

United States Department of the Interior Bureau of Land Management

MTM 99236

Nance-Brown AVF Coal Exchange Rosebud County, Montana

U.S. Department of the Interior
Bureau of Land Management

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Decision Record Montana State Office

I. BACKGROUND:

Section 510(b)(5) of the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. § 1260(b)(5), prohibits mining in alluvial valley floors (“AVFs”) and provides that if an owner of fee coal within an AVF meets certain statutory criteria, the owner is entitled to an exchange of their private fee coal for Federal fee coal. The Bureau of Land Management (“BLM”) is charged with executing AVF fee coal exchanges pursuant to SMCRA and the Federal Land Policy and Management Act of 1976 (“FLPMA”). 43 C.F.R. 3436.2-3(a).

Jay Nance, Brett A. Boedecker as Personal Representative for Susanne N. Boedecker, Joseph P. Hayes, Patricia Hayes Rodolph, and the Brown Cattle Company Shareholders Coal Trust (collectively “Nance-Brown” or the “proponents”) first filed their application for an AVF fee coal exchange with the BLM in December 1994, MTM 99236. On October 10, 1997, the BLM determined that the proponents were qualified under section 510(b)(5) of SMCRA to pursue an exchange for ±3,379.55 acres of fee (privately owned) coal located within the Tongue River AVF. The Nance-Brown fee coal lands are located in Rosebud, County near Birney at T. 4 S., R. 43 E., T. 5 S., R. 43 E., T. 5 S., R. 42 E., T. 6 S., R. 42 E., T. 6 S., R. 43 E.

Over the years, BLM continued to process the exchange, but on August 29, 2006, the proponents initiated a lawsuit to compel the completion of the exchange. *See Nance v. Kempthorne*, No. CV-06-125-BLG-RFC (D. Mont. filed Aug. 29, 2006). Following a court order issued on December 9, 2008, and revised on May 19, 2009, which mandated a schedule for completion of the exchange, the parties entered into a stipulation on November 19, 2009, and revised on January 29, 2010. This revised stipulation allows BLM the ability to follow the regulatory process for completing an AVF exchange in an expeditious manner.

On March 2, 2010, the proponents identified Federal coal lands (“Ashenurst Tract”), also located in Rosebud County, southwest of Colstrip, Montana, T. 1 N., R. 40 E., T. 1 S., R. 41 E, as the only Federal coal they would consider for exchange to fulfill the SMCRA AVF exchange requirements. *See Nance v. Kempthorne*, No. CV-06-125-BLG-RFC (D. Mont. March 2, 2010) (Plaintiffs’ Status Report). According to the applicable statutes and regulations, the amount of coal that BLM exchanges must be equal to the current market value of the AVF fee coal owned by Nance-Brown as determined by a qualified appraisal. In addition, the exchange must be within the public interest. The Ashenurst Tract consists of unleased coal owned by the United States; the surface and other mineral interests within the Ashenurst Tract are owned by the private parties, excluding 624.21 acres where United States owns all minerals.

As part of the exchange process, BLM prepared an Environmental Assessment (“EA”) to analyze any potential environmental impacts of a potential fee coal exchange that would transfer ownership of some or all of the Federal coal in the Ashenurst Tract for private coal in the Nance-Brown AVF as required by the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, and 43 CFR 2201.7-1. BLM completed the EA for the proposed Nance-Brown AVF Coal Exchange on October 6, 2010, DOI-BLM-MT-C020-2011-0005-EA. The EA and the

subsequent Finding of No Significant Impact ("FONSI") determination are attached to and incorporated by reference in this decision.

II. DECISION

The BLM has determined that the proposed Nance-Brown Fee Coal Exchange is in the public interest, and it is BLM's decision to proceed with the proposed AVF Fee Coal Exchange as described under the Proposed Action in the Environmental Assessment and Finding of No Significant Impact and equalized for value. Nance-Brown will convey, by warranty deed, ownership of the fee coal in the lands described in Appendix A to the United States, excluding the coal under the townsite of Birney and Tract A. The newly acquired Federal coal will be managed, as indicated, by the BLM and the Bureau of Indian Affairs ("BIA") in Trust for the Northern Cheyenne Tribe (NCT).

