



CENTER FOR BIOLOGICAL DIVERSITY, ET AL.

162 IBLA 268

Decided August 16, 2004

Editors note: *See*, CENTER FOR BIOLOGICAL DIVERSITY v UNITED STATES DEPARTMENT OF the INTERIOR; --- F.3d ---, 2009 [WL 2914504](#) (C.A.9 (Ariz.)), 09 Cal. Daily Op. Serv. 11,755.



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

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.

IBLA 2001-326

Decided August 16, 2004

Appeal from a decision of the State Director, Arizona, Bureau of Land Management, denying a protest to a Record of Decision approving the Ray Land Exchange. AZA-31116.

Affirmed.

1. Exchanges of Land: Generally–Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Exchanges–National Environmental Policy Act of 1969: Environmental Statements

The scope of the environmental impacts to be considered in an EIS for a proposed land exchange includes the indirect effects which, although later in time, are still reasonably foreseeable. Indirect effects of a land exchange may include the impacts of the proposed use of the selected lands when this land use could not occur without the exchange. A challenge to an exchange on the basis of the scope of the impacts from mining operations considered in the EIS is properly denied when the selected lands are located adjacent to an ongoing mining operation, the lands are encompassed by mining and mill site claims located by the proponent, and it appears these mining operations would be conducted under the mining law in the absence of an exchange.

2. Exchanges of Land: Generally–Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Exchanges–National

Environmental Policy Act of 1969: Environmental Statements

In the preparation of an EIS, BLM is obligated to assess alternatives to a proposed action including the no-action alternative and reasonable alternatives which are feasible, will accomplish the intended purpose, and will avoid or minimize the adverse impacts of the action upon the environment. A proposed land exchange will be upheld despite a failure to consider a no-mining alternative in detail when the selected lands are encumbered by mining and mill site claims and located adjacent to an ongoing mining operation such that a no-mining alternative is based on a highly speculative assumption of the invalidity of the claims.

APPEARANCES: Roger Flynn, Esq., and Jeffrey C. Parsons, Esq., Western Mining Action Project, Boulder, Colorado, for the Center for Biological Diversity, Western Land Exchange Project, and Sierra Club; Scott Thomas, Esq., ASARCO Incorporated, Phoenix, Arizona, Jerry L. Haggard, Esq., Phoenix, Arizona, for ASARCO Incorporated; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Center for Biological Diversity, Western Land Exchange Project, and Sierra Club (appellants) have appealed from a May 18, 2001, decision of the State Director, Arizona, Bureau of Land Management (BLM), denying their protest to the April 27, 2000, Record of Decision (ROD) of the Field Manager, Tucson Field Office, BLM, approving the "Ray Land Exchange," AZA-31116, in southern Arizona.^{1/}

By letter dated April 1, 1993, later amended, ASARCO Incorporated proposed to exchange with BLM 7,304 acres of private land owned or controlled by it (offered private lands), contained in 18 parcels, situated in Pinal and Mohave Counties, Arizona, for 10,976 acres of public land (selected public lands), contained in 31 parcels, situated in Pinal and Gila counties, Arizona. The United States owns the mineral estate in 2,780 acres and the surface and mineral estate in 8,196 acres of the selected public lands. In instances where the United States owns only the mineral estate, ASARCO presently owns the surface estate in approximately 1,638 acres and

^{1/} H. Barry Holt, Chief Administrative Judge of this Board, has taken no part in the consideration of this appeal.

has applied to purchase the surface estate in the remaining lands (approximately 1,142 acres) from the owner (State of Arizona). The selected parcels (Ray Complex (RM-1 through RM-18); Copper Butte/Buckeye (CB-1 through CB-5); Chilito/Hayden (CH-1 through CH-5); and Casa Grande (CG-1 through CG-3)) range in size from less than one acre to over 2,000 acres, in the case of surface/mineral estates, and from 30 to 595 acres, in the case of mineral estates.

ASARCO's offered private lands, which consist of the surface estate in 360 acres and the surface and mineral estates in 6,944 acres, encompass five parcels and groupings of parcels, as follows: Gila River Parcel at Cochran (320 acres); Knisely Ranch Parcels (160 acres); McCracken Mountains Parcels (6,384 acres); Sacramento Valley Parcel (120 acres); and Tomlin Parcels (320 acres). ASARCO sought to enter into the exchange generally in order to "consolidate and secure its existing land holdings in areas where it will expand existing facilities or construct new facilities" intended to support its mine development and mineral processing operations. (Motion to Intervene, dated Mar. 1, 2002, at 4.) The land exchange would be completed pursuant to section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1716 (2000).

Because the proposed land exchange did not conform, in full, to BLM's existing land-use plans (specifically, the Phoenix and Safford District Resource Management Plans (RMP)), since most of the land was classified for retention in Federal ownership for multiple-use management, BLM also proposed to amend the plans, as part of the process of approving the exchange. The proposed amendments would authorize disposal of the selected public lands (not already so authorized), provided the exchange is completed. The BLM decision to amend the plans, also contained in its April 2000 ROD and signed by the State Director, is not reviewable by the Board. Oregon Natural Resources Council Action, 148 IBLA 186, 190 (1999); Albert Yparraguirre, 105 IBLA 245, 248 (1988).

Most of the selected public lands are situated near or adjacent to ASARCO's Ray Complex (Complex), an ongoing open pit copper mining and processing operation, which encompasses about 38,366 acres of private land (surface and surface/mineral estates) near Kearny, Hayden, and Winkelman, Arizona. See Motion to Intervene, Ex. A, Affidavit of Thomas E. Scartaccini, dated Feb. 27, 2002, at 2. Appellant asserts that the public lands are needed "for facilities to support the mining and mineral processing operations at the Ray Mine and Hayden Smelter and at [its] Copper Butte property [which] will be developed in the future approximately six miles west of the Ray Mine." (Motion to Intervene at 3-4.) The Complex consists of the Ray Mine (Mine), which appellant indicates is the "second largest copper producing mine" in the State of Arizona, and the Hayden Smelter, which processes copper ore from the mine and elsewhere. Id. at 3. It also encompasses ASARCO's

“Copper Butte/Buckeye property and Chilito/Hayden property.” *Id.* at Ex. A, Affidavit of Thomas E. Scartaccini, dated Feb. 27, 2002. The remaining selected public lands (637 acres) are situated near or adjacent to ASARCO’s Santa Cruz Project, which encompasses about 7,490 acres of private land near Casa Grande, Arizona, “containing copper mineralization” which ASARCO intends to mine separately. *Id.* at 4. The public lands are sought by ASARCO for “mining facilities to be constructed on, under or adjoining that land.” *Id.* The selected public lands in the case of the Casa Grande property are mineral estates owned by the United States, where ASARCO already owns the surface estate.

