DANIEL E. BROWN

IBLA 2000-136 Decided August 16, 2000

Appeal from a decision of the Colorado State Office, Bureau of Land Management, dismissing a protest of public land exchange COC-59912-PX.

Affirmed.

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

A protest against an exchange is properly denied where the protestant did not establish that the proposed exchange would be contrary to provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1994), or that the exchange will contravene the public interest. Disagreement as to what is in the public interest does not show error in BLM's determination.

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

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 his own appraisal establishing fair market value, failing in which the BLM appraisal is properly upheld.

APPEARANCES: Daniel E. Brown, pro se.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Daniel E. Brown has appealed a November 18, 1999, decision of the Colorado State Office, Bureau of Land Management (BLM), dismissing his protest of land exchange COC-59912-PX.

In a Notice of Exchange Proposal (NOEP) published in June 1999, BLM announced that it was adding private land to assembled land exchange C-59912 (Silver Creek). The notice described the private land as the Bollinger Property located in sec. 2, T. 4 N., R. 73 W., Sixth Principal

Meridian, Larimer County, Colorado, adjacent to the Roosevelt National Forest, and southwest of Estes Park, Colorado. The NOEP stated that the lands were identified in BLM's Northeast Resource Management Plan as suitable for acquisition and subsequent transfer to the United States Forest Service. The parcel was described as an important component of the viewshed of the Peak to Peak Scenic Byway, possessing scenic qualities enjoyed by tourists and local residents. The NOEP also stated the property provided habitat for the peregrine falcon, deer, elk, and black bear. It asserted that acquisition of the property would protect the scenic and wildlife resource values of the property and prevent potential development.

The Bollinger Property is an irregularly shaped 75-acre portion of a 120-acre property owned by the Bollingers. An appraisal of the property was prepared with March 16, 1999, as the date of value. The appraisal described the property as unimproved with no building structures and that its primary use was as open space and a tree farm. The land was described as extremely steep, rocky and mountainous, but that it did offer some development potential and good habitat for wildlife species. The appraisal stated that there was no dedicated legal or physical access to the property but that, as adjoining landowners, BLM and Arapaho National Forest would hold legal access, although not physical access due to a lack of roads. (April 6, 1999, letter to BLM from Stahl Appraisal.) The appraiser used the Sales Comparison method in valuing the property and concluded it had an appraised value of $262,500, or $3,500 per acre.

On September 1, 1999, BLM issued a Record of Decision (ROD) which announced its intention to acquire the Bollinger property with its two springs. The ROD determined that acquisition of the Bollinger Property was consistent with the Kremmling Resource Management Plan and the Northeast Resource Management Plan. Acquisition of the Bollinger Property was found to be in the public interest because it would preserve the natural conditions on an undeveloped parcel of land, consolidate existing Forest Service and nearby public lands and allow for better management of resources, and that acquisition of the two springs would benefit area wildlife.

Brown commented on the NOEP and protested the ROD. In his comments on the NOEP he requested that BLM require the Bollingers to grant a permanent public access along the northerly and/or easterly portion of the retained property for access to the traded property and other public lands beyond, or that BLM simply adjust the boundary of the retained 45 acres 60 feet south or west to provide access. (July 9, 1999, comment at 2.) In his October 4, 1999, protest of the ROD, Brown contended that the land exchange was not in the public interest and again raised the question of access. He argued that the "value of the land" was not properly assessed because the access to it was not determined, evaluated or appraised, nor was the cost of procuring or providing future access, because BLM had determined that access was not necessary. (Protest at 1.) Moreover, he contended that the lack of access would limit the ability to use and enjoy the thousands of acres of public land in the Estes Valley

and would make the public lands private areas for a few adjoining landowners. Brown asserted that while the rationale in the ROD was that acquisition of the Bollinger property would "block up public land" and "consolidate existing Forest Service and Public Lands," in reality the acquisition would not consolidate Government lands, but rather the later planned transfer of lands from BLM to the Forest Service would be the actual consolidation. (Protest at 1.)

