While I believe that because the difference in value made the "proposed" exchange contrary to public interest I was and am also of the belief that the process and BLM progress in this matter has treated Belco in an extremely unfair manner. My intervention was to encourage the process move expeditiously forward in fairness to Belco, to express my view on the "proposed" exchange, to encourage examination of alternatives including redelineation of the tract and not to oppose "an exchange" which has not as yet been outlined or in my view fully discussed and evaluated.

\*\*\* I did not suggest that BLM give consideration to a lease exchange in the Buffalo area near Belco. In fact, the comments of our own Game & Fish Department would run contrary to such a recommendation. \*\*\* The principal point I was attempting to make was that the process should move forward in a more expeditious manner with a redelineated tract or alternatives fully evaluated.

(SOR, App. B.)

It is impossible from the administrative record forwarded to the Board by BLM to identify any of the letters or comments to which the Acting State Director refers, except for the letter from Governor Sullivan. However, counsel for Belco has submitted a copy of a May 6, 1992, letter from the Wyoming Game and Fish Department to BLM stating that an exchange would "be in the best interest of wildlife," (SOR, Ex. J); a copy of a newspaper article from the May 28, 1992, edition of The News-Record, Gillette, Wyoming, stating that the Campell County commissioners had written a letter to BLM which stated in part that "the board believes the exchange would be a benefit to the county \*\*\*," (SOR, Ex. N); and a copy of a letter from United States Senator Alan Simpson to BLM, dated May 20, 1992, in which Senator Simpson stated:

A geology degree is not necessary to determine that a straight tract for tract exchange is not "equal value."

However, it is my understanding that as early as 1983 Belco modified its proposal and asked BLM to redelineate the tracts which included a proposal where 170 million Belco tons would be exchanged for 100 million tons or less of Hay Creek coal, but such a proposal was ignored. Wouldn't an approach like this make sense from an appraisal standpoint considering the difference in BTU content between the two tracts?

\* \* \* \* \*

Perhaps BLM may wish to look seriously at a redelineation and with it an adjustment of appraisals to reflect this.

\* \* \* \* \*

Therefore, I hope you will continue to look at this exchange proposal, particularly in a redelineated form.

(SOR, Ex. P.)

While it could easily be concluded that the public comment did not support a tract for tract exchange, since not even Belco advocated that position, the administrative record before the Board does show some public support for an exchange for a redelineated Hay Creek tract.

With regard to whether the proposed exchange conformed to NEPA, the Acting State Director determined that criterion to be "neutral" because there was little difference between the two tracts "[i]n an environmental sense." (Decision at 10.) The factor for consideration, however, is whether the exchange conforms to NEPA policies, goals, and objectives, "as determined through the environmental analysis process, including a full examination of all available alternatives to the exchange." (Emphasis supplied.) Ordinarily, upon receipt of some type of proposal, BLM will analyze all aspects of the proposal by conducting an environmental assessment, which includes alternatives to the proposed action, including the no action alternative. See, e.g., Continental Divide Trail Society, 139 IBLA 101 (1997). Clearly, such action was contemplated by the BLM Manual and, indeed, BLM prepared a preliminary environmental assessment in 1988. However, it set aside that effort in favor of first conducting an economic evaluation of the tracts. Had it proceeded with an assessment, it may have considered various redelineations of the Hay Creek tract as alternatives to a tract for tract exchange. By failing to do so, it deprived Belco of proper consideration of its proposal under this criterion. Under the circumstances, we will also consider this factor to be neutral.

The last criterion favors an exchange because both tracts are in the State of Wyoming.

The BLM Manual provides that the offered lease tract will be considered acceptable for exchange if the cumulative effect of the public interest factors is positive. In this case, we must conclude that the cumulative effect of the factors is positive. In fact, of the seven factors listed in the BLM Manual, five are positive, i.e., favorable to an exchange, and two are neutral. None is negative.

Because we conclude that the public interest favors completing a coal exchange, we remand the case to BLM in order that it may complete, as expeditiously as possible, an exchange of the Belco tract for a redelineated Hay Creek tract or for all or part of one of the other two tracts listed in the Agreement. 18/

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18/ In requesting relief on appeal, counsel for Belco suggested that this Board mandate a specific time frame for completion of an exchange not to exceed 24 months, in order to allow for negotiations, NEPA compliance, public comment, and the actual exchange. He also proposed that this Board assert continuing jurisdiction over the matter and request status reports from BLM every 90 days. Given the history of this case, we can appreciate the basis for counsel's requests. Nevertheless, we hesitate to impose a strict deadline for completion of the exchange, noting only that BLM should assign this matter a top priority and, as stated, act as expeditiously as possible to complete an exchange. In that regard, we note that Cunningham's Mar. 5, 1991, letter, quoted from above, outlining a course of action proposed by BLM to complete an exchange might now be useful. Responding to counsel's other proposal, this Board has only appellate jurisdiction. It has no supervisory authority over BLM. Accordingly, we must decline any invitation to maintain continuing jurisdiction over this matter.

With regard to the Acting State Director's statement that it would not be in the public interest to disturb the "integrity" of the Hay Creek tract by "carving out a small nugget," we note the following statement by Cunningham in his September 27, 1994, Affidavit submitted on appeal:

The redelineation issue has since [1983] been a topic in numerous contacts and telephone conversations with the BLM and is also confirmed in the chronological history of the various BLM Buffalo reports of the 1980's and early 1990's. Unfortunately, BLM has failed to consider this good faith Belco redelineation request seriously. Statements made by BLM in its decision that "by carving out a small nugget" would not be in the public interest as it would somehow affect the larger tract is simply not supportable. Imposition of due diligence requirements would severely limit a new tract to 200 to 350 million tons maximum. Hay Creek is now 800 million tons (plus) and too large to be leased as a single unit even though there is no interest in the tract from anyone at present.

(SOR, App. A at 5.) <sup>19/</sup> We note that Cunningham's statement is un rebutted by BLM on appeal.

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 reversed and remanded.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur.

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James L. Burski  
Administrative Judge

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<sup>19/</sup> In the Affidavit, Cunningham described the original 1983 proposed redelineation: "Belco proposed these Hay Creek reserves [100 million tons] from a small acreage in the extreme southeast portion of the Hay Creek tract to allow the balance of the Hay Creek tract reserves to remain in a logical mining unit." (SOR, App. A at 5.)