In exchange, BLM, on behalf of the United States, will convey by patent ownership of the Federal coal estate in the Ashenhurst Tract, as described in Appendix B, to Nance-Brown. The exchange will not include the Federal coal interest in T. 1 N, R. 41 E Sec. 6, which was included in the Notice of Exchange Proposal (NOEP), because of resource concerns identified in the EA and FONSI and the coal in the tract was not needed to equalize the values as required by statute and regulation.

The exchange of lands or interests in lands shall be of equal value or equalized in accordance with 43 CFR 2201.6. The appraised value of the Federal coal estate is \$5,573,000 and the value of the Fee coal estate is \$5,536,000. In order to equalize the appraised values, the Nance-Brown will make a payment of \$37,000 to the United States. A cash equalization payment can be used after all reasonable efforts to equalize values by adding and excluding lands have been made and the payment does not exceed 25 percent of the Federal lands to be conveyed.

III. EXPLANATION OF DECISION

A. Authorities

The authority for this decision is contained in Section 510(b)(5) of SMCRA. 30 U.S.C. § 1260(b)(5). Pursuant to Section 510(b)(5) of SMCRA, AVF fee coal exchanges, such as this one, must follow the exchange procedures set forth in Section 206 of FLPMA, 43 U.S.C. § 1716. As mandated by SMCRA, FLPMA, and the implementing regulations, the market value of the Federal and non-Federal coal will be determined by a qualified appraiser and approved by the BLM. *See, e.g.*, 43 U.S.C. § 1716(b); 43 CFR 2201.3. The coal exchanged must be of equal value, or if they are not equal, the value can be equalized by the payment of money to the grantor or the Secretary so long as the payment does not exceed 25 percent of the total value of the coal or interests transferred out of Federal ownership, 43 U.S.C. § 1716(b); *see, e.g.*, 43 CFR 2201.5, 2201.6, and 3436.2-3(e). In determining the value of the coal deposit underlying or near an AVF, the Secretary shall proceed as though there were no prohibition on surface coal mining

operations on the property, 43 CFR 3436.2-3(e). Other relevant regulations are located at 43 CFR subparts 2200, 2201, 2203, and 3436.

B. Public Interest Determination

1. Public interest determination factors.

FLPMA provides that exchanges are authorized “where the Secretary concerned determines that the public interest will be well served by making that exchange” 43 U.S.C. § 1716(a). By regulation, BLM has laid out in detail the factors that must be considered in evaluating whether an exchange involving Federal fee coal deposits is in the public interest. 43 CFR subparts 2200, 2201, and 2203. As with any exchange involving public lands, BLM must “determine if a proposed exchange is in the public interest” 43 CFR 2201.7-1(a); *see also* 43 CFR 2203.0-9 (incorporating compliance with 43 CFR subparts 2200 and 2201 for exchanges involving Federal fee coal). BLM’s regulations state:

Determination of public interest. In making this determination, the authorized officer must find that:

- (1) The resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired, and
- (2) The intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with the established management objectives on adjacent Federal lands and Indian trust lands. . . .

43 CFR 2200.0-6(b); *see also* 43 U.S.C. § 1716(a). The determination of the public interest is made after reviewing the management decisions affecting the coal tracts in the Powder River Resource Area Resource Management Plan; the potential environmental impacts of mining the tracts discussed in the EA; input from the public; and the values of the offered and selected coal lands in the appraisal.

In addition to the general land exchange factors, for exchanges involving fee coal exchanges, BLM must also consider “whether the exchange will create or maintain a situation inconsistent with the Federal anti-trust laws.” 43 CFR 2203.0-6. BLM, in making this determination, shall consider the advice of the Attorney General of the United States.

2. Public interest determination for the non-Federal fee coal to be acquired.

Section 510(b)(5) of SMCRA prohibits the approval of permits for surface coal mining operations if the proposed surface coal mining operation is located west of the 100th meridian west longitude and would either interrupt, discontinue or preclude farming on AVFs that are irrigated or naturally subirrigated, or would materially damage the quantity or quality of water in

surface or underground water systems that supply these valley floors. 30 U.S.C. § 1260(b)(5)(A) & (B). Owners of private fee coal affected by this provision may apply to BLM for an exchange of their private fee coal for Federal fee coal. *Id.* These AVF fee coal exchanges are processed pursuant to section 206 of FLPMA, except that, unlike the discretionary exchanges contemplated by FLPMA, courts have considered AVF fee coal exchanges to be mandatory for qualified AVF fee coal owners. *Id.*; see *Nance v. Kempthorne*, No. CV-06-125-BLG-RFC, at 15 (D. Mont. Dec. 21, 2007) (order denying motion to dismiss).