In its decision rejecting Brown's protest, BLM described the Bollinger property as

> adjacent to the Roosevelt National Forest, approximately three miles southwest of Estes Park, Colorado, on the south side of Mary's Lake, a Bureau of Reclamation reservoir that is part of the Big Thompson Project. BLM manages land to the west of the offered land that was identified in the BLM's Northeast Resource Area Resource Management as suitable for acquisition and subsequent transfer to the United States Forest Service in a boundary adjustment between that agency and BLM. The offered land lies adjacent to national forest system lands that are currently managed to protect or preserve scenic values and recreational uses of designated scenic byways and other heavily used scenic travel corridors.

(Decision at 1-2.) BLM stated that the value of the Bollinger Property was established by an appraisal prepared to Federal standards and that the appraised value reflected the conclusion that there was no "dedicated" legal or physical access to the Bollinger parcel. BLM maintained that the appraisal indicated that there was no direct public access to the property and physical vehicular access would require extension of a private road, and that this was considered in the determination of the value of the property. It also explained that exchanges of land could not be completed without willing sellers and that the Bollingers were not willing to exchange the entire 120-acre parcel, nor were they willing to provide public access across the land they retained. BLM reiterated its conclusions as previously expressed in the NOEP and in its September 3, 1999, Notice of Decision (Notice) that Federal acquisition of the offered parcel would protect the scenic qualities and wildlife resource values of the parcel and prevent potential development that would conflict with natural resource management goals for adjacent Federal lands. It concluded that these benefits were not negated by the fact that the Bollingers retained ownership of a portion of their property. (Decision at 2.)

The decision rejected Brown's complaint as to the lack of access, stating that the Forest Service and BLM had agreed that acquisition of access across privately-owned land to the Bollinger property was not required to effectively manage the 75 acres and other Federally-owned lands in the area in accordance with the management objectives for visual quality and dispersed recreation as defined in the Forest Plan. BLM also rejected Brown's assertion that acquisition of the property would not consolidate Federal ownership in the area. BLM stated that it managed land

to the west of the Bollinger property which had been proposed for addition to the Roosevelt National Forest through a boundary adjustment between BLM and the Forest Service and that BLM and the Forest Service had developed an interim management agreement for the property until such time as administration was transferred to the Forest Service. Therefore, BLM explained, the acquisition of the property would consolidate Federal ownership and ultimately result in a more coherent boundary for more efficient management of the National Forest System lands in the area. (Decision at 3.)

In his notice of appeal and statement of reasons (SOR) Brown reiterates many of the arguments he set forth in his earlier communications with BLM. Brown asserts that including the Bollinger 75 acres in the Silver Creek land exchange makes the boundary more irregular, not less. He maintains that a result of the exchange would be that the remaining 45-acre tract of the Bollinger Property would become the sole private property between Federal lands. Brown contends that after the exchange the consolidated Forest Service land would be separated from the Bureau of Reclamation land at Mary's Lake by the 45-acre Bollinger tract. (SOR at 1.)

Brown also disagrees with BLM's conclusion that the 75-acre Bollinger acquisition is a major component of the scenic byway viewshed. He contends that the highway is several hundred miles long and the 75-acre Bollinger tract can be seen for less than seven-tenths of a mile and is over ½ mile from the highway. (SOR at 2.) Thus, Brown argues that the 75 acres are only a minor component of the viewshed and that even if the parcel were to be developed it would be unlikely that there would be any impact on the viewshed because the building sites are on the lower part of that land.

Moreover, Brown contends that BLM ignored the issue and value of access in evaluating the value of the site and that that gives a false value to the parcel. In particular, he asserts that the courts of Colorado have allowed every legal building site an access "by necessity" and thus any private purchaser would be given access by the court. Thus, he maintains that if access was not considered, the fair market value was not properly ascertained. Brown contends that the land has its value mostly because of its location and accessibility, but because the Bollinger Property abuts other Forest Service land, the Government did not consider the issue of access, which he argues is important. (SOR at 2.)