ASARCO is the holder of 747 lode mining and millsite claims covering most of the selected public lands.^{2/} (FEIS at 3-37.) These claims afford appellant rights to use the land in conjunction with mining and mineral processing operations under the General Mining Law of 1872, as amended, 30 U.S.C. §§ 21-54 (2000). However, ASARCO states that it desires to obtain fee simple title in order to avoid the uncertainty associated with continued Federal ownership of the selected public lands, which could potentially be disruptive of the planned expansion of its current mining and processing operations:

Without consummation of the land exchange, ASARCO will continue to bear the risk of losing the rights to use the unpatented mining claims and mill sites within the Selected Lands in the future by, for example, changes in public land laws, errors in paying mining claim maintenance fees, or by persons locating other claims and disputing ASARCO’s land use rights. That risk makes expanding existing operations and developing new mines more costly and time-consuming.

(Motion to Intervene at 4.) ASARCO notes that “security of title” which would be afforded by fee simple title will help to obtain the financing and facilitate “mine development and mineral processing operations.” (Motion to Intervene at 4.) By order dated May 16, 2002, the Board granted ASARCO’s motion to intervene in the present proceeding, as a matter of right. (Order, dated May 16, 2002, at 2.)

In order to determine the potential environmental consequences of undertaking the proposed land exchange and alternatives thereto, including the no-action alternative, BLM prepared an Environmental Impact Statement (EIS), pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969

^{2/} Parcel CH-1 is covered by four mining claims held by a third party, and parcel CH-5 is not covered by any mining or millsite claim. The remainder of the selected public lands are covered by mining and millsite claims held by ASARCO.

(NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000).^{3/} On October 19, 1998, BLM issued a Draft EIS (DEIS). Following a 90-day period for public comment and further agency review, a Final EIS (FEIS) was issued on June 7, 1999.

In addressing the environmental impacts of either proceeding with part or all of the proposed exchange or not approving any exchange (i.e., “no action”), BLM deemed mining and mining-related uses of the selected public lands to be reasonably foreseeable, regardless of what decision it made,^{4/} generally classifying such uses as follows:

Existing Mining (EXIST): If surface disturbance has already occurred due to mining activity in or adjacent to the Ray Mine, the affected lands are classified as existing mining. Areas of existing mining total approximately 272 acres (2%) of the selected lands. The parcels in this category are all located in the Ray Mine portion of the Ray Complex Area.

Production Operations and Support Areas (POS): Areas classified as Production Operations and Support would be subject to substantial disturbance (25 to 100 percent) of the land surface. These areas comprise an estimated 3,614 acres (33%) of the selected lands. Potential foreseeable mining uses include, but are not limited to, expansion of open pits, haul roads, solution-extraction rock deposition areas, and overburden deposition areas. Most of the selected lands parcels in this category are located in the Ray Mine and Copper Butte/Buckeye portions of the Ray Complex Area.

Transition (TRANS): Transition areas would be subject to less intensive mining-related activities, resulting in 5 to 25 percent surface disturbance. An estimated 875 acres (8%) of the selected lands fall into this category. Potential foreseeable mining uses include, but are not limited to, raveling areas around overburden and leach rock deposition

^{3/} In addition to the proposed action, BLM considered two exchange alternatives, each of which would eliminate selected public lands in the Copper Butte/Buckeye area from the exchange, with a corresponding reduction in offered private lands.

^{4/} Thus, BLM states that, under the no action alternative, “future management actions by BLM are expected to include processing multiple mining MPO [Mine Plan of Operations] or NOI [Notice of Intent] proposals (under 43 CFR [Subpart] 3809) for individual actions as submitted, and/or processing applications from A[SARCO] to patent their existing claims on the selected [public] lands.” (ROD at 9.)

areas, access roads, storm water diversion ditches, rights-of-way, and administrative facilities.

Intermittent Use (INTER): These areas would not be subject to direct mining activity, resulting in less than five percent surface disturbance. Potential intermittent uses, which would affect an estimated 4,481 acres (41%) of selected lands, include, but are not limited to, consolidation of A[SARCO] ownership and buffering neighboring land owners from mining operations.

Long-Range Prospect (LRP): Selected lands in this category could potentially be used for mine development and associated support facilities at some point in the future, but no conceptual mine planning has begun. Because future mining uses of these lands are unknown, the degree of surface disturbance resulting from such mining activity cannot be projected. Approximately 1,733 acres (16%) of the selected lands belong to this category.

(FEIS at 2-14 to 2-15; see id. at 2-16 to 2-17, 2-19, 2-21, 2-23.)

Thereafter, BLM issued its April 2000 ROD, approving the proposed land exchange. The ROD was based on BLM's review of the likely environmental impacts of the exchange in the FEIS, and also its assessment of whether the exchange would be in the "public interest," pursuant to section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (2000).^{5/} During the 45-day protest period following issuance of the ROD, appellants filed a protest, challenging the ROD, on June 28, 2000. The protest was denied by the State Director, in his May 2001 decision.

Appellants appealed from the State Director's May 2001 decision, contending in essence that BLM's decision to go forward with the proposed land exchange, following environmental and other review, violates the General Mining Law of 1872, section 102(2)(C) of NEPA, and section 206(a) of FLPMA because it was fundamentally premised on an erroneous assumption that ASARCO's "expan[sion] [of] the Ray mine complex onto the selected [public] lands would occur *in the exact same manner* whether or not th[e] exchange takes place." (Notice of Appeal/Petition for Stay (NA/Petition) at 2; see Appellants' Consolidated Response, dated June 19, 2002, at 16 ("BLM's public interest analysis under FLPMA and its analysis under

^{5/} Section 206(a) of FLPMA provides, in relevant part, that a "tract of public land or interests therein may be disposed of by exchange * * * where the Secretary [of the Interior] determines that the public interest will be well served by making the exchange." 43 U.S.C. § 1716(a) (2000).

NEPA were flawed because they assumed full-scale mining would necessarily occur regardless of whether the Exchange went forward”).) Appellants argue that BLM’s assumption has rendered its NEPA analysis “extremely narrow in scope,” thus violating section 102(2)(C) of NEPA: “BLM erroneously assumed that all of the major environmental impacts would be the same for all alternatives and that the Exchange itself had little bearing on whether mining would occur, and what impacts would result from mining.” (NA/Petition at 2.) Rather, appellants assert that the expansion of ASARCO’s mining and processing operations is “extremely problematic under [F]ederal laws and could likely occur **only** if these lands were privatized.” *Id.*; see Appellants’ Consolidated Response at 19 (“[W]ithout the Exchange, the mine expansion could likely not occur at all”). Appellants request the Board to vacate BLM’s April 2000 ROD and remand the case to BLM for compliance with the General Mining Law of 1872, section 102(2)(C) of NEPA, and section 206(a) of FLPMA.

In appealing the State Director’s May 2001 decision, appellants petitioned the Board to stay the effect of the decision to go forward with the land exchange, pursuant to 43 CFR 4.21. When action by the Board on appellants’ petition was delayed beyond 45 days after the end of the 30-day appeal period following appellants’ receipt of the BLM decision, the decision “became effective” pursuant to 43 CFR 4.21(a)(3), on August 27, 2001. Subsequently, by order dated November 1, 2001, the Board granted appellants’ stay petition, thus suspending the effect of the State Director’s May 2001 decision, and preventing any further action in pursuance of the land exchange pending our final disposition of this appeal.