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

3. Public interest determination for the Federal coal to be exchanged

BLM retains its discretion as to the Federal lands that would be exchanged under Section 510(b)(5) of SMCRA. See *Nance v. Kempthorne*, No. CV-06-125-BLG-RFC, at 17 (D. Mont. May 29, 2008) (order re motions for summary judgment). In doing so, BLM will consider the public interest factors as they pertain to Federal coal being removed from Federal ownership.

The Federal coal proposed for exchange to Nance-Brown is referred to as the Ashenhurst Tracts in the EA. The Ashenhurst Tracts are part of a larger coal area located south of the Rosebud Mine near Colstrip in Rosebud County, Montana. The coal area is an extension of Area C South of the mine. The Federal coal in the area is laid out in a “checkerboard” pattern with sections of private fee coal located between sections of Federal coal.

The coal reserves in the area are based on the Rosebud coal seam. The coal seam thickness runs from 16 to 26 feet in the reserve area and overburden depths vary from 50-100 feet in the coulee bottoms to over 300 feet beneath the ridges separating the coulees. The seam quality is expected to be 8,600-8,700 BTU/lb, 0.75 to 1.0% sulfur.

The Federal coal tracts in the Ashenhurst Tracts that are being considered for exchange are split-estate lands where different entities own the surface and minerals. As described in the EA, the surface lands over the Federal coal tracts are owned by the Ashenhurst Ranch Inc. and Big Sky Coal Company. The lands owned by Big Sky Coal Company were removed from consideration for exchange as a result of the EA impact analysis and the coal in the tract was not needed to equalize the values as required by statute and regulation.

The Ashenhurst Tracts have been previously identified as acceptable for further consideration of coal leasing under 43 CFR 3420.1 (Powder River Resource Area Resource Management Plan, March 1985). The offered coal tracts are in the same State as the non-Federal tracts to be acquired as required by Section 216 of FLPMA and 43 CFR 3436.2-2.

BLM received comments concerning the public interest associated with exchanging the Federal coal under the Ashenhurst Tracts.

a. *Surface Owner Protection*

A number of the comments at the EA scoping meeting, on the October 6, 2010 EA, and at the hearing on the public interest considerations dealt with the potential impacts the exchange would have on the potential application of the surface owner protection provision of Section 714 of SMCRA and the potential impacts on the value of the surface to the private surface owners.

When Federal coal is considered for lease, Section 714 of SMCRA and the implementing regulations require the submission of evidence of written surface owner consent to enter and commence surface mining from a qualified surface owner. 30 U.S.C. § 1304(c); 43 CFR subpart 3427. However, if the Federal coal estate is transferred to a private owner through exchange or disposed of in a manner other than a Federal coal lease, a qualified surface owner may not have the same protections under state law. *See* 30 U.S.C. § 1260(b)(6) (providing that for split estates lands in which the surface and coal estates are owned by different private owners, applicants for surface coal mining operations must submit written consent of the surface owner, a conveyance or other right allowing the extraction of coal, or the legal relationship between the split estate owners will be determined by state law); *see also* Mont. Admin R. 17.24.303.

The comments received generally characterized the SMCRA surface owner consent provision prior to leasing as a right and implied that it confers a property interest which must be accounted for in the exchange. However, Section 714(g) explicitly states that “[n]othing in this section shall be construed as increasing or diminishing any property rights by the United States or by any other landowner.” 30 U.S.C. § 1304(g). Thus, it was clear that Congress did not intend to create any property right for the surface owner when it enacted Section 714(g) of SMCRA.

The commenters also contend that there will be potential negative impacts on the value of the surface to the Ashenhurst Ranch, Inc. due to the loss of the SMCRA Section 714 surface owner protection provision if the exchange is completed. The exchange could potentially have direct effects on the applicability of the SMCRA Section 714 surface owner protection on four out of seven contiguous sections owned by the Ashenhurst Ranch, Inc.¹ In turn, the change of coal ownership from Federal to private could affect the value of those four tracts and, indirectly, the value of the contiguous three tracts owned by the Ashenhurst Ranch, Inc.