In support of his argument that the land is overvalued, Brown has provided information on three sales, which he asserts involve comparable lands. He maintains that much of the value for each of these parcels was as building sites and contends that would suggest that the fair market value of the Bollinger property is much less. The first sale identified by Brown was for 80 acres which he describes as abutting the Bollinger Property to the north with National Forest on two sides. This property sold for $111,000 in December 1993. The second sale was for 40 acres in sec. 17, T. 4 N., R 72 W., described as surrounded by National Forest. Brown reports that this land sold for $35,000 on January 29, 1999. The third sale was for 80 acres in sec. 29, T. 4 N., R. 72 with National Forest on 2 sides. This property sold for $175,000 on March 8, 1999. (SOR at 3.)

[1] Exchanges of public land for private land are authorized by section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716 (1994), upon a finding by the Secretary of the Interior that the public interest will be "well served." The Secretary, in considering the public interest, "shall give full consideration to better Federal land management and the needs of the State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife * * *." 43 U.S.C. § 1716 (1994). The weight to be given every element bearing on such decisionmaking is left to the discretion of the Secretary. Anthony Hulhev, 152 IBLA 127, 135 (2000); John S. Peck, 114 IBLA 393, 397 (1990).

BLM concluded that acquisition of the Bollinger Property was in the public interest because the parcel was an important component of the viewshed of the Peak-to-Peak Scenic Byway as well as a property that provided habitat for the peregrine falcon, deer, elk, and black bear. (Decision at 2; Environmental Assessment (EA) CO-018-98-45 at 1.3.) It also determined that acquisition would ultimately result in a more coherent boundary for more efficient management of the National Forest System in the area and that the lack of access would not preclude the Federal Government from managing the property in accordance with the management objectives as defined in the Forest Plan. Thus, BLM decided that the lack of access was not a reason to pass up the opportunity to acquire the Bollinger Property. (Decision at 3; EA at 1.5.1.)

The record is clear that the Bollinger Property was being acquired by BLM with the intent that it be transferred to the Forest Service once Congress approved. Brown admits that it is that transfer that will result in the consolidation of the land. The fact that the acquisition of the Bollinger Property will not result in immediate consolidation does not show error in BLM's conclusion that acquisition of the property would ultimately result in more efficient Federal management in the future.

While Brown disagrees with BLM's conclusion that acquisition of the Bollinger Property is in the public interest, he has not shown error in that conclusion. He agrees that the acreage has some value as wildlife habitat but avers that all land in the area does, and thus seemingly argues that more land is not necessary. Brown disputes the conclusion that the property is an important component of the viewshed, asserting it is only visible from the road for seven-tenths of a mile and is over a half-mile from the road. He also maintains that any development would not be visible from the road. None of this is evidence that BLM erred in its decision that acquisition of the property is in the public interest, but is simply a difference of opinion as to what is an important component of the viewshed, and how valuable the land is as wildlife habitat. Nor has Brown shown that the failure to acquire access is contrary to the public interest. See Natec Minerals, Inc., 143 IBLA 362, 369 (1998). A simple disagreement is insufficient to show error in BLM's determination. Southwest Resource Council, 96 IBLA 105, 115, 94 I.D. 56, 62 (1987); In Re Otter Slide Timber Sale, 75 IBLA 380, 384 (1983).

[2] Brown also challenges the appraisal of the Bollinger Property. 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 his own appraisal establishing fair market value. San Carlos Apache Tribe, 149 IBLA 29, 48 (1999); Voice Ministries of Farmington, Inc., 124 IBLA 358, 361 (1992); High Country Communications, Inc., 105 IBLA 14, 16 (1988). Brown has shown no error in the methodology of the appraisal, nor has he submitted his own appraisal of the Bollinger Property. However, he has identified three sales which he claims involve comparable lands.