In the meantime, appellants filed a lawsuit on September 18, 2001, seeking judicial review of BLM’s decision by a Federal district court in Center for Biological Diversity v. U.S. Department of the Interior, No. CV 01-1758-PHX-ROS (D. Ariz.). ASARCO intervened in the proceeding. Recognizing that the present appeal was still pending before the Board, the court stayed any further proceedings before the court concerning the “legality of the land exchange in order to await the determination of the IBLA.” (Order dated Mar. 31, 2003, at 9.) It thus retained jurisdiction, awaiting the Board’s ruling on the merits of appellants’ appeal from BLM’s approval of the land exchange.

Appellants assert that their members’ recreational and aesthetic use and enjoyment of the selected public lands will be precluded by BLM’s conveyance of the lands pursuant to the proposed exchange. In addition, they note that, after conveyance, their use and enjoyment of surrounding public lands will be adversely affected by ASARCO’s subsequent development of the selected lands for mining and milling purposes. As a threshold matter, ASARCO has moved to dismiss the appeal on the ground that appellants have failed to demonstrate, with specificity, that they or any of their members are substantially likely to be “adversely affected” by the

exchange, and thus lack standing under 43 CFR 4.410(a) to appeal. (Answer dated Mar. 1, 2002, at 5, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992), and Legal and Safety Employer Research Inc. (LASER), 154 IBLA 167, 172-73 (2001).) It is true that appellants have, to date, failed to identify their affected members, provide “evidence of [their] use,” or specify the likely adverse impacts, necessary to establish standing. Wyoming Outdoor Council, 153 IBLA 379, 384 (2000); see LASER, 154 IBLA at 172-73; Appellants’ Consolidated Response at 3-5. While in some circumstances a show cause order may be issued to require further specifics regarding standing, the allegation of standing here is not so vague and remote as in the case of Lujan v. Defenders of Wildlife cited by intervenor, involving impacts in foreign countries that might be visited by appellants. We think this case is also distinguishable on the issue of standing from the LASER case involving an organization which reviews many projects in Western United States and asserted its members may be subjected to hazards to human health. 154 IBLA at 172. Accordingly, the motion to dismiss is denied.

Section 102(2)(C) of NEPA requires BLM to prepare an EIS when it intends to engage in a “major Federal action[.]” which may “significantly affect[.] the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2000); see Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985). Once BLM has done so, it is well established that the adequacy of the EIS must be judged by whether it constituted a “detailed statement,” which took a “hard look” at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(C) (2000); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976); see 40 CFR 1502.1; Dubois v. U.S. Department of Agriculture, 102 F.3d 1273, 1285-86 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997); Donna Charpied, 150 IBLA 314, 321 (1999), appeal dismissed, Desert Citizens Against Pollution v. Bisson, 954 F. Supp. 1430 (S.D. Cal. 1997), rev’d and remanded on other grounds, 231 F.3d 1172 (9th Cir. 2000).

The EIS must generally fulfill the primary mission of section 102(2)(C) of NEPA, which is to ensure that, in exercising the substantive discretion afforded it to approve a land exchange, BLM, together with the public, is fully informed regarding the significant environmental consequences likely to result from taking such action, and thus able to decide whether to proceed in the light of such consequences. 40 CFR 1500.1(b) and (c); Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98, 100 (1983); Dubois v. U.S. Department of Agriculture, 102 F.3d at 1285-86; Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987); see Western Land Exchange Project v. Dombeck, 47 F. Supp.2d 1196, 1205-06 (D. Ore. 1999). In deciding whether an EIS promotes informed decisionmaking, it is well settled that a “rule of reason” will be employed.

As the court stated in County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2nd Cir. 1977), cert. denied, 434 U.S. 1064 (1978):

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

The critical question is whether the EIS contains a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the proposed action and alternatives thereto, which question is equally applicable in the case of land exchanges. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting from Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)); see Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 809 (9th Cir. 1999); Sierra Club v. Dombeck, 161 F. Supp.2d 1052, 1065 (D. Ariz. 2001). Thus, in order to overcome BLM’s decision to approve the proposed land exchange following preparation of the EIS, appellants must generally carry their burden to demonstrate by a preponderance of the evidence that BLM failed to consider, or to adequately consider, a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. Southwest Center for Biological Diversity, 154 IBLA 231, 237 (2001); Donna Charpied, 150 IBLA at 322.

Appellants’ chief contention on appeal is that BLM’s environmental review, pursuant to section 102(2)(C) of NEPA, and public interest assessment, pursuant to section 206(a) of FLPMA, and, ultimately, its decision to go forward with the land exchange, were fatally compromised by its erroneous assumption that ASARCO had a “right’ to develop” its unpatented mining and millsite claims under the General Mining Law of 1872 and thus would engage in mining and processing operations on the selected public lands regardless of whether the land was conveyed into private ownership under the exchange:

BLM’s review and selection of the preferred alternative was based on an assumption that the lode and millsite claims were valid and all uses of the lode claims would be allowed – an assumption directly contradicted by the Record.

(NA/Petition at 8, 30; see id. at 29 (“[BLM’s] entire decisionmaking process was based on the assumption that the applicant had ‘statutory rights’”); Appellants’ Consolidated Response at 9-10 (“[T]he underlying premise of the BLM’s entire exchange decision * * * was that ASARCO has a statutory right to proceed with full-scale mineral development regardless of whether the Exchange goes forward”).)

In essence, appellants challenge the exchange decision of BLM for failure to prepare an adequate EIS under NEPA and for failure to properly consider the public interest on three grounds. Under the Mining Law, appellants contend that the record does not support the right of ASARCO to develop the selected public lands for mining support operations such as waste dumps and, hence, the expansion of mining operations to place waste rock dumps and other mining support facilities on the selected lands is a connected action which must be analyzed as an impact of the exchange. (NA/Petition at 33.) Accordingly, appellants contend that the option of restricting or denying mining operations is a reasonable alternative which should be considered. Id. at 23-24. Finally, appellants assert that the discretion to restrict or deny mining operations on the selected lands requires BLM to consider denying the exchange in the public interest. Id. at 36-37.

Appellants argue that BLM’s assumption that the land would be developed for mining operations was contrary to the General Mining Law of 1872, because it has not been demonstrated on the record that the claims are valid under the mining law, thus investing ASARCO with the basic right to engage in such operations, or that all of the anticipated uses of the claims are permissible. (NA/Petition at 8-9.) Appellants contend that the vast majority of the selected lands are covered by unpatented lode mining claims which do not contain a discovery of a valuable mineral deposit and, in the absence of a discovery, such claims may not be used for such contemplated ancillary operations as a waste rock dump or overburden disposal as contemplated in the FEIS. (NA/Petition at 15-17, citing Solicitor’s Opinion, M-37004 (Jan. 18, 2001) at 6.) Regarding the intervenor’s right to use mill site claims located on the selected lands for ancillary operations, appellants argue BLM erred in assuming the right to use “excess” mill site claims. (NA/Petition at 21.) This latter argument relies on another opinion of the Solicitor holding that the Mining Law authorizes the patent of no more than one mill site of not more than five acres in association with each mining claim. Solicitor’s Opinion, M-36988 (Nov. 7, 1997).^{6/}

Appellants particularly object to BLM’s statement in the Final EIS, as follows:

^{6/} This has been referred to as the mill site opinion. This opinion has recently been overruled by a subsequent Solicitor’s opinion concurred in by the Secretary. Solicitor’s Opinion, M-37010 (Oct. 7, 2003).