¹ The Ashenhurst Ranch, Inc. owns the surface of seven contiguous sections (T. 1 N., R. 40 E.: Secs. 21, 22, 26, 27, 28, 33, and 34) of which four (T. 1 N., R. 40 E.: Secs. 22, 26, 28, and 34) overlay Federal coal. *See* EA DOI-BLM-MT-CO20-2011-0005-EA (Oct. 6, 2010), Map 3.2, p. 28. After consideration of these tracts in the EA and as part of the value-equalization process, described in this Decision Record, BLM determined that all four of these sections would be exchanged.

Any loss of value for those four sections, or indirectly on the other three sections, due to the potential inapplicability of the SMCRA surface owner protection is speculative. However, because the exchange “affect(s) or may affect the use or value of private property,” a takings implication assessment (“TIA”) was completed as directed by Executive Order 12,630 (March 18, 1988) and Attorney General, Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, p. 4 (June 30, 1988). The TIA, completed by the Office of the Solicitor on March 8, 2011, concluded that it is unlikely that the exchange would rise to the level of a Fifth Amendment taking.

Simply because a taking is unlikely to occur, it does not end our public interest consideration of the exchange’s potential impacts to and needs of State and local residents. Thus, it is important to consider what loss of value may be incurred as a result of the exchange. Generally, any loss of value related to the decision to complete the AVF fee coal exchange would be the result of the surface owner losing some bargaining position in negotiations with the coal operator to obtain access for mining, assuming mining will occur. Any potential loss of value would likely not rise to the level of total loss of value for the property because (1) the surface owner would be compensated by the coal operator if the mining requires the use of the surface of the property, (2) upon completion of mining, the surface owner can resume any uses that were restricted during mining, including the primary current use—grazing, and (3) the surface owner can make full use of the surface until any potential mining occurs. In addition, the temporary loss of use of the surface has been accounted for in the appraisal of the Federal coal tracts through a surface disturbance royalty paid by the coal operator to the surface owner. Thus, although some loss of value cannot be ruled out as a consequence of the exchange, the exchange would not completely deprive the surface owners use of their property, and BLM has no way of measuring any partial value loss with any certainty.

The BLM may attach reservations or restrictions to the deed as needed to protect the public interest. 43 CFR 2200.0-6. BLM policy dictates that these restrictions should generally be used only “on Federal land conveyed into non-Federal ownership . . . where required by law or executive order, clearly supported by the environmental documentation and closely coordinated with the Field or Regional Solicitor.” Land Exchange Handbook, H-2200-1, at 6-4. After a close examination of the comments received, the law, and our analysis of the potential consequences of the exchange, BLM has decided that such a reservation or restriction that would allow any potential qualified surface owners to maintain their protection is not needed. In this instance, restrictions or reservations are not required by law or executive order and is not clearly supported by the documentation because: (1) loss of use of the surface is temporary, and the surface owners are likely to be compensated to some degree; (2) SMCRA Section 714 only extends the protection to qualified surface owners in leasing situations, as this exchange is not a leasing matter, it is unclear whether the surface owners are qualified as defined in SMCRA and the regulations; and (3) there is no authority to extend similar surface owner protections to nonleasing situations.

b. Environmental Analysis

Public interest factors related to the environment, such as fish and wildlife habitats, cultural resources, and socio-economic impacts to the community were examined in the October 6, 2010

EA. BLM received comments on this EA, and a summary of the comments and BLM's responses and changes are found in the attached EA and FONSI. In particular, the issues identified through the public scoping process were discussed and analyzed in chapters 3 and 4 of the EA. These issues include the potential effects of the proposed exchange on:

- Private surface owner rights;
- The value of private surface land;
- Cultural resources; and
- The development of the coal.

After considering the comments received during the EA scoping process and the factors that must be considered in evaluating whether an exchange involving Federal fee coal deposits is in the public interest (43 CFR 2200.0-6(b)) two alternatives were developed:

Alternative A— Exchange of All of the Nance-Brown AVF Fee Coal for Some or All of the Federal Coal Underlying the Ashenhurst Tract (Proposed Action Alternative)

In this Alternative, BLM would exchange some or all of the unleased Federal coal, within the Ashenhurst Tract, to equal the value, as determined by appraisal, of approximately 3,379.55 acres of non-Federal coal in the alluvial valley floor of the Tongue River owned by Nance-Brown. Only coal ownership would be exchanged. Alternative A analyzed the potential impacts to the environment of development of the coal on the Ashenhurst Tracts. The impacts from mining the coal tracts are based on the Reasonably Foreseeable Development ("RFD") scenario described in Appendix A of the EA. The RFD estimated the coal tracts would be leased in the next 10 years and mining would continue for another 20 years.

Alternative B— No Exchange (No Action Alternative)

In this Alternative, BLM would not approve the exchange of ownership of the Nance-Brown fee coal for some or all of the unleased federal coal in the Ashenhurst Tracts. The Federal unleased coal in the Ashenhurst Tracts would remain available for further consideration for future leasing or exchange. Under current law, the Nance-Brown AVF coal would not be available for surface mining because of SMCRA and the State's AVF determination. Although Nance-Brown would still be eligible for an exchange of Federal coal in Montana, selection of this alternative would further delay BLM's compliance with Section 510(b)(5) of SMCRA and any applicable court orders and stipulations.

The analysis of the Proposed Action included the issues identified in the public scoping process. Two issues identified in scoping were related to the potential impacts to the private surface owners, primarily the Ashenhurst Ranch Inc., over the Federal coal lands to be exchanged. The EA described the issues and discussed the potential impacts. In addition, the issues were raised at the hearing on the public interest determination and are discussed in the Surface Owner Protection section above.

As part of the EA process a cultural resources survey was completed on the Federal coal tracts. The survey identified cultural resources were present and that some sites were potentially eligible for the National Register. These sites occurred on all five Federal coal tracts on which the survey was conducted. However, the greatest concentration of cultural sites occur on T. 1 S.,

R. 41 E. PMM Section 6 ("Section 6") and includes some sites that may be important to Native American Groups. In addition, this section is not needed for value equalization purposes. Thus, this tract will be excluded from the exchange and will remain in Federal ownership to be available for further lease consideration in accordance with the relevant Resource Management Plan ("RMP"). By remaining in Federal ownership, BLM will retain its discretion to attach mitigation plans to this tract in the future if it is considered for leasing.

The EA also discussed some of the socio-economic impacts of the exchange. Primarily, the conveyance of the Federal coal tracts to private owners will result in the loss of lease bonus, rents and production royalty payments, referred to as the Federal revenues. The RFD estimated the leasing, and the revenue generated from this leasing, could occur in the next 10 years. Once leased, mining and reclamation is expected to continue for another 30 years. The loss of Federal revenues on the land to be exchanged was estimated using the operating assumptions and market values found in the appraisal. The present value of the forgone Federal revenues is an estimated \$8.3 million dollars. The annual revenues would vary based on the bonus paid and annual production from the tracts. Half the Federal revenues, approximately \$4 million dollars, would have been disbursed to the State. The Montana Department of Revenue would return a quarter of the state share to Rosebud County under the current formula. The loss of revenues would be offset in part by the State and Federal income taxes due on the mineral payments to the private lessor.

The exchange of coal ownership in the Federal tracts would not impact the existing or proposed management of the adjacent Federal lands.

c. Competitive Interest and Anti-Trust Implications

The Federal coal tracts are located south of the Rosebud Mine operated by Western Energy Company. The Federal tracts, along with the intervening fee coal, are positioned to be an extension of Area C South of the mine. Although it is currently expired, Western Energy was issued Federal Coal Exploration License MTM 98618, which encompassed the Federal tracts. The tracts also adjoin the Big Sky Mine, which is no longer operating and is undergoing reclamation activities associated with the closure. No other mines are located in the vicinity of the tracts.

After completion of the EA, which analyzed the impacts of development on the selected coal exchange tracts, the BLM held a public meeting to receive comments on the public interest factors of the proposed exchange. In accordance with 43 CFR 2203.4(a), on December 1, 2010, BLM forwarded to the Attorney General copies of the public comments and the transcript of the October 19, 2010 public meeting. Over 90 days elapsed without any formal response from the Office of the Attorney General. Informal inquiries indicated that there were no anti-trust concerns with the exchange proposal.

d. Public Interest Determination and Conclusion

The authorized officer has given full consideration to the existing and proposed management of the coal lands to be conveyed and to be acquired through the AVF exchange. The exchange is in

conformance with the RMP, and the EA/FONSI discusses the potential environmental impacts of mining the conveyed tracts. The proposed use of the conveyed Federal coal lands will not conflict with the adjacent Federal lands, which are available for further consideration for leasing. There are no Indian trust lands adjacent to the Federal coal tracts. The needs of the State and local residents were considered through the NEPA scoping process that identified issues analyzed in the EA/FONSI, the public interest comment procedures, and this Decision Record (DR). Thus, there is no indication that the intended use of the conveyed Federal lands will conflict with the management objectives on adjacent Federal lands.

The market values of the coal interests to be exchanged have been determined through an appraisal of each property as described in the following section. The values will be equalized by a cash equalization payment, which is permitted after all reasonable efforts to equalize values by adding and excluding lands have been made and the payment does not exceed 25 percent of the Federal lands to be conveyed. The loss of Federal mineral revenues on the conveyed coal lands is offset by the benefits derived from protecting the AVF coal lands from being developed as a result of the SMCRA prohibition.

Therefore, after reviewing the relevant documents summarized here, the public input received, and the factors listed in 43 CFR 2200.0-6(b), BLM has determined this exchange to be in the public interest.

C. Appraisal and Equal Value Resolution

The exchange of lands or interests in lands shall be of equal value and shall be based on market value as determined by the Secretary through appraisals. 43 CFR 2200.0-6(c). The parties to the exchange shall comply with the appraisal standards set forth in the Department of Justice "Uniform Appraisal Standards for Federal Land Acquisitions" when appraising the value of the Federal and non-Federal lands or interests in lands involved in an exchange, 43 CFR 2201.3.

The appraisals for both properties were prepared by a Certified Mineral Appraiser, Alan Stagg of Stagg Resource Consultants, Inc., under contract with the Department of Justice and were reviewed and accepted by BLM. The appraisals only included the value of the coal estate in each property. The appraised values are found in Appendix C.

The Appraisal Report for the non-Federal coal in the Nance-Brown Tracts was reviewed and approved by BLM on August 24, 2011. The appraisal established a value of \$5.536 million for the fee coal estate in the Nance-Brown tracts, which includes an estimated 31.3 million tons of recoverable coal, described in Appendix A.

The Appraisal Report for the Federal coal in the Ashenhurst Tracts was reviewed and approved by BLM on August 23, 2011. The BLM requested, in the appraisal instructions, that the value of the Federal coal be determined for each section within the Ashenhurst Tracts in order to facilitate the equalization of values to complete the exchange. As a result of the analysis in the EA and because of its limited value, Section 6 was removed from consideration for exchange. So, the Federal tracts to be exchanged include T. 1 N., R. 40 E., PMM, Sections 22, 26, 28 and 34,

described in Appendix B. The appraisal established a value of \$5.573 million for the Federal coal of the four sections of the Ashenhurst Tracts to be exchanged, including an estimated 36.9 million tons recoverable coal.

The difference in the appraised values was less than 1 percent, which is less than 10 acres at the average coal thickness on the Federal tract. So, no further efforts to add or subtract coal from either tract were reasonable. Therefore, in order to equalize the values in the coal tracts to be exchanged, the parties have agreed to use a cash equalization payment according to 43 CFR 2201.6(a)(2). The Nance-Brown will make a payment of \$37,000 to the United States.

D. Title

The Office of the Field Solicitor has reviewed the title evidence for the Nance-Brown fee coal tracts and determined that the title evidence complies with the Department of Justice's title standards.

E. Conformance with Land Use Plans

The authorized officer shall consider only those exchange proposals that are in conformance with land use plans or plan amendments, 43 CFR 2200.0-6(g). Also, the Federal coal to be exchanged has to be determined as acceptable for further consideration for coal leasing as a prerequisite for consideration in an AVF fee coal exchange, 43 CFR 3436.2-2.

The Federal coal lands in the Ashenhurst Tract are located in the Powder River Resource Area, Miles City District Office. The RMP that includes the Ashenhurst Tracts was approved March 15, 1985.

The coal screens were applied in the RMP and were described in the final RMP EIS completed in December 1984. The screening process and the results of the analysis are included in Appendix D, Federal Coal Lands Review Process, of the Final RMP. The RMP identified the coal deposits in the Resource Area, which were acceptable for further lease consideration in the description of the Proposed Plan on page 19. These areas are shown on the Preferred Alternative map attached to the RMP. In addition the RMP states: "Coal exchanges in areas found acceptable for further lease consideration would be considered ...on a case by case basis..." The Federal coal in the Ashenhurst Tract was found to be acceptable for further lease consideration in the RMP.

IV. CONSULTATION AND COORDINATION

A. Summary of Public Involvement

BLM sent 177 scoping letters on April 2, 2010, to landowners, adjacent landowners, interest groups, industry, media, and city, state and Federal government agencies requesting comments

and information on the proposed Nance-Brown AVF coal exchange. Attached to the scoping letter was the Notice of Exchange Proposal (NOEP) dated March 29, 2010. The NOEP included the legal descriptions of the Nance-Brown and Ashenurst Tracts and maps of the geographic area. The NOEP was published April 8, 2010, in the Miles City Star, Billings Gazette, Forsyth Independent, and Big Horn County News newspapers. The NOEP announced the scoping meeting that took place on April 22, 2010, and informed the public of the 45-day comment period.

B. Comments and Issues Raised by the Public

The scoping meeting was held in Colstrip, Montana on April 22, 2010. There were 20 individuals that attended the meeting and approximately five individuals gave verbal comments on the proposed exchange. Four written comments were received throughout the 45-day comment period. Surface owner protection was the main topic of discussion. The comments were considered and reflected in the Nance-Brown AVF Coal Exchange EA.

On October 7, 2010, a Notice was published in the Federal Register, 75 FR 62137. A press release was published in the Miles City Star, Billings Gazette, Forsyth Independent, and Big Horn County News newspapers covering eastern Montana requesting comments on the Nance-Brown AVF Coal Exchange EA and to inform the public of the public meeting that was to be held on October 19, 2010, in Colstrip, Montana. BLM also sent out 171 letters to landowners, adjacent landowners, interest groups, industry, media, and city, state and Federal government agencies informing them of the 45-day comment period on the EA and of the scheduled public meeting on the public interest factors.

The public meeting was held in Colstrip, Montana on October 19, 2010, to receive comments on the public interest factors involved with the proposed exchange. Sixteen individuals attended the hearing, and three individuals gave their testimony. The potential effects of the exchange on the surface owners overlying the Federal coal were the primary focus of the comments.

The 45-day comment period on the Nance-Brown Coal Exchange EA generated comments from three groups. Comments and concerns expressed by the three groups included:

- The adequacy of the description of the Proposed Action;
- How the proposed action or alternatives conformed to existing Land Use Plans;
- Issues identified during the public scoping period, such as the potential effects on surface owners; and
- The sufficiency of the analysis regarding cultural resources, visual resource management, vegetation, development of subsurface resources, climate change, air quality, water quality, ground water and surface water.

The EA has been revised to address these concerns and clarify the analysis related to these issues and comments. The changes to the EA are incorporated throughout the EA and are shaded to make it easier for the reader to see how the text was modified in response to public comments.

V. RATIONALE FOR THE DECISION

The proposed exchange fulfills BLM's statutory duties under Section 510(b)(5) of SMCRA, Section 206 of FLPMA, and the implementing regulations to effectuate an exchange for private AVF fee coal that cannot be mined pursuant to SMCRA for unleased Federal coal in Montana. BLM has thoroughly considered (1) the potential environmental impacts through the attached EA/FONSI, (2) the public interest factors, above, including but not limited to needs of local residents as expressed by their public comments and the public interest of AVF exchanges generally as recognized by the Court in *Nance v. Kempthorne*, No. CV-06-125-BLG-RFC (D. Mont. May 28, 2008), pp. 16-19, Order Re Motions for Summary Judgment, and (3) the antitrust implications after consultation with the Department of Justice. In addition, a qualified appraiser has appraised the properties, and the values will be equalized pursuant to the FLPMA and the regulations.

VI. IMPLEMENTATION

Implementation of this decision to complete this exchange will occur only upon expiration of the 45-day protest period, initiated by publication of the Notice of Decision, and after the resolution of any protests.

VII. ADMINISTRATIVE REVIEW OPPORTUNITIES

When the decision to approve or disapprove this exchange is made, the authorized officer will publish a notice of the availability of the decision, pursuant to 43 CFR 2201.7-1, in newspapers of general circulation, and it will be mailed to State and local governmental subdivisions having authority in the geographical area within which the lands covered by the notice are located, the non-Federal exchange parties, authorized users of involved Federal lands, the congressional delegation, individuals who requested notification or filed written objections, and others as appropriate. The notice will provide for a 45-day protest period from the date of publication. The notice will include the date of the decision, a concise description of the decision, the name and title of the deciding official, directions for obtaining a copy of the decision, and the date of the beginning of the protest period.

VIII. SIGNATURE OF THE AUTHORIZED OFFICER

Approved By: Theresa M. Hanley Date 8-26-2011
Theresa Hanley,
Deputy State Director, Division of Resources, Montana State Office

Appendix A

LEGAL DESCRIPTIONS OF TRACTS EXCHANGED

Offered Tract (Non-Federal Coal)

The Nance-Brown will convey by warranty deed to the United States their coal interests in the following described lands (excluding the Birney townsite and include title reservations, encumbrances and interests)

<u>Principal Meridian Montana, (Rosebud County, Montana)</u>	<u>Acres</u>
T. 4 S., R. 43 E.,	
sec. 23, Lot 2	18.66
SE $\frac{1}{4}$ SE $\frac{1}{4}$	40.00
sec. 24, Lot 2	21.00
Lot 3	27.31
Lot 4	37.99
S $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$	160.00
sec. 25, W $\frac{1}{2}$ NW $\frac{1}{4}$	80.00
sec. 26, NE $\frac{1}{4}$, E $\frac{1}{2}$ W $\frac{1}{2}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$	480.00
sec. 27, Lot 1	22.03
sec. 33, Lot 1	35.26
sec. 34, S $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$	320.00
sec. 35, W $\frac{1}{2}$ NW $\frac{1}{4}$	80.00
T. 5 S., R. 42 E.,	
sec. 25, Lot 5	33.14
E $\frac{1}{2}$ E $\frac{1}{2}$	160.00
sec. 35, E $\frac{1}{2}$, E $\frac{1}{2}$ SW $\frac{1}{4}$	400.00
T. 5 S., R. 43 E.,	
sec. 3, Lot 3	39.82
Lot 4	39.76
sec. 9, NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$	80.00
T. 6 S., R. 42 E.,	
sec. 1, SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$	160.00
sec. 12, E $\frac{1}{2}$ E $\frac{1}{2}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$	320.00
sec. 13, NE $\frac{1}{4}$ NE $\frac{1}{4}$	40.00
T. 6 S., R. 43 E.,	
sec. 6, Lot 2	41.17
Lot 3	41.15
Lot 4	34.97
Lot 5	34.04
Lot 6	34.06
Lot 7	34.09

Appendix: B

LEGAL DESCRIPTIONS OF TRACTS EXCHANGED

Offered Tract (Federal Coal)

The United States will convey by patent to the Nance-Brown the federal coal interests in the following described lands.

<u>Principal Meridian Montana, (Rosebud County, Montana)</u>	<u>Acres</u>
T. 1 N., R. 40 E.,	
sec. 22,	640.00
sec. 26,	640.00
sec. 28,	640.00
sec. 34, Lot 1	39.36
Lot 2	39.35
Lot 3	39.35
Lot 4	39.34
N2, N2S2	480.00
Consisting of Approximately	2,557.40 acres

Appendix C

AGREEMENT ON VALUE FOR LANDS INVOLVED IN THE NANCE-BROWN AVF COAL EXCHANGE MTM 99236

The following documents the agreement on value (price) reached as of August 15, 2011, by and between Nance-Brown and the **United States, by the Authorized Officer of the Bureau of Land Management** ("BLM") with respect to AVF coal land exchange, MTM 99236.

Federal Land		Appraisal
Rosebud County		
Ashenhurst Coal Tracts	2,557.40 acres	\$ 5,573,000
Total Value of Federal Land:		\$ 5,573,000

Values for the federal lands are based on appraisals prepared by Stagg Resource Consultants Inc. dated August 10, 2011, and approved by Phillip Perlewitz, BLM Review Appraiser, on August 23, 2011, respectively.

Non-Federal Land		Appraisal
Rosebud County		
Nance-Brown Coal Tract	3,350.55 acres	\$ 5,536,000
Total Value of Non-Federal Land:		\$ 5,536,000

Values for the non-Federal land are based on appraisals prepared by Stagg Resource Consultants Inc. dated August 16, 2011, and approved by, Phillip Perlewitz, BLM Review Appraiser on August 24, 2011, respectively.

In order to equalize the appraised values, the Nance-Brown will make a payment of \$37,000 to the United States. A cash equalization payment can be used after all reasonable efforts to equalize values by adding and excluding lands have been made and the payment does not exceed 25 percent of the Federal lands to be conveyed.