While Brown contends that the comparable cost of other similar lands was not ascertained, the appraisal in the case file shows otherwise. The appraiser conducted a search for mountain land sales in the immediate vicinity of the Bollinger Property. Out of the 17 sales he found, the appraiser identified 8 sales to be most similar to the Bollinger Property. (Appraisal at 32.) These properties were small- to medium-sized mountainous tracts of developable land in northern Boulder and southern Larimer Counties. (Appraisal at 28.) The eight sales were described as similar to the Bollinger Property as to size, location, access, utilities, topography, and development potential, and the appraiser considered all of those factors. All of the sales occurred within the previous 4 years. (Appraisal at 28.) Additionally, the appraiser adjusted prices at the rate of 1 percent per month (compounded) since each sale, to account for the increase in land prices in the area. (Appraisal at 26.) The appraiser used the Sales Comparison method in valuing the Bollinger Property because the property was unimproved and without a measurable or sustained income stream.

Brown asserts that location and use are the primary factors in valuing the property and both of those factors were considered in the appraisal. Indeed, the appraiser stated that location was often an important factor. The appraiser also noted that the supply of good buildable land in Estes Park Valley was limited and that therefore the real estate values were higher than in other parts of the state. Because large acreage tracts were rare in the Valley, the appraiser found it necessary to go outside the Valley to find acreage sales comparable to the Bollinger Property.

In order to determine the highest and best use of the Bollinger Property, the appraiser looked at what was legally permissible. The southern 60 acres of the Bollinger Property was zoned "A-accommodations" while the northern 15 acres was zoned "E-estate." (Appraisal at 21.) The "A" zoning permits the development of rental cabins, which are residential in character with an authorized density range from 2 to 4 units per acre. Other permitted uses included single family dwellings; boarding and rooming houses; hotels and motels; resort cabins; guest houses; tourist homes, and; accessory buildings and uses. The "E-zoning" was explained as low-density residential zoning intended for areas that were reliant upon on-site water and sewer facilities. Minimum lot size was limited to 2-1/2 acres with a minimum of 200 feet of width. Permitted uses for "E" zoned areas included

single family dwellings, public and private schools; public parks and playgrounds and other recreational facilities; churches and church schools, and guest houses. (Appraisal at 3.)

The appraiser concluded that there was a 10-acre portion of the property that was fairly attractive and was a suitable building site for either a single family home or a facility which might include a lodge and cabins. (Appraisal at 21.) He also noted that development in the Estes Valley was occurring on very steep slopes and therefore he could not rule out the possibility of a second, although steeper site. (Appraisal at 22.) However, he stated that use was dependent upon finding a good and sufficient water source and perfecting access and installing an adequate sewer system. While these posed difficulties, they were not insurmountable problems. Id. The Bollinger Property was all above 8,100 feet in elevation, making it unavailable for public water without a pumping system. (Appraisal at 21.) Wells were described as expensive and the results "uncertain at best." (Appraisal at 21.)

Brown asserts that the value of the Bollinger Property is wrong because BLM ignored the issue and value of access in evaluating the property. That is incorrect. In fact, the appraiser determined that, while there was legal access across private and public land adjoining the Bollinger property, there was no direct physical road access available to the property. (Appraisal at 24.) The appraiser considered the matter of access in his review of the eight properties and stated that because access was an important factor, he would make adjustments to the sales to reflect measurable differences in the quality of access to the Bollinger Property. (Appraisal at 24.)

The appraiser reviewed eight similar sales and compared them to the Bollinger Property. Sale CO-020 was for 43 acres in February 1999, and CO-021 was for 40 acres in May 1999. 1/ Both tracts were 4 miles south of the Bollinger Property. The price for the tracts was $4,640 and $5,000 per acre. Both tracts were north-facing like the Bollinger Property and with similar utilities, but wells in the area of the Bollinger Property were thought to be more difficult to drill and less certain. However, the Bollinger Property was rated as superior with regard as to its potential to be subdivided. Overall the Bollinger Property was rated as inferior to the other properties. (Appraisal at 32.)

Sale CO-016 was for a 44.69-acre tract sold in April 1995 for a time-adjusted value of $4,668 per acre. The tract generally sloped south but was very rough and rocky with access by a primitive dirt road. The Bollinger Property was deemed the equal of CO-016 as to location, utilities, and topography, with the Bollinger Property superior as to development potential, but inferior as to size and access. Overall the Bollinger

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1/ The appraisal was completed in March 1999, at which time the sale of tract CO-021 was not completed. The sale was scheduled for completion on May 1, 1999.