In developing alternatives, BLM concluded that foreseeable mining-related uses of the selected [public] lands are actions common to all alternatives; that is, mining/mine-support uses would likely occur whether any one of the land exchange alternatives were selected or the No Action alternative was selected. This is because a land exchange is not required for mining-related activities to take place on the selected lands. A[SARCO] currently holds the vast majority of the mining claims on the public lands selected for exchange, and through these mining claims, A[SARCO] has the right to pursue development on the selected lands for mining or mining-related uses.

(FEIS at 2-13; see Decision at 3 (“BLM’s assertion that A[SARCO] has a right to pursue development of the selected lands is in full agreement with all aspects of the 1872 Mining Law”).)

In considering the exchange proposal, BLM was properly cognizant of the fact that ASARCO has rights under the General Mining Law of 1872, while the selected public lands remain in Federal ownership. (FEIS at 2-13; ROD at 8.) Generally, absent the discovery of a “valuable mineral deposit” on each of the unpatented lode mining claims, ASARCO would not be entitled to the “exclusive right of possession and enjoyment of all the surface [of the claim]” and subsurface rights under 30 U.S.C. §§ 22 and 26 (2000), good against the United States, or ultimately to a patent of the claimed lands, pursuant to 30 U.S.C. §§ 22 and 29 (2000). Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-36 (1963); Wilbur v. Krushnic, 280 U.S. 306, 316-17 (1930); Cameron v. United States, 252 U.S. 450, 460 (1920); Cole v. Ralph, 252 U.S. 286, 294-96 (1920). In such circumstances, BLM would have discretion to modify or even reject an MPO filed to engage in mining operations and related activity. Great Basin Mine Watch, 146 IBLA 248, 256 (1998) (“Rights to mine under the general mining laws are derivative of a discovery of a valuable mineral deposit”); Solicitor’s Opinion, M-37004 (Jan. 18, 2001) at 6. Even absent the discovery of a valuable mineral deposit, ASARCO would have the “statutory right to enter on public land in search of minerals.” Duguid v. Best, 291 F.2d 235, 238 (9th Cir. 1961), cert. denied, 372 U.S. 906 (1963); see Cole v. Ralph, 252 U.S. at 294-95; Union Oil Company of California v. Smith, 249 U.S. 337, 346-47 (1919); Ronald A. Pene, 147 IBLA 153, 157 (1999). Such possessory rights, which are good against everyone but the United States, would authorize ASARCO to engage in exploratory operations.

In the event of the discovery of a valuable mineral deposit, however, ASARCO clearly would have the right, good against everyone (including the United States), to engage in reasonable mining operations and related activity on the lands claimed under its mining claims. Cole v. Ralph, 252 U.S. at 294 (“[T]he discoverer is given

the right to locate a substantial area embracing his discovery[and] to hold the same and extract the mineral”); Havasupai Tribe v. United States, 752 F. Supp. 1471, 1492 (D. Ariz. 1990), aff’d, 943 F.2d 32 (9th Cir. 1991), cert. denied, 503 U.S. 959 (1992) (“[A Federal agency] cannot categorically deny an otherwise reasonable [mining] plan of operations”); Southwest Resource Council, 96 IBLA 105, 120, 94 I.D. 56, 65 (1987) (“BLM may not * * * absolutely forbid mining or totally bar access to a valid mining claim”); United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 289-90, 80 I.D. 538, 542 (1973) (“The holder of a valid mining claim has the right, from the time of location, to extract, process and market the locatable mineral resources thereon. * * * The claimant need not * * * apply for patent to preserve his property right in the claim, but may if he chooses continue to extract and freely dispose of the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land.”).

With respect to mill sites, the relevant law provides that when “nonmineral land not contiguous to the vein or lode is used by the proprietor of such vein or lode for mining or milling purposes,” such ground may be included in an application for a mill site patent together with an application for patent of the vein or lode. 30 U.S.C. § 42(a) (2000). Locations of mill site claims are limited to five acres. Id. Much of the thrust of appellant’s challenge is predicated on the assumption that no more than one mill site may be located for any mining claim supported by a discovery. This assumption is based on the interpretation of the mill site statute set forth in the mill site opinion. Solicitor’s Opinion, M-36988 (Nov. 7, 1997). As noted above, this interpretation of the law has subsequently been overruled. Solicitor’s Opinion, M-37010 (Oct. 7, 2003); see note 5, supra. In the latter opinion, the Solicitor held:

After reviewing the matter, we conclude that the mill site provision does not categorically limit the number of mill sites that may be located and patented to one for each mining claim and that the Department’s traditional practice of not applying such a numerical limitation is in conformity with the requirements of the Mining Law. Accordingly, we conclude that the 1997 Opinion, in reaching the opposite conclusion, does not properly interpret the mill site provision and improperly departs from the Department’s traditional practice and interpretation. Our conclusion is based on analysis of the Mining Law, its legislative history, the congressional purpose, and the Department’s settled administrative practice and interpretation.

Solicitor’s Opinion, M-37010 at 2-3. This revised opinion became the basis of an amendment of the regulations regarding mill sites to expressly provide that more than one mill site may be located per mining claim. 68 FR 61070 (Oct. 24, 2003) (to be codified at 43 CFR 3832.32). Purposes for which a mill site may be used include

rock and soil dumps, tailings ponds, and any other use that is reasonably incident to mine development and operation. 68 FR 61071 (Oct. 24, 2003) (to be codified at 43 CFR 3832.34(a)). ASARCO points out that to the extent any of its mining claims on selected lands required for support operations such as rock dumps were found not to encompass a discovery, such claims could be relocated as mill sites under the Mining Law. (Answer at 25.)

In challenging the validity of the mining claims on the selected lands, appellants cite the real estate appraisal prepared for BLM in connection with the exchange application. Appellants quote the statement that “[m]ost of the mineral estate land contains no viable economic minerals.” (Real Estate Appraisal, Review Statement, at 2.) Appellants point out the appraisal notes that “[m]ost of the land is considered mine support, that is, non-mineralized property best suited for uses ancillary to the mine, such as overburden piles or buffer between actual mine use and surrounding lands.” *Id.* While the appraisal of value of the selected lands conducted in connection with the exchange found that most of the land was more valuable for support of mining operations than for the recovery of minerals, there is no evidence that the Department has conducted a mineral validity examination of the mining claims and, hence, the existence of a valuable mineral deposit on any of the lands subject to a mining claim has yet to be determined. The BLM mineral potential assessment is properly distinguished from a determination, by a mineral examiner in the context of a validity examination, that there is no exposure, within each of the claims, of a deposit containing minerals in such quality and quantity as would justify a prudent person in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *See* Mineral Potential Report, dated Nov. 21, 1997, at 1-2 (“Any conclusions contained within this report are limited to the Ray Land Exchange, and should not be used for any other purpose”); BLM Manual, Section 3031.3 (“The occurrence of a mineral resource does not necessarily imply that the mineral can be economically exploited or is likely to be developed * * *. The potential for the occurrence of a mineral resource also does not imply that the quality and quantity of the resource are known.”), Illustration 3 (“As used in th[e] [mineral potential] classification, potential * * * does not imply that the potential concentration is or may be economic, that is, could be extracted profitably”) (Rel. 3-115 (6/19/85)); Decision at 5 (“Because a validity examination and an appraisal are done for such divergent purposes, an appraisal cannot be assumed to indicate in any way the validity of a mining claim”).

A distinction must be drawn between a mining claim validity examination made by a BLM mineral examiner and any other type of evaluation of the mineral potential, including an appraisal of the value of the land for purposes of an exchange. Thus, a report regarding a mining claimant’s rights prepared pursuant to section 5 of

the Act of July 23, 1955, 30 U.S.C. § 613 (2000),^{7/} and a decision not to challenge the claimant's right to use the surface resources on the claim does not preclude a subsequent decision to contest the mining claim for lack of discovery. See United States v. Waters, 146 IBLA 172, 174 n.4 (1998); United States v. Harper, 8 IBLA 357, 361-62 (1972). Further, we find no indication that there been any determination regarding the validity of any of the mill site claims. Thus, the validity of these claims under the General Mining Law of 1872 has yet to be decided by the Department.

Appellants assert that BLM erred in concluding that ASARCO has a "right' to develop" the mining and mill site claims absent a determination that the claims are valid under the General Mining Law of 1872, and that, had BLM engaged in such a validity determination, it would have decided that the "vast majority" of the mining claims are not valid, since they do not contain a valuable mineral deposit. (NA/Petition at 15.) Although the location of a mining claim does not render a claim presumptively valid and the Department may require a claimant to provide evidence of validity before approving an MPO or allowing other surface disturbance in connection with the claim, Richard C. Swainbank, 141 IBLA 37, 44 (1997),^{8/} no MPO has been filed by ASARCO. This factor distinguishes the present case from such precedents as Great Basin Mine Watch, cited by appellants. Rejection of a MPO on the ground of lack of a discovery generally requires a mineral validity examination. Further, until the Department undertakes a mining or mill site claim contest, which is required by the U.S. Constitution, and renders a final determination of invalidity, it is well established that the claimant will be permitted to engage in mining and processing operations. Best v. Humboldt Placer Mining Co., 371 U.S. at 336-40; Cameron v. United States, 252 U.S. at 460 ("[T]he land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void"); Collord v. U.S. Department of the Interior, 154 F.3d 933, 936 (9th Cir. 1998) ("[M]ining and milling site claims are property interests and the Constitution requires

^{7/} Section 4 of the Act provided that any unpatented mining claim located after July 23, 1955, shall be subject (prior to patent) to the right of the United States to manage the surface resources thereon except locatable minerals. 30 U.S.C. § 612 (1994). Section 5 of the Act established a procedure for adjudicating the right to manage the surface resources on unpatented mining claims located prior to July 23, 1955, involving notice to claimants and a right, upon the filing by the claimant of a verified statement, to a hearing. 30 U.S.C. § 613 (1994); see United States v. Godwin, 8 IBLA 258 (1972).

^{8/} The decision in Swainbank explicitly recognized that a determination that a mining claim is invalid for lack of discovery can only be made after a contest hearing. 141 IBLA at 44. 141 IBLA at 44.

a hearing before the agency can cancel these claims”); Southwest Resource Council, 96 IBLA at 106-10, 123-25, 94 I.D. at 57-59, 67; Bruce W. Crawford, 86 IBLA 350, 376, 92 I.D. 208, 222 (1985).

Thus, we find no error in BLM’s assumption that, while the selected lands remained in Federal ownership, ASARCO had the right to pursue development of the claimed lands, since the Department had neither undertaken a mineral examination of the claims for the purpose of ascertaining validity nor initiated a mining or mill site claim contest asserting invalidity. San Carlos Apache Tribe, 149 IBLA 29, 47 (1999) (“[The exchange proponent] had every right to conduct mining operations consistent with its unpatented mining claims on the selected lands regardless of whether the exchange is approved or not”). In San Carlos we upheld the exchange of selected lands embraced in mining claims against a challenge that the exchange would lead to mining development, noting that “mining-related activities on the selected lands would be the same for all alternatives.” 149 IBLA at 49-50.^{2/}

Moreover, we do not find that ASARCO was required to affirmatively establish the discovery of a valuable mineral deposit or otherwise demonstrate the validity of any or all of its claims, or that BLM was required to undertake a validity determination as a part of its land exchange approval process.^{10/} As BLM correctly stated:

[C]laim validity examination is not considered a prerequisite for a land exchange per FLPMA Section 206 * * *, since all mining claims are relinquished by the proponent prior to conveyance; and * * * claim validity examinations are not required under the General Mining Law and the regulations promulgated thereunder for mineral exploration or development[.]

(Decision at 8; see FEIS at 7-50 (“Active claims * * * [which] are properly filed and maintained * * * do not require validity examinations under the General Mining Act of 1872 to be utilized in mining activities. Validity examinations are only required in

^{2/} Appellants seek to distinguish the San Carlos case on the ground that the assumption of claim validity and the right to develop the claims was not raised as an issue in that case. We find this argument unpersuasive because appellants’ assertion that the claims are invalid is not supported by either the law or the record. The record shows a considerable history of past and ongoing mining in the area of the selected lands.

^{10/} We do not read the Solicitor’s Jan. 18, 2001, Opinion, which was approved by the Secretary, to require BLM to undertake a validity determination in the context of a land exchange. See Solicitor’s Opinion, M-37004 (Jan. 18, 2001), at 14-16.

the case of patent application processing or to resolve resource conflicts on a case by case [basis]”); ROD at 18 (“All mining claims on the selected parcels held by A[SARCO] will be relinquished simultaneously with conveyance of exchange lands”); Decision at 6 (“Any applicable limitations on mill sites under the Mining Law are considered by BLM in [the] processing of patent applications and plans of operation”); BLM Reply to Appellants’ Consolidated Response, dated July 17, 2002, at 14 (“BLM’s [current] regulations do not require a validity examination of any mining claims [on lands open to mineral entry] before approval of [a mining] plan of operations,” citing 43 CFR 3809.100 and 65 FR 69997, 70026 (Nov. 21, 2000));^{11/} 43 CFR 3809.411; Solicitor’s Opinion, M-37004 (Jan. 18, 2001), at 6 (“[T]he Department of the Interior has not historically determined mining claim validity before approving plans of operation”), 14-16.) Thus, a determination of claim validity was not required as a matter of course prior to approval of an MPO. A fortiori, BLM was not required to determine claim validity in the context of this land exchange since the claims would cease to exist prior to any conveyance.

Because BLM concluded that mining and related activities would generally occur on the selected public lands, regardless of whether they were retained in Federal ownership or conveyed into private hands, it determined that the land exchange was not itself likely to result in the environmental impacts generally

^{11/} In the course of promulgating regulations (43 CFR 3809.100), effective Jan. 20, 2001, codifying its existing policy “requir[ing]” validity examinations when operations are proposed on segregated or withdrawn lands, BLM addressed a comment suggesting that such examinations should be required “on all lands”:

“BLM disagrees with the comment. We are responsible for closely reviewing data submitted in a plan of operation to ensure that plans for extraction of the mineral deposit make sense. For example, we would not approve a plan of operations for an open-pit gold mine if no data were submitted outlining where the gold mineralization lies. However, if a plan of operations appears to be of marginal or questionable profitability, the BLM manager has the prerogative to request a validity exam before that plan is approved. Generally speaking, however, BLM will not require validity examinations when plans of operations are submitted on lands open to location under the mining laws.”

65 FR at 70026; but see Solicitor’s Opinion, M-37004 (Jan. 18, 2001), at 15-16 (If the Secretary has reasonable grounds to question the validity of a mining claim located on lands which have not been withdrawn when reviewing a plan of operations to use the mining claim for ancillary operations (e.g., waste rock dump), the Secretary should refrain from approving the plan of operations until the claim is relocated as a mill site within the acreage limitations of the Mining Law or approves the plan as an exercise of discretion after preparing a NEPA analysis including the no-action alternative.)

associated with such activities. Hence, BLM found such impacts were not caused by the exchange, and thus neither direct nor indirect effects of the exchange. 40 CFR 1508.8. The record does not establish that mining and related activity generally constitute, in the context of the proposed land exchange, “connected” actions within the scope of impacts required to be considered, since such activity may occur regardless of the exchange. 40 CFR 1508.25.

[1] The scope of environmental impacts which must be considered in an EIS includes the indirect effects of the proposed action. 40 CFR 1508.25(c)(2); Sierra Club Uncompahgre Group, 152 IBLA 371, 384 (2000); Defenders of Wildlife, 152 IBLA 1, 6 (2000). Indirect effects of a proposed action are defined as those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 CFR 1508.8(b). Indirect effects may be found when the exchange and the proposed use of the selected lands are connected actions in that such action could not be undertaken in the absence of the exchange. 40 CFR 1508.25(a). Courts have held that a Federal agency must consider the planned private development of selected lands when this land use could not occur without approval of the exchange. Thus, analysis in an EIS is required for a land exchange in which the proponents are planning to take action which significantly affects the quality of the environment and the exchange is an act without which such action could not be taken. National Forest Preservation Group v. Butz, 485 F.2d 408, 411 (9th Cir. 1973). Similarly, when the transferee in an exchange has planned an action which will significantly affect the environment and which could not occur without the land exchange, the agency cannot ignore the impacts of the transferee’s plan. Lodge Tower Condominium Association v. Lodge Properties, Inc., 880 F. Supp 1370, 1383-84 (D. Colo. 1995), aff’d, 85 F.3d 476 (10th Cir. 1996). In order to conclude that a particular indirect effect is caused by a proposed action within the meaning of 43 CFR 1508.8(b), it must be shown that there is a reasonably close causal relationship between the Federal action and the effects at issue. Sierra Club Uncompahgre Group, 152 IBLA at 384; Defenders of Wildlife, 152 IBLA at 7; James Shaw, 130 IBLA 105, 114 (1994).

In the absence of a validity determination by a BLM mineral examiner, we find appellants’ assertion that the claims are invalid to be speculative. This is especially true in the context of this case in which the selected lands are in close proximity to ongoing mining operations. The challenge to the use of the lands for ancillary mining operations (e.g., waste rock dump) is also substantially undercut by the current interpretation of the statute authorizing location of mill sites, 30 U.S.C. § 42(a) (2000), and the implementing regulations, as noted above. Thus, we find the assertion of the invalidity of these claims to be speculative and insufficient to establish a causal relationship between the exchange and the anticipated use of the

selected lands for mining and mining support facilities. Accordingly, we find that no error in the NEPA analysis in the FEIS has been shown in this regard.

Nonetheless, BLM considered, at some length, the impacts of mining and related activities, based on ASARCO's conceptualized mine development plans, on air, water, fish and wildlife, and other surface and subsurface environmental resources and values, to the extent that they constituted direct, indirect, and cumulative effects associated with the exchange or no-exchange options.^{12/} (FEIS at 1-17 to 1-18, 2-26, 2-28, 2-30, 2-32, 2-34, 2-36, 4-1 to 4-9, 4-11 to 4-23, 4-27 to 4-31, 4-33 to 4-39, 4-45 to 4-50; Technical Memorandum, "Ray Land Exchange/Plan Amendment Draft EIS: Description of Existing Mining and Foreseeable Mining Use of Selected Lands," dated Oct. 15, 1997; Decision at 8 ("Based upon a foreseeable use plan * * *, BLM analyzed the direct, indirect and cumulative impacts of future mining within the limits of the information available"); see ASARCO Answer at 12-13 ("BLM evaluated the impacts common to all alternatives * * * [b]ased on ASARCO's conceptual mining development plans"); BLM Answer at 37 ("BLM * * * carefully considered impacts of foreseeable uses * * * of the selected lands as mineral development and mining activities").)

Appellants also challenge the range of alternatives considered in the EIS. In particular, appellants dispute the failure to consider a no-mining alternative or mining under strict limitations imposed by BLM. (NA/Petition at 23-24.) This argument is also premised on appellants' contention that the claims are invalid for lack of discovery or for location of excess mill site claims.

[2] Relevant Council on Environmental Quality regulations provide that Federal agencies shall, to the fullest extent possible, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 CFR 1500.2(e). Agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were

^{12/} We are not convinced that BLM "abdicat[ed]" its responsibility to address the likely environmental effects of mining by noting that the specific effects of mining would be dealt with when ASARCO went through the process of obtaining the necessary Federal and/or State permits for mining operations, which would occur were the lands public or private. (NA/Petition at 33 (citing FEIS at 4-1); see FEIS at 1-18, 4-13, 4-16, 4-18 to 4-19.) Rather, it was simply not possible, when deciding whether to approve the exchange, to determine precisely the extent to which the permitting process would impact the nature and extent of mining, whether the selected lands were retained or conveyed, which made assessing the specific effects of mining an exercise in speculation. (FEIS at 1-18.)

eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 CFR 1502.14(a). Such alternatives should include reasonable alternatives to a proposed action which will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact. 40 CFR 1500.2(e); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d 1457, 1466-67 (10th Cir. 1984); Sierra Club Uncompahgre Group, 152 IBLA at 378; Defenders of Wildlife, 152 IBLA at 9. A “rule of reason” approach applies to both the range of alternatives and the extent to which each alternative must be addressed. Southern Utah Wilderness Alliance, 152 IBLA 217, 223-24 (2000); see Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972); Allen D. Miller, 132 IBLA 270, 274 (1995).

Among the alternatives considered by BLM was the no-action alternative in which no lands would be exchanged. Under this alternative, BLM noted that the “selected lands would remain in public ownership and would continue to be managed by BLM according to the multiple-use management directives in FLPMA.” (FEIS at 2-10.) Under the no-action alternative, BLM noted future actions are expected to include processing multiple MPO’s as submitted and processing patent applications for the selected lands. Id. Also considered by BLM was an alternative under which ASARCO would be required to submit a MPO pursuant to the regulations at 43 CFR Subpart 3809. Id. at 2-18. This alternative was not analyzed in detail, BLM explained, because ASARCO has not submitted a MPO and BLM lacks authority to require a MPO for the selected lands in processing an exchange application. Id. The no-mining alternative in which the land exchange would not take place was also considered briefly by BLM, noting that this could occur if all MPO’s for the selected lands were rejected, the claims were determined to be invalid, or the claimant was unable to secure the necessary state and Federal permits for mine operations. Id. at 2-24. Given the factual circumstances of this case, BLM concluded the likelihood of such an occurrence is nil (not reasonably foreseeable) and, hence, BLM did not analyze this alternative in detail. Id.

A no-mining alternative is based on an assumption of the invalidity of ASARCO’s mining claims, a conclusion which, as noted above, is speculative and not supported by the record in the absence of a mining claim validity examination or a mining claim contest. Thus, such an alternative is simply not a reasonable alternative requiring detailed consideration in the present context. San Carlos Apache Tribe, 149 IBLA at 50 (“Given the * * * mining claims of record on the selected lands ([most] belonging to [the exchange proponent]), the no-action [or no-exchange] alternative is not and never can be considered a ‘no-mining’ alternative”). Indeed, absent a formal invalidity determination, it is quite likely that all or some of ASARCO’s claims are, in fact, valid, and thus it will be permitted to undertake mining and related operations. Thus, appellants have not shown that BLM violated

section 102(2)(C) of NEPA by not considering any “viable” alternative. (NA/Petition at 26 (quoting from Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985)).) Rather, we agree with BLM that it was not required to consider “alternatives that * * * fail to recognize rights available to claimants under the Mining Law,” or to envision circumstances which are unlikely to occur. (Reply to Appellants’ Consolidated Response at 12; see FEIS at 7-49 (“The No Mining alternative was not considered a reasonable alternative as a consequence of the existing mining laws”).) As we stated in San Carlos Apache Tribe, 149 IBLA at 48, rejecting the argument that BLM was required to consider an alternative involving no mining or, at least, more restricted mining were the exchange not to occur: “[A]gencies need not discuss alternatives * * * that are remote and speculative.” See id. at 37, 49-50; Headwaters, Inc. v. BLM, 914 F.2d at 1180 (“Section [102 of NEPA] does not require the consideration of alternatives ‘whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative’,” quoting from Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974)). Since the Department has yet to adjudicate the validity of any of ASARCO’s mining claims under the General Mining Law of 1872, implementation of an alternative under which no mining would occur on any or all of the claims, by reason of their invalidity, must be deemed “remote and speculative.”

With regard to whether the exchange is in the public interest, appellants argue that BLM cannot make a proper determination whether an exchange is in the public interest pursuant to section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (2000), based on the erroneous assumption that ASARCO has the right to develop the selected lands under the mining law. (NA/Petition at 36-38.) For the reasons set forth in our analysis above, we find appellants’ assertion that the claims are invalid to be speculative. BLM is required to ensure, in approving a land exchange, that the “public interest will be served by the trade [of public for private lands].” Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1180 n.8 (9th Cir. 2000). This requires that BLM balance the advantages and disadvantages of the exchange, including the likely adverse environmental effects resulting from the exchange and ensuing development and use of the conveyed public lands. Barrett S. Duff, 122 IBLA 244, 247 (1992); cf. National Audubon Society v. Hodel, 606 F. Supp. 825, 835-46 (D. Alaska 1984) (exchange pursuant to 16 U.S.C. § 3192(h) (2000)).

BLM assumed, in deciding whether proceeding with the land exchange at issue here was in the “public interest,” within the meaning of section 206(a) of FLPMA, that mining and related activity were likely to occur, somewhere and in a similar form, notwithstanding whether the selected public lands were retained in Federal ownership or conveyed into private hands. Appellants’ speculation regarding the invalidity of the claims is insufficient to establish error in this assumption, and, to the

extent that it entered into BLM's public interest determination, we do not think that that finding was fatally flawed. Thus, we find the record supports the BLM conclusion that the exchange serves the public interest by using public lands, which would generally be subjected to mining and related activity even were they retained in Federal ownership, to acquire private lands which would advance BLM's goals of protecting and conserving lands and other natural resource values. (ROD at 2, 8, 10; Memorandum to the Assistant Secretary, Land and Minerals Management, from the State Director dated Sept. 1, 1998, at 2 ("The fact that the opportunity to acquire these high value natural resource lands (offered lands) will be lost and the public lands (selected lands) will be mined anyway, pursuant to the 1872 Mining Law, if the land exchange is not completed, needs consideration").)

BLM specifically concluded that conveyance of the selected public lands and acquisition of the offered private lands was, because of their relative natural resource and other values, in the public interest:

Through the exchange, BLM has an opportunity to achieve several public lands management objectives: 1) improve resource management efficiency by disposing heavily encumbered, isolated and difficult to manage public lands; 2) acquire lands that will consolidate ownership patterns within wilderness and special management areas; and 3) acquire lands with fewer encumbrances and higher resource values.

(FEIS at 1-18; see id. at 3-42 ("The proximity to A[SARCO]'s lands, number of encumbered parcels combined with difficult physical access make the selected lands in the Ray Complex difficult to manage"), 3-43; ROD at 7-8; Decision at 1-2, 14, 16.)

Appellants challenge BLM's finding that the exchange is in the public interest. Appellants have not shown that BLM failed to properly consider any relevant factor bearing on the question of whether the exchange would be in the public interest, or otherwise acted in an arbitrary and capricious manner. Burton A. McGregor, 119 IBLA 95, 103 (1991). "Where conflicting uses of the public lands are at issue and the matter has been committed to the discretion of the BLM, the Board will uphold the decision of the BLM unless appellant has shown that the BLM did not adequately consider all of the factors involved." California Association of Four-Wheel Drive Clubs, Inc., 38 IBLA 361, 367-68 (1978), quoted in American Motorcycle Association, 119 IBLA 196, 199 (1991). This Board will not ordinarily substitute its judgment for that of the BLM official duly authorized to exercise the discretion where the basis for that decision is clearly set forth in the decision and the record before BLM. Nevada Power Company, 137 IBLA 328, 333-34 (1997); see Donna Charpied, 150 IBLA at 344. While appellants would clearly reach a different conclusion

regarding whether the exchange is in the public interest, they have not shown that BLM failed to consider relevant factors. Accordingly, appellants' challenge to the BLM finding that the exchange is in the public interest is rejected.

Except to the extent that they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by appellants are rejected on the ground that they are contrary to the facts or law, or are immaterial.

We, therefore, conclude that the State Director, in his May 2001 decision, properly denied appellants' protest to the Ray Land Exchange, approved by the Field Manager's April 2000 ROD, thus permitting it to go forward.

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

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE HEMMER CONCURRING,

I concur in the result and ultimately agree with my colleague's conclusions. However, my own review of the record took a more tortuous route and I wish to add several points of analysis necessary to reach my conclusion.

The premise underlying appellants' argument is that, in order to exchange public lands for private properties, BLM must ensure that lands "selected" to be conveyed to the exchange proponent could be mined in full compliance with Mining Law of 1872 as if those lands remained Federally owned. Further, appellants' assertion that BLM must ensure that all mining claims on the selected lands are valid under the Mining Law of 1872 sets a higher standard for lands to be exchanged out of Federal ownership than if they had remained public lands. Such contentions misrepresent the nature of the action taking place. The essence of the exchange is to transfer to private ownership what was in Federal ownership. No statutory requirement in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1616 (2000), or the Mining Law requires that lands so divested from Federal supervision must nonetheless comply with requirements of law as if they remained in Federal ownership. Put another way, I find no basis in law for the appellants' assertion that an exchange can be implemented only if the lands conveyed in the exchange would be treated the same in private hands as if they remained public lands.

That this is true is demonstrated by considering whether such legal analysis must accompany an exchange of lands for private acquisition for a purpose unrelated to mining. For example, BLM might effectuate an exchange which, inter alia, provides lands to an incorporated city wishing to add a housing subdivision with associated schools and shopping areas. See, e.g., Nevada Outdoor Recreation Association, Inc., 158 IBLA 8, 9 (2000) (discussing exchange of land effectuated, inter alia, for purposes of planned community). So long as the exchange was for fair market value and otherwise met the purposes of FLPMA, the National Environmental Policy Act (NEPA), 42 U.S.C. § 102 (2000), and any other law governing the exchange itself, the legality of the exchange would not be judged on the basis of whether the land conveyed could have been permitted for housing, shopping, and schools if the lands had remained in Federal ownership. The difficulty in accomplishing such purposes on public lands could be an impetus for the exchange in the first place.

Appellants' argument is thus not based on statute; rather, it is an objection to Asarco's overall mining goals as effectuated by the exchange provision. That BLM may not have ensured that every parcel could have met the Mining Law of 1872, had it remained in Federal ownership, is not the question for the exchange. The question

is whether the overall exchange can be justified in the interests of the United States. Wade Patrick Stout, 153 IBLA 13, 18-19 (2000). Exchanges may be effectuated to further various public policy purposes, including mining which falls within FLPMA's multi-use concept for the public lands. 43 U.S.C. § 1701(a) (7), (12) (2000). Allowing mining on private lands by way of an exchange, therefore, cannot be a de facto contravention of the public interest as appellants suggest. Objecting to private mining interests may be a valid concern on the part of appellants but does not show that BLM exercised its discretion erroneously.

I think that the difficult issue in this case comes in the process of applying NEPA. On this issue, I find both parties' arguments and the record to be circular and somewhat inconsistent. I am perturbed by BLM's assertions that foreseeable consequences of this exchange are not possible to predict or are speculative. It appears that the record contains considerable information indicating where within the selected lands mineral resources are located and where they are not. It is this information that forms the basis for the classification of foreseeable uses ("existing," "production," "transition," "intermittent use," and "long-range prospect") identified for the selected lands in the FEIS. (FEIS at 2-14 through 2-15; Figures 2-7 through 2-9; Oct. 15, 1997, Ray Land Exchange/Plan Amendment Draft EIS: Description of Existing Mining and Foreseeable Mining Use of Selected Lands.) Further, BLM changed its land use designations for the vast majority of the selected lands in the Phoenix and Safford Resource Management Plans from "resource conservation area" and "long term management area" to "suitable for disposal" in the context of implementing this exchange decision. (FEIS at 1-3.) I disagree with BLM's response in the protest decision that these amendments to the RMPs are not to be considered consequential (or has having "impacts") in the EIS because the amendments to the RMPs are different decisions than the exchange itself. (Protest Decision at 14, Response # 13.) To the contrary, the RMP amendments would not have occurred but for the exchange. To the extent each RMP amendment changes the designation of land and thereby the permitted uses of it, it may also change the foreseeable impacts on the human environment when those land designations no longer pertain and a private landowner may accomplish purposes that were not permitted before. Combining these two points of information – the knowable classification within the context of mining of the selected lands with the change in land designation – made foreseeable impacts easily presentable in a manner not easily found in this EIS and less speculative than BLM suggests.

Nonetheless, I agree with the lead opinion that appellants' arguments do not sufficiently take into account the record and the mining uses of the land evident therein, nor the above-described facts, in suggesting that mining would be entirely different if the selected lands were not transferred outside of Federal ownership and that BLM thereby did not adequately identify the effects of the proposed action.

Appellants' argument, premised on their contention that BLM is presuming that mining will or would take place on all the selected lands if the exchange were to occur and that it would not or might not so take place in the absence of the exchange, also ignores the classification system identified by ASARCO and BLM. In fact, that classification shows that BLM and ASARCO did not anticipate much (less than 5 %) surface activity at all on 41 % of the selected lands (intermittent use areas) and that a remaining 8 % of the lands (transition lands) would be subject to little more surface disturbance than that (up to 25 %). For 16 % of the lands (long-range prospect) mining was conceivable but so long-range as to be truly speculative. Disturbed as I am by BLM's failure to clearly and succinctly state to the public the impacts this exchange will cause by alterations to the land designations in existing RMPs (see FEIS at part 1.3), appellants have not properly articulated why the kinds of uses envisioned by the land classifications would not have been permitted by the Phoenix and Safford RMP designations in place (resource conservation area or long-term management area) before the exchange.

Considering NEPA's procedural aspect and the fact that whatever a reviewing body might think of the outcome, what is required is that the agency consider the effects in an EIS, I am not convinced that BLM did not do so. Somewhat obscurely, BLM followed NEPA and chose a course of action that accepted impacts in return for benefits elsewhere. By employing the land classification system for the selected lands, BLM did generally identify impacts.

Finally, I find equally non-responsive BLM's failure to address at all in the protest decision appellants' assertions that the land exchange is not in the public interest because such exchanges within Arizona are resulting in an overall reduction of public lands. (Protest at 21.) Nonetheless, BLM has performed fair market value analyses for all the selected and offered lands. In order to support their assertion, it is incumbent upon appellants to demonstrate that this exchange did not constitute a fair market value exchange within the meaning of 43 U.S.C. § 1716(b) (2000). Appellants merely suggest on appeal that the Board look into whether the fair market value analysis is correct given their claims that BLM failed to conduct a validity analysis and thereby ascertain the precise mineral value of the selected lands. This argument is not sufficient to undermine the fair market value analyses in the record.

For these reasons, I concur.

Lisa Hemmer
Administrative Judge