Property was deemed notably inferior, in part because it sloped north. (Appraisal at 32.)

Sale CO-014 was for a 59.56-acre tract which sold in March 1996 for a time-adjusted value of $3,868 per acre. The appraiser stated that its larger size caused its price per acre to be less and avers that this is an important distinction since the Bollinger Property was larger than CO-016 and CO-014, and if all other factors were equal, would indicate a still lower value per acre for the Bollinger Property. The appraiser concluded that compared to sale CO-014, the Bollinger Property is equal as to location, utilities, and topography. However, while the Bollinger Property was deemed superior as to development potential, because of its potential to be subdivided, it was deemed inferior overall due to its larger size and poorer accessibility. (Appraisal at 32.)

Sale CO-025 was for a 40-acre tract which sold in January 1998 for a time-adjusted value of $3,841 per acre. In comparison to this tract, the Bollinger Property was found to be inferior as to size, access, and topography, but superior as to subdivision potential and location. Overall the Bollinger Property was deemed slightly inferior to sale CO-025. (Appraisal at 33.)

Sales CO-024 and CO-026 occurred in January 1997 for an adjusted price of $3,954 and $3,132, respectively. Sale CO-024 was for an unimproved 36-acre tract with some view of the Mummy Range and with better topography than the Bollinger Property. Sale CO-026 was for a 39.147-acre unimproved property with rock cliffs that must be climbed to gain direct access. Indirect access to both tracts was by a common, primitive road which was steep and rough, and best traveled by a 4-wheel drive vehicle. The Bollinger Property was deemed to have the superior location and subdivision potential, but was inferior as to size and access, with the other factors rated equal. The appraiser concluded that overall the Bollinger Property was inferior to sale CO-024, and superior to CO-026, indicating that the value of the Bollinger property would lie between $3,132 and $3,954 per acre. (Appraisal at 33.)

Another sale the appraiser reviewed was CO-004, which was for a 70.27-acre tract and thus nearly the same size as the Bollinger Property. The sale occurred in February 1996 with a time-adjusted value of $3,360 per acre. However, because it required considerable adjustment for time and location it was found to be less reliable as an indicator of value. It was included because, like the Bollinger Property, it could be divided into two sites and its development potential, utilities, and topography were similar. While the Bollinger property was found to be substantially superior as to location, it was inferior as to access. Therefore, on an overall comparison the Bollinger Property was deemed to be slightly superior to sale CO-004. (Appraisal at 33.)

After reviewing these eight sales the appraiser concluded that the value of the Bollinger Property lay between the slightly inferior sale CO-004 at $3,360 per acre and the slightly superior sale CO-014 at $3,686.

He therefore concluded that the evidence supported a market value of $3,500 per acre, or $262,500, for the 75-acre property as a whole. (Appraisal at 33.)

It is clear from the appraisal that larger parcels are not necessarily more desirable, that in fact additional acreage can lower the price per acre, because the buyer is paying for usable land and sometimes acquiring additional acreage just because it is part of the property being offered. Essentially, the appraiser agreed with Brown's assertion that any acreage beyond the building site had marginal value and he considered that. Not only did the appraisal report state that generally larger tracts sold for less per acre than smaller ones, but in comparing the various sales with the Bollinger Property, the appraiser noted the size of the Bollinger Property as a negative factor. (Appraisal at 26, 32.) Thus, Brown's argument was addressed in the appraisal.

As to the three sales that Brown stated were comparable, we have no way of knowing whether they were, in fact, comparable because he provided no information on the factors that the appraiser considered in appraising the Bollinger Property. It is unknown whether utilities or water were available, and what ease of access, potential for development, topography, and views were represented in these properties, and whether they were north- or south-sloping. The mere fact that there were three sales in the area for lesser amounts than the appraised value of the Bollinger Property does not show that there was error in the methodology of the appraisal.

Brown has not shown that the acquisition is contrary to law, is not in the public interest, or that there was error in the methodology of the appraisal. Therefore, BLM's decision is properly affirmed.

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.

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James P. Terry
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge