

**BEFORE THE
PARKS AND RECREATION COMMISSION
OF THE STATE OF OREGON**

IN THE MATTER OF THE REVIEW OF)	APPROVAL
A REQUEST FOR AN EXCHANGE OF)	ORDER
REAL PROPERTY PROPOSED BY)	14-__-__
BANDON BIOTA, LLC)	

This matter came before the Oregon Parks and Recreation Commission (the “Commission”) on February 5, 2014, as a request for an exchange of real property owned by the Oregon Parks and Recreation Department (the “Department”) initiated by Bandon Biota, LLC (“Bandon Biota”), pursuant to ORS 390.121 and OAR chapter 736, division 19. The request before the Commission involves: (1) the fee title transfer from the Department to Bandon Biota of a 280-acre non-oceanfront portion of the 878-acre Bandon State Natural Area encumbered with an easement for continued public use of a trail corridor in Coos County; (2) the fee title transfer from Bandon Biota to the Department of an 111-acre oceanfront parcel adjoining Bandon State Natural Area in Coos County; (3) the fee title transfer from Bandon Biota to the Department of a 97-acre riverfront parcel adjoining Bullards Beach State Park in Coos County; (4) a contribution from Bandon Biota worth \$450,000 to facilitate government acquisition of approximately 11-acres of oceanfront parcels at Whale Cove in the viewshed of Rocky Creek State Wayside in Lincoln County; (5) a contribution from Bandon Biota worth \$2,500,000 toward the Department’s acquisition of an addition to the state park system, currently identified as the Grouse Mountain Ranch in Grant County; (6) a contribution from Bandon Biota worth \$300,000 toward the Department’s control of gorse on Bullards Beach State Park and the reconfigured Bandon State Natural Area in Coos County, and Cape Blanco State Park and the Floras Lake State Natural Area in Curry County; and (7) an easement from Bandon Biota to the Department across the Sheep Ranch at Bandon Dunes in Coos County for purposes of relocating and aligning the Oregon Coast Trail in accordance with the Department’s trail standards. The Commission fully considered the proposed exchange request, the oral and written comments of the public, and the reports of the Department. The Commission makes the following findings of fact, interpretations of the Commission’s rules, conclusion of law, and decision:

I. Introduction and Background

The Commission has express statutory authority to both acquire real property and exchange real property acquired by the Department when in the Department’s opinion and judgment such action would further the mission of the Department. ORS 390.121(1) and (3). The Commission has adopted by rule a methodology for consideration and criteria to evaluate land exchanges that a party other than the Department initiates. OAR chapter 736, division 19. Under the applicable criteria, the Commission concludes in this order that this request is an acquisition by exchange of real property and other assets that provides overwhelming public benefit to the state park system.

A. Commission History

1. On September 2, 2004, the Commission adopted OAR chapter 736, division 19 to advance to rule its long-standing internal Land Acquisition and Exchange Policy.
2. On August 19, 2010, Bandon Biota submitted a “preliminary proposal for informal review, questions, comments and guidance” for the September 2010 Commission meeting.
3. On September 22, 2010, Bandon Biota presented their preliminary exchange proposal concept at the Commission’s meeting in South Beach State Park near Newport.
4. On January 26, 2011, the Commission continued the discussion and final consideration for adoption of amendments to OAR chapter 736, division 19; Acquisition Policy to the March 2011 meeting.
5. On March 16, 2011, the Commission adopted amendments to division 19. The amendment added the Criteria for Exchange rule, OAR 736-019-0070.
6. On July 20, 2011, Bandon Biota provided public comments on their exchange proposal at the Commission’s meeting in Bandon.
7. In June 2013, Bandon Biota presented an updated request for exchange proposal to the Department.
8. On July 3, 2103, the Department released the request for exchange proposal as part of the announcement for the July 17, 2103 Commission meeting in Bandon. The Commission solicited written and oral public comment on the request.
9. On July 17, 2013, Bandon Biota presented the proposed exchange at the Commission’s meeting in Coos Bay. The Commission took public comment on the Bandon Biota request.
10. On August 16, 2013, the Department held a public meeting in Bandon as part of the Commission’s effort to solicit further public comment on the Bandon Biota request.
11. On August 19, 2013, the Department held a public meeting in Mount Vernon as part of the Commission’s effort to solicit further public comment on the Bandon Biota request.
12. On September 24, 2013, the Department presented an informational update on the proposed exchange with Bandon Biota and the acquisition of Grouse Mountain Ranch and the public provided comments at the Commission’s meeting in Condon.
13. On November 19, 2013, the Commission received a letter from Governor Kitzhaber stating his belief that the exchange and acquisition “will positively advance economic

and conservation values” and the importance of considering the potential impacts of the acquisition on agricultural and other community values.

14. On November 20, 2013, the Commission passed four motions related to Bandon Biota exchange and the acquisition of Grouse Mountain Ranch:

Motion 1: the Commission finds that the contemplated Bandon Biota exchange meets the “overwhelming public benefit” standard of OAR 736-019-0070(4) and instructs the Department to prepare a proposed final order for Commission approval.

Motion 2: the Commission finds that the acquisition of Grouse Mountain Ranch meets the acquisition standards in OAR 736-019-0060 and instructs the Department to prepare a proposed final order for Commission approval.

Motion 3: the Commission directs the Department to continue good faith efforts to address local community concerns as reflected in the Governor’s letter dated November 19, 2013.

Motion 4: the Department will accept additional written testimony until December 6, 2013, regarding the proposed exchange or the proposed Grouse Mountain Ranch acquisition to afford the department the opportunity to consider the comments in preparing the proposed final orders.

15. On November 20, 2013, Bandon Biota and the Department executed the Grouse Mountain Ranch Assistance Agreement.
16. On December 6, 2013, the public comment period closed on both the Bandon Biota exchange request and the acquisition of Grouse Mountain Ranch as directed by the Commission’s Motion 4.
17. On January 23 and 30, 2014, the Department made the further reports requested by the Commission available to the public to allow comment on them and the draft orders at February 5, 2014 Commission meeting.

B. General Description of affected components of the state park system

The exchange request involves several components of the state park system. The Commission provides a brief description of the park system and the existing parks involved in the exchange. In discussing the exchange criteria below, the Commission details both how the exchange would affect these state park system components individually and how the exchange would benefit the state park system as a whole.

The Oregon State Park System is comprised of more than 220 parks spanning over 105,000 acres. The system serves an estimated 40 million daytime visitors (5th in the nation) and 2 million campers (8th in the nation) each year. More than 90 percent of all Oregonians participate in outdoor recreation at least once a year. 2013-2017

Statewide Comprehensive Outdoor Recreation Plan. As the Oregon population continues to grow faster than the national average at nearly one percent per year (US Census), the need to avoid future overcrowding in local, state and federal parks compels action now to configure the park system in way that preserves access to key features like the ocean shore, and adds new acreage to the state park portfolio.

The Bandon State Natural Area, formerly Bandon State Park, is a year round day use area located south of Bandon in Coos County. The Department designates a property a State Natural Area when the property is an outstanding natural resource that may offer opportunities to see important or unique natural features, plants, or wildlife. The primary natural features of Bandon State Natural Area identified in the Bullards Beach District Parks Master Plan are its four miles of ocean beach and its scenic coast line. OAR 736-018-0045(1)(r). Recreational activities include picnicking, sightseeing, beach activities, hiking, and horseback riding. The Bandon State Natural Area offers picnic facilities, restrooms, and a trail system. Annual day use attendance is 306,412, concentrated on the ocean shore. Natural features of the state natural area include beach, active littoral strand dunes, older forested dunes, interdunal swales and wetlands, rare plant communities, semi-stabilized interior dunes, views of the dune sheet, and rare plant occurrences (including a state listed threatened species). The Bullards Beach District Parks Master Plan establishes as an objective the control of gorse within the state natural area.

Bullards Beach State Park is located north of Bandon in Coos County at the mouth of the Coquille River; across the river from the Bandon Marsh National Wildlife Refuge. The historic Coquille River Lighthouse is located at the end of the beach access road in the park. Recreational use of the park include picnicking, boating, fishing, horseback riding, hiking, beach activities, nature study, visiting the historic lighthouse, and camping. The campground includes approximately 100 full-hookup sites, more than 82 electrical sites with water, 13 yurts, a horse camp with eight primitive sites, and a hiker/biker camp. Average annual daily attendance for the park is 395,960; average annual camper nights is 97,060. Natural features of the 1,289.32-acre park include four miles of ocean shore including the Coquille Spit; Coquille River, sand dunes, forests. The ocean foredune, deflation plain and winter pond areas in stabilized dunes include snowy plover bird habitat, populations of the state-listed endangered plant silvery phacelia, and waterfowl resting areas. The Bullards Beach District Parks Master Plan establishes as an objective the control of gorse within the park.

Whale Cove is located to the north of Rocky Creek State Wayside in Lincoln County and includes a rocky coastal headland, forest, and grassy coastal prairie. The area provides critical habitat for coastal wildlife. The headland parcel also includes a Native American midden site more than 3000 years old. Rocky Creek State Wayside is a 59-acre ocean-front park on a forested bluff overlooking the ocean. Whale Cove is in the Rocky Creek State Wayside viewshed looking north.

The Oregon Coast Trail is a statewide significant trail under the Oregon Recreation Trails System Act that follows the coastline. *See Oregon Trails 2005-2014: A Statewide Action Plan* at 250, table 2. The majority of the route is on the beach. The rest

of the 382-mile trail winds through state parks or other public lands, and on trail easements or permits from generous private landowners.

Cape Blanco State Park is a destination park located off the Oregon Coast Highway 101, nine miles east of the City of Port Orford in Curry County. The 1,895.4-acre park's recreational facilities include 54 electrical camp sites, 4 log cabins, 8 horse camp sites, group RV and group tent, hiker biker camp, 7 mile equestrian trail, 150 acres open riding range, fishing access to the Sixes River and black sands beach, and natural areas. The Hughes House (c. 1896), and the Cape Blanco Lighthouse are listed on the National Register of Historic Places. The Curry County State Parks Master Plan (2003) at page 80 states, "The presence of gorse throughout the park is a very serious management threat." OAR 736-018-0045(1)(n).

Floras Lake State Natural Area is located about nine miles north of Port Orford in Curry County. Classified as a State Natural Area, Floras Lake is 1,371.45 acres of extensive scenery, forest, sandstone bluffs and ocean frontage with sea terraces and steep beaches. The Blacklock Point portion of this property is a registered State Natural Heritage Area to protect important ecosystem components and provide for public interpretation and education. Recreational facilities are limited to trails and an undeveloped trailhead at the airport. The Curry County State Parks Master Plan (2003) establishes the control gorse and Scot's broom intrusions as a Natural, Scenic and Cultural Resource Management Guidelines for Floras Lake State Natural Area. OAR 736-018-0045(1)(n).

II. Discussion

In considering the exchange request of Bandon Biota, the Commission is called upon to make a determination under the criteria in OAR chapter 736, division 19 for the first time. Some of the comments received by the Commission are based on the commenters' interpretations of one provision or another of division 19. The Commission, as the governing body that adopted division 19, provides the discussion that follows to reconcile instances where the text of division 19 may be capable of supporting more than one interpretation by clarifying the Commission's interpretation of its rules.

The Commission first describes the seven elements of the exchange request. Next, the Commission provides a description of the Department's methodology in undertaking consideration of the exchange request. The Commission then describes and applies the criteria applicable to the exchange request. Finally, the Commission makes its determination whether the proposed exchange provides an overwhelming public benefit to the Oregon State Parks System, its visitors, and the citizens of Oregon.

A. Elements of the Exchange

(1) The fee title transfer from the Department to Bandon Biota of a 280-acre non-oceanfront portion of the 878-acre Bandon State Natural Area encumbered with an easement for continued public use of a trail corridor in Coos County;

Bandon Biota requests in the exchange proposal a 280-acre non-oceanfront portion of the 878-acre Bandon State Natural Area. Bandon State Natural Area features four miles of beaches backed by stabilized and unstabilized sand dune ridges paralleling the ocean. While the overall size of the request has remained at 280-acres, the configuration of the 280-acres portion's final boundary changed, with a strip extended to the north and the western boundary moving east. The Department and Bandon Biota agreed to the change because it enabled the Department to retain lands with more important natural resource and cultural resource features than originally proposed, while furthering the objectives of Bandon Biota. Bandon Biota has stated that the acquired land would be involved in the effort to create Bandon Links, a walking-only championship links municipal golf course.

An existing trail from a parking and access point on a Bureau of Land Management owned property to the ocean shore north of Laurel Lake crosses the southernmost portion of the exchange property. The Department would retain an easement for continued public use of the trail.

Bandon Biota provided a biological assessment that included the 280-acre non-oceanfront portion of the Bandon State Natural Area in its study area. *See* Biological Assessment Twomile Creek Property and Southern Bandon State Natural Area, Coos County, Oregon (2007) at 5 (Figure 1). The report described the area as composed of stabilized and unstabilized sand dunes forming two ridges parallel to the beach, separated by seasonally-flooded wetlands in the trough between the dunes. Dunal plant communities are found in troughs between the dunes. Elevations range from 20 to 90 feet above sea level. Most use of the area is limited to infrequent recreational entry by the public and adjoining landowners. The report mentioned that much of the study area was "overrun with gorse and serves as a center of dispersal for this invasive species." *Id.* at 3.

The Department has recently prepared a vegetation inventory for the 280-acre portion of interest to Bandon Biota. *See* Vegetation Inventory and Botanical Resource Assessment for the Portion of Bandon State Natural Area under Potential Land Exchange Consideration (October 23, 2013). The Department assessed the area for plant communities, wetlands, state and federally-listed plant species, and habitat quality. The report summarizes:

"In the case of this particular property, both highly significant natural habitats and areas highly degraded by invasive species are widespread in the study area. One plant species listed as threatened under Oregon's Endangered Species Act is present in a portion of the study area. Several rare and sensitive, but unlisted, species are also present. Deterioration of habitat condition and ecological function is due primarily to weed infestation and subsequent stabilization of formerly significant sparsely vegetated sand and dynamic dunal habitats that provide a vanishing habitat niche for a number of declining species of plants and wildlife." *Id.* at 1.

The reconfiguration of the Bandon State Natural Area would confer some areas of occupied habitat for silvery phacelia out of state ownership. Areas of rare habitats including beach sagewort dunal habitat, shore pine/kinnikinnik woodland, shore pine/hairy manzanita woodland, Port Orford cedar forest, Pacific madrone-wavyleaf silktassel stabilized dune summits, and shore pine/bog blueberry wetland are conferred out of state ownership without replacement in the property being conferred into state ownership. Some of those habitats do and some may otherwise exist on the reconfigured Bandon State Natural Area. The Department developed concepts for natural resource management of the vegetation and habitat ecology for the area. *Id.* at 42-43. Those concepts may be applied regardless of future land uses.

The land exchange area associated with Bandon State Natural Area is the ancestral homelands of the Coquille Indian Tribe and the Confederated Tribes of the Siletz Indians. The Department Archaeologist conducted background research using the State Historic Preservation Office (SHPO) database of archaeological sites and all information was obtained from confidential sites forms. Proposed Bandon Land Exchange Cultural Resources Overview (2014). Because archaeological site information can be exempt from disclosure under the public records law, ORS 192.501(11), the Commission describes these resources generally for purposes of this order.

The Department identified two sites that would leave state ownership in the exchange. The first, is a small portion of a precontact site that consists of a lithic scatter of chert, basalt and quartzite flakes, broken cobbles and fire cracked rock. The majority of the site will remain within the reconfigured Bandon State Natural Area. Archaeologists were unable to relocate this site in 1994 and 2004, possibly because of the migration of Twomile Creek and the site may be destroyed. The second, also is a precontact site that consists of a lithic scatter of chert, basalt and quartzite flakes, fire cracked rock and broken cobbles exposed on red subsoil. Archaeologists were unable to relocate the site in 2004 due to dense gorse.

(2) The fee title transfer from Bandon Biota to the Department of an 111-acre oceanfront parcel adjoining Bandon State Natural Area in Coos County;

The 111-acre oceanfront parcel is located on the shores of the Pacific Ocean and New River approximately six miles south of the city of Bandon. New River runs through the center of the property on a north-south alignment. Lower Fourmile Road enters the property from the south and terminates on the property. There is a parking area at the end of the road. A trail continues north through the property along the same alignment as Fourmile Road. The trail forks in the northern half of the property, with one fork leading northwest to New River, and two other forks leading north and east to enter Bandon State Natural Area.

The Department has prepared a vegetation inventory for the 111-acre oceanfront parcel. *See* Approximate and Assumed Vegetation of the Former County Park Property

on Fourmile Lane, Bandon, Oregon (November 7, 2013). That report determines that significant natural habitats and areas highly degraded by invasive species are both present on the parcel.

In 1993, the Pacific coast population of the western snowy plover (*Charadrius alexandrinus nivosus*) was listed as a threatened species under the Endangered Species Act (ESA). The Department prepared a Habitat Conservation Plan (HCP) as part of its application for an incidental take permit (ITP) authorized under Section 10(a)(1)(B) of the ESA. The Department's federally approved HCP includes the ocean shore area of the parcel as the northernmost extent of the New River Restricted Snowy Plover Management Area (New River RMA). See Habitat Conservation Plan for the Western Snowy Plover (2010) at Figure F-9. The New River RMA is identified as an area currently occupied by Western Snowy Plovers. *Id.* at Table 1-2. The parcel adjoins the southern end of the Bandon Snowy Plover Management Area (SMPA).

The land exchange parcel associated with the reconfigured Bandon State Natural Area is the ancestral homelands of the Coquille Indian Tribe and the Confederated Tribes of the Siletz Indians. The Department Archaeologist conducted background research using the SHPO database of archaeological sites and all information was obtained from confidential sites forms. Proposed Bandon Land Exchange Cultural Resources Overview (2014). Again, because archaeological site information can be exempt from disclosure under the public records law, ORS 192.501(11), the Commission describes these resources generally for purposes of this order.

The Department identified a site that would come under state ownership in the exchange. It is a precontact site that consists of two loci. Locus 1 appears to be the remains of a substantial village or long-term camp and includes artifacts such as fire cracked rock, cobble choppers, and cryptocrystalline (CCS), schist and quartzite flakes. At Locus 1, sediments of white clay were also observed, which is consistent with clay house floors found on the Oregon coast. Locus 2 consists of lithic debitage and small amounts of fire cracked rock, and is surrounded by dense gorse.

(3) The fee title transfer from Bandon Biota to the Department of a 97-acre riverfront parcel adjoining Bullards Beach State Park in Coos County;

The riverfront parcel on Coquille Spit is 97 acres of stabilized sand flats, low dunes, deflation plain, river beach, old dredge spoils, and tidelands. Most features are less than 15 feet above sea level. The Department's Bullards Beach State Park and restored tidal marsh owned by the Port of Bandon surround the parcel, which fronts on the Coquille River. Bandon Marsh National Wildlife Refuge is on the opposite shore of the river. Bandon Biota provided a 2007 biological assessment for the property that determined that the riverfront parcel has great value as a conservation site because it provides a significant opportunity for connecting lands already in conservation ownership.

The land exchange parcel adjoining Bullards Beach State Park is the ancestral homelands of the Coquille Indian Tribe and the Confederated Tribes of the Siletz Indians. The Department Archaeologist conducted background research using the SHPO database of archaeological sites and all information was obtained from confidential sites forms. Proposed Bandon Land Exchange Cultural Resources Overview (2014). Again, because archaeological site information can be exempt from disclosure under the public records law, ORS 192.501(11), the Commission describes these resources generally for purposes of this order.

The Department identified three sites that would come under state ownership in the exchange. The first is a precontact lithic scatter consisting of chert flakes and fire cracked rock. Although inventoried, this site may have been significantly eroded and possibly destroyed. The second is a precontact site that consists of a wood stake fishing weir. The third is also a precontact site and consists of a shell midden, which is nearly 100 percent gaper clams and a small amount of large unidentifiable shell and charcoal.

(4) A contribution from Bandon Biota worth \$450,000 to facilitate government acquisition of approximately 11-acres of oceanfront parcels at Whale Cove near Rocky Creek State Wayside in Lincoln County;

By an Interagency Agreement with the Oregon Department of Transportation in 2012, the Department agreed to provide matching funds for this acquisition under a 2008 National Scenic Byway Program grant awarded for the Pacific Coast Scenic Byway Oregon: Whale Cove – Protecting a Pacific Coast Treasure project. Bandon Biota will contribute \$450,000 in matching funds required to leverage that federal grant and a landowner donation for acquisition of the Whale Cove property. Bandon Biota’s contribution towards acquisition of the Whale Cove property is non-refundable and not contingent on completion of the rest of the exchange. The Whale Cove parcels are comprised of coastal forest, prairie, and rocky headland. Public acquisition of the Whale Cove property will protect the viewshed from the Rocky Creek State Scenic Viewpoint and other viewpoints.

(5) A contribution from Bandon Biota worth \$2,500,000 towards the Department’s acquisition of an addition to the state park system, currently identified as the Grouse Mountain Ranch in Grant County;

At the Department’s direction, Bandon Biota will provide \$2,500,000 into an escrow account established for the acquisition of an addition to the state park system. The Commission directed the Department to identify an addition to the state park system that could develop as a destination state park. The Department has currently identified the Grouse Mountain Ranch in Grant County as that acquisition. The Commission is considering final approval of that acquisition by separate order.

(6) A contribution from Bandon Biota worth \$300,000 toward the Department’s control of gorse on Bullards Beach State Park and the reconfigured Bandon State Natural Area in Coos County, and Cape

Blanco State Park and the Floras Lake State Natural Area in Curry County;

The Ocean Shore Management Plan describes gorse (*Ulex europaeus*) as an invasive plant species affecting the ocean shore:

“Gorse is a many-branched, rigid perennial species with thorns. A native to Europe, it was introduced to Oregon as an ornamental. This species, a relative of Scotch broom, is another invasive species that is expanding its range north along the coast and inland. Currently it covers many acres of land in Douglas, Coos and Curry counties. Infested areas soon become an impenetrable monoculture crowding out desirable native plant species.

“While goats and sheep feed on the young growth, other animals are not known to graze on the plant. Control for gorse is difficult due to its waxy cuticle, which inhibits herbicide penetration. Gorse also produces a large number of seeds that can remain viable in the soil for 30-plus years. At one park location, the removal of this species resulted in the discovery of a picnic table that had been overtaken by gorse. The plant is also prone to burning and poses a safety problem.” Ocean Shore Management Plan at 115.

That plan establishes Natural Resource Management Recommendations including “Continue to remove invasive species, such as Scots broom, European beachgrass gorse and other invasive species on Oregon Parks and Recreation Department lands.” Ocean Shore Management Plan at 2.

The exchange request provides a contribution from Bandon Biota of \$300,000 to the Department dedicated to the control of gorse on Bullards Beach State Park, the reconfigured Bandon State Natural Area that is not adjacent to the areas being exchanges out of state ownership, Cape Blanco State Park, and the Floras Lake State Natural Area.

(7) An easement from Bandon Biota to the Department across the Sheep Ranch at Bandon Dunes in Coos County for purposes of relocating and aligning the Oregon Coast Trail in accordance with the Department’s trail standards.

The Oregon Coast Trail is a statewide significant trail under the Oregon Recreation Trails System Act that follows the coastline. *See* Oregon Trails 2005-2014: A Statewide Action Plan at 250, table 2. The exchange request would provide the Department an easement across the Bandon Dunes golf resort that provides an improved trail alignment in that vicinity.

B. Department Methodology

The purpose of division 19 is to establish a methodology for the consideration of, *inter alia*, a land exchange request received by the Department. OAR 736-019-0000. The Commission provided the methodology to allow the Department to acquire Oregon’s

best representative landscapes and most significant sites in order to protect the state's most valuable natural, scenic, cultural, historic, and recreational resources; provide general public access to such sites where consistent with resource protection, include historical themes in development master plans, and to foster the citizen's appreciation and enjoyment of outdoor recreation resources. OAR 736-019-0000(1)-(4). Although the Commission does not construe those objectives to establish approval criteria for the proposed land exchange under consideration, the OAR 736-019-0000(1)-(4) objectives provide context for the Commission's ultimate determination that the requested exchange provides overwhelming public benefit to the state park system.

The Commission has established in rule a policy for how the Department is to undertake an exchange of real property. OAR 736-019-0040. The Department is to "use sound principles of real estate acquisition when acquiring or exchanging real property." The Commission has enumerated such specific sound principles in OAR 736-019-0100. As discussed below, the Commission finds that the Department has complied with the applicable requirements of that rule. The Department is also to comply with all federal and state laws pertaining to real property acquisition. The Commission has identified ORS 390.121, ORS 390.630 and OAR chapter 736, division 19 as providing the authority and the applicable criteria for its consideration of the proposed exchange. Compliance with those provisions is discussed below. OAR 736-019-0040 also establishes that the Department is to ensure prudent use of public monies in its real property transactions. Because this exchange request does not involve the use of Department monies, the Commission finds that intent of the policy directive is subsumed into its analysis of whether the proposal provides an overwhelming public benefit to the Oregon State Park system, its visitors, and citizens, which is resounding, clear and obvious under OAR 736-019-0070(4).

Additionally, the Commission has enumerated four aspirations for the Department in acquiring or exchanging real property in OAR 736-019-0040(1) to (4). The Commission does not construe these aspirations to establish approval criterion. The aspirations provide guidance to the Department in conducting real property transactions. Similarly, OAR 736-019-0080(5) provides guidance as to when the Department will employ land exchanges. The Commission construes that provision to apply to land exchanges initiated by the Department. Evaluation of land exchanges initiated by a party other than the Department is pursuant to the more specific standards at OAR 736-019-0070(4).

The Commission has established acquisition practices for the Department. OAR 736-019-0100. The Commission finds that OAR 736-019-0100 applies to four of the seven elements of this exchange. The Department's conformance to the acquisition practices related to the acquisitions of Bandon Biota owned parcels adjoining Bullards Beach State Park and Bandon State Natural Area, and the acquisition of the right to realign a real property easement for the Oregon Coast Trail are discussed below. The Department's conformance to the acquisition practices of OAR 736-019-0100 related acquisition of Grouse Mountain Ranch is discussed in Commission Order 14-____ at ____.

OAR 736-019-0100(1)(f) requires that the Department only make acquisitions and exchanges with this Commission's approval. This order establishes compliance with OAR 736-019-0100(1)(f).

The Department is neither engaging in land purchases or land sales in this transaction; therefore, the Commission finds the requirement of OAR 736-019-0100(1)(a) to establish land value by appraisal is not applicable. However, because the Commission policy under OAR 736-019-0040 mandates that the Department will "use sound principles of real estate acquisition when acquiring or exchanging real property", the Department has ordered new appraisals of the properties it would receive from Bandon Biota and the 280-acre non-oceanfront portion of the Bandon State Natural Area. The Bandon Biota properties were previously appraised in 2010 and the Department property was appraised in 2011. The new appraisals will provide up-to-date appraisals consistent with the intent of OAR 736-019-0100(1)(a) and the requirement of OAR 736-019-0100(1)(i) that appraisals not be older than one year. The appraisals will be subject to independent review in compliance with OAR 736-019-0100(1)(b). Additionally, the Department has used sound business principles to secure the appraisals as required by OAR 736-019-0100(1)(h) and required that the appraisal assumptions are consistent with the provisions of OAR 736-019-0100(1)(j) regarding the parcel to be received by Bandon Biota.

OAR 736-019-0100(1)(c) provides a requirement related to land purchases and does not apply to this exchange. However, the Commission notes that the exchange of the Coos County properties will result in an increase of private land ownership in that county; therefore, there is not a potential to cause significant loss of property tax revenue.

The Department is neither purchasing nor condemning property through the use of eminent domain. The Commission concludes that OAR 736-019-0100(1)(d) and (e) do not apply. The exchange does not involve paying of earnest money by the Department; the Commission concludes that OAR 736-019-0100(1)(g) does not apply.

The Department has prepared a Department of Administrative Services Agency Surplus Real Property Notification as required by OAR 736-019-0100(1)(k) and OAR 736-019-0070(3)(d). In adopting these provisions, the Commission intended that the Department provide the notice to ensure that state agencies and local governments were aware that the Department was considering a request that involved lands leaving Department ownership. In the circumstance of an exchange request under OAR 736-019-0070(3), the Commission construes its rules to serve a notice function only. Should the exchange not proceed, the Commission does not intend that the real property subject to the exchange be deemed surplus property.

Under OAR 736-019-0100(1)(l), the Department must undertake "a visual inspection and check the records for historical uses of any land considered for acquisition. If either the visual inspection or historic records provide information the Department determines merits further investigation of environmental issues, the Department will engage in additional environmental review." The Department has

prepared environmental reports. For exchanges such as this, the proponent is required to provide the Department a written environmental review for lands the Department is to receive in the exchange. OAR 736-019-0070(3)(e). Bandon Biota provided Biological Assessments prepared in 2007 for the 97-acre riverfront property adjoining Bullards Beach State Park and for a study area that included the 111-acre oceanfront property and the Bandon State Natural Area.

Finally, for the acquisition of the 111-acre oceanfront parcel adjoining the Bandon State Natural Area, the Department considered ORS 390.630(1)-(4) as required by OAR 736-019-0100(2). The Commission's consideration of ORS 390.630(1)-(4) is discussed below.

C. Criteria Applicable to the Exchange

Authority and Criteria

The Commission identifies ORS 390.121 and OAR chapter 736, division 19 as providing the authority and the applicable criteria for its consideration of the proposed exchange. In addition, for the acquisition of the land adjoining Bandon State Natural Area, ORS 390.630 provides both authority and applicable considerations. No other criteria, considerations, or authority apply to this decision. Although the Commission individually discusses the various components of the exchange and makes specific findings thereto, the Commission's evaluation and decision is based on the proposed exchange in its entirety.

Statutory Authority

The Commission has express statutory authority to acquire real property. ORS 390.121(1) provides that the Commission may:

“Acquire by purchase, agreement, donation or by exercise of eminent domain, real property or any right or interest therein deemed necessary for the operation and development of state parks, roads, trails, campgrounds, picnic areas, boat ramps, nature study areas, waysides, relaxation areas, visitor and interpretive centers, department management facilities, such as shops, equipment sheds, office buildings, park ranger residences or other real property or any right or interest because of its natural, scenic, cultural, historic or recreational value, or any other places of attraction and scenic or historic value which in the judgment of the State Parks and Recreation Department will contribute to the general welfare, enjoyment and pleasure of the public.”

The broad acquisition authority of the Commission is based in part on the Department making a considered decision that the acquisition “will contribute to the general welfare, enjoyment and pleasure of the public.” The Commission finds that implicit in recommending approval of the Bandon Biota request under the overwhelming public benefit to the state park system standard of OAR 736-019-0070(4), the Department considers these acquisitions to contribute to the general welfare, enjoyment and pleasure

of the public. The Commission’s reasoning is that it construes the statutory phrase “contribute to the general welfare, enjoyment and pleasure of the public” to set a lower standard than the standard is has established in rule for approval of an exchange request.

Under provisions of the Beach Bill, the Commission also has express authority to acquire ownership of or interests in the ocean shore or lands adjacent to the ocean shore from private landowners for recreation areas or access purposes. ORS 390.630. The 111-acre oceanfront acquisition involves a transfer of land held in private ownership to the Department. In that situation, OAR 736-019-0100(2) requires the Department to consider the criteria provided in the Beach Bill. ORS 390.630 provides:

“The State Parks and Recreation Department, in accordance with ORS 390.121, may acquire ownership of or interests in the ocean shore or lands abutting, adjacent or contiguous to the ocean shore as may be appropriate for state recreation areas or access to such areas where such lands are held in private ownership. However, when acquiring ownership of or interests in lands abutting, adjacent or contiguous to the ocean shore for such recreation areas or access where such lands are held in private ownership, the department shall consider the following:

“(1) The availability of other public lands in the vicinity for such recreational use or access.

“(2) The land uses, improvements, and density of development in the vicinity.

“(3) Existing public recreation areas and accesses in the vicinity.

“(4) Any local zoning or use restrictions affecting the area in question.”

The acquisition, while not solely “for state recreation areas or access to such areas,” certainly does provide both public recreation areas and public access; therefore the Commission considers ORS 390.630(1) to (4). The first statutory consideration regards other public lands available for recreational use in the area. The Bullards Beach District Parks Master Plan identifies recreational uses as picnicking, sightseeing, beach activities, hiking, horseback riding. The Bandon State Natural Area, to which this parcel will be added, is public land that provides that recreational use. As to statutory considerations (2) and (3), the Ocean Shore Management Plan (2005) found an access gap in this area of undeveloped lands:

“China Creek access to Boice Cope/Floras Lake: There is no official public access site south of the China Creek access at Bandon State [Natural Area] until the Boice Cope county park access at Floras Lake. This is a gap of almost 12 miles, but includes about 8 miles of New River spit that is not officially considered a gap. Adjacent state park, federal, county and private lands are all undeveloped.” Ocean Shore Management Plan at 63.

Finally, ORS 390.630(4) requires consideration of zoning or use restrictions. The property is located within the Coos County’s Recreational (REC) Zone and Minor Estuary and Shoreland (MES) zone. The Coos County Zoning and Land Development Ordinance of 1985, describes the purposes of the REC and MES zones. The purpose of the “MES” district is to regulate uses within the inventoried minor estuaries and adjacent shorelands within unincorporated Coos County. The purpose of the “REC” district is to accommodate recreational uses of areas with high recreational or open space value. The REC district applies solely to areas designated as “Recreation” in the Comprehensive Plan, which includes state parks. The zone requires new recreational developments to be oriented to the open space nature of the land. The Coos County Comprehensive Plan requires that the type and intensity of recreational developments in the REC district must be conditioned by environmental considerations set forth in the County’s Coastal Shoreland/Dune Lands Comprehensive Plan policies where such developments are allowed in these coastal resource areas.

The Commission’s consideration of ORS 390.630(1)-(4) leads it to conclude that this acquisition is appropriate under the Beach Bill. This acquisition reconfigures the Bandon State Natural Area to include another one-half mile of the ocean shore in public ownership. The acquisition adds publically-owned ocean shore access in an undeveloped area that is identified as 12 mile gap in ocean shore access by the Ocean Shore Management Plan. Because the land was previously in county ownership, the county zoning is already consistent with the zoning for a state natural area.

Although this acquisition of Coquille Spit riverfront land adjoins Bullards Beach State Park which is “abutting, adjacent, or contiguous” to the ocean shore, all access to the ocean shore from this acquisition would be across the existing Bullards Beach State Park. Under that circumstance, the Commission concludes that the ORS 390.630 considerations do not apply to that acquisition.

The Commission also has express statutory authority to exchange real property. With exceptions that do not apply here, ORS 390.121 provides:

“In carrying out its responsibilities, the State Parks and Recreation Commission may:

“* * * * *

“(3) Sell, lease, *exchange* or otherwise dispose or permit use of *real* or personal *property*, including equipment and materials acquired by the department, *if in the opinion of the department it is no longer needed, required or useful for department purposes, * * **” (emphasis added).

Thus, ORS 390.121(3) authorizes this Commission to exchange real property if in the opinion of the Department the real property is no longer needed, is no longer required or is no longer useful for department purposes.

In applying ORS 390.121(3), the Commission understands its authority to depend on the Department first arriving at an opinion regarding whether the real property “is no longer needed, required or useful for department purposes.” Because the phrase is expressed using the disjunctive conjunction “or” the Commission construes “needed”, “required”, and “useful” to be alternatives. Therefore, the Department need only be of the opinion that the real property is not any one of the three – needed, required, or useful – in order to exchange real property. While “needed” and “required” have very similar meanings that connote something that must be had, “useful” connotes a mere capability of being put to use. With that understanding of its authority under ORS 390.121(3) in mind, the Commission turns to consideration of the real property proposed for exchange, *i.e.* the 280-acre portion of the Bandon State Natural Area.

To begin, the Commission dismisses the notion that the subject property is no longer *useful* for Department purposes. As stated in the Department’s recent Botanical Resource Assessment, “In the case of this particular property, both highly significant natural habitats and areas highly degraded by invasive species are widespread in the study area.” The subject property is capable of being put to use as highly significant natural habitats. Nevertheless, the Commission construes its authority to exchange under ORS 390.121(3) to not be contingent on being of the opinion that the property is not useful. The Commission also has authority to exchange property if it is either not needed or not required in the opinion of the Department.

In bringing the exchange request to the Commission with an approval recommendation, the Department came to the opinion that the portion of the Bandon State Natural Area that is leaving state ownership in the exchange is no longer required or needed for Department purposes. The primary natural features of the Bandon State Natural Area identified in the Bullards Beach District Parks Master Plan are its four miles of ocean beach and its scenic coast line. OAR 736-018-0045(1)(r). The 280-acre portion Bandon Biota requests contains neither oceanfront nor ocean shore. The Commission understands the purpose of the Bandon State Natural Area to be primarily natural resource protection and secondarily to provide recreational hiking and wildlife viewing opportunities.

As reconfigured by this exchange, the Bandon State Natural Area is 80 percent of its size before the exchange; however, it retains the characteristics of and achieves the purposes of a state natural area. The Commission designates Department properties as a State Natural Area to denote properties that have an outstanding natural resource that may offer opportunities to see important or unique natural features, plants, or wildlife. The reconfigured Bandon State Natural Area adds roughly one-half of a mile of state-owned shoreline; the Bullards Beach District Parks Master Plan identifies the ocean shore areas as Primary Protection Areas. In terms of legally protected species, the addition of this littoral strand habitat to the reconfigured boundary of Bandon State Natural Area will add areas of occupied western snowy plover, pink sand verbena, and silvery phacelia habitat to state ownership as well as provide potential habitat for the plants pink sandverbena, silvery phacelia, Wolf’s evening primrose, and Point Reye’s birdsbeak – all of which are listed under the state Endangered Species Act. Ocean Shore Management

Plan at 101-104. Two rare examples of slough sedge-tufted hairgrass-sphagnum fen are conferred into state ownership that are not present in the property being conferred out of state ownership. The reconfiguration also confers to the state a roughly a one-half of a mile stretch of New River, which hosts coastal coho, fall chinook, and winter steelhead.

The Bullards Beach District Parks Master Plan identified and distinguished those areas that are Primary Protection Areas from those that are Secondary Protection Areas. Under the four land use designations used in that master plan, the Primary Protection Area designation is the most use-restrictive designation and is used “to protect essential park attractions or to prohibit development in potentially dangerous areas.” In Primary Protection Areas, the department limits activities to those with minimal impact on resources. The Secondary Protection Area designation is used to indicate common natural resource and recreational values. Such areas commonly provide protection and buffering for Primary Protection Areas and also serve to reserve land for future use if unforeseen development needs arise. In the areas designated as Secondary Protection Area, the department allows both resource management activities and low impact recreation.

The area leaving state ownership is a portion of the area of the Bandon State Natural Area that is designated as Secondary Protection Areas. OAR 736-018-0045(1)(r). The Department will retain an easement encompassing the public trail corridor within the southern portion of the BNSA to maintain public access to the ocean shore. ORS 390.620(1) prohibits the alienation of any portion of the “ocean shore” as defined in ORS 390.605(1) and described in ORS 390.610(1). The Commission finds that the portion of the Bandon State Natural Area leaving state ownership is not oceanfront and does not contain any ocean shore.

The Commission finds that the Department will retain existing public access and that lands leaving state ownership do not include either the primary protected areas of Bandon State Natural Area or any of the ocean shore. In sum, because the reconfigured Bandon State Natural Area continues to achieve the purposes of that ownership, the Commission concurs in the Department’s opinion that the 280-acre parcel is no longer needed or required for Department purposes.

Although the Commission concludes that the 280-acre non-oceanfront portion of the BNSA may be exchanged under the authority in ORS 390.121(3), to be clear, absent this request for exchange proposal that satisfies our overwhelming public benefit to the state park system standard, the Commission was not *sua sponte* considering selling or otherwise disposing of that property. The Commission did not solicit the request; however, when a request is presented, the Commission will evaluate it under its ORS 390.121(3) authority and the criteria in division 19.

The acquisitions in Bandon Biota’s request for exchange are consistent with the Commission’s authority to acquire real property under ORS 390.121(1) and ORS 390.630. The Commission also has established its authority to engage in the exchange under ORS 390.121(3). Having determined that the Commission is acting within its

express statutory authority, we turn to an analysis of the exchange proposal under our applicable rules.

OAR chapter 736, division 19

Defined terms

Under OAR chapter 736, division 19, the Commission considers this request as an “acquisition” by “exchange” of real property and “other assets” that provides “overwhelming public benefit” to the state park system. OAR 736-019-0020. The Commission’s rules define “Acquisition” to mean “obtaining title to real property or any right or interest therein, * * * by * * * exchange, * * *.” OAR 736-019-0020(1). The department is obtaining title to real property adjoining Bullards Beach State Park and real property adjoining Bandon State Natural Area; and the right to realign a real property easement for the Oregon Coast Trail. The Commission considers each of the foregoing to be an “acquisition” under division 19. Regarding the contribution from Bandon Biota \$2,500,000 to the Department’s acquisition of an addition to the state park system, currently identified as the Grouse Mountain Ranch, the result of that agreement is an interest in real property, not money; therefore the Commission also considers that element to be an acquisition. An “exchange” is defined as “the simultaneous, mutual transfer between willing parties of one or more interests in land, * * * other assets of equal value, or any combination thereof.” OAR 736-019-0020(5). The Commission finds that the request is an “exchange” under division 19. The Commission has defined “other assets” as “cash or forms of consideration other than land * * *, including but not limited to access rights, mineral rights, and water rights.” OAR 736-019-0020(6). The Commission considers the Bandon Biota contributions of \$450,000 to facilitate government acquisition of oceanfront parcels at Whale Cove and \$300,000 to the Department dedicated to the control of gorse involved in this exchange request to be “other assets” under division 19. Finally, the Commission has defined “overwhelming public benefit” to mean a determination by the Commission “in the approval of a property exchange that accounts for the natural, scenic, cultural, historic, recreational, and operational benefits of a proposal that are likely to be above and beyond the monetary value of the exchange.” The Commission’s determination below applies that definition in applying OAR 736-019-0070(4).

Criteria For Exchange

The Commission has established by rule the criteria for exchange. OAR 736-019-0070. The rule first directs the Department to apply all of the elements of OAR 736-019-0060. OAR 736-019-0070(1)(a). The Commission construes that requirement to apply only to those elements of an exchange that are “acquisitions” under this division. In this request for exchange, the four elements that the Commission considers “acquisitions” are the Bandon Biota owned parcels adjoining Bullards Beach State Park and Bandon State Natural Area, the acquisition of the right to realign a real property easement for the Oregon Coast Trail, and the Grouse Mountain Ranch. The Commission’s analysis of the acquisition of Grouse Mountain Ranch under OAR 736-019-0060 is discussed in Commission Order 14-____ at ____.

In section (1) of OAR 736-019-0060, the Commission established four things that the Department is to do in acquiring property. The first requirement is that the Department establishes and maintains a list of properties of interest which it is authorized to acquire listed properties as they become available. OAR 736-019-0060(1)(a). The Department prepared, and the Commission adopted, the 2013-15 Land Acquisition Priorities list on July 17, 2013. Properties that are elements of this exchange that are on the list are Grouse Mountain Ranch and Whale Cove.

The second requirement is that the Department consider park master plans adopted pursuant to ORS 195.120, the State Trails Plan, the Willamette Greenway Plan or other plans adopted by the Commission that identify certain land acquisitions as desired and needed. OAR 736-019-0060(1)(b). The Commission adopted a master plan for the Bullards Beach District Parks in 1987, by administrative rule. OAR 736-018-0045(1)(r). That plan identified the 97-acre riverfront adjoining Bullards Beach State Park as an area of concern. Subsequently, the Commission identified “South Coast Recreation Lands Opportunities” in the Ocean Shore Management Plan. The 97-acre riverfront acquisition is identified as the “Coquille River spit inholding” and the plan states “Along the river shore portion of the spit at Bullards Beach State Park is a privately owned inholding that could be consolidated into the park to provide consistent management.” *Id.* at 181. That plan also addressed the 111-acre oceanfront acquisition as the Lower Fourmile Creek county site and states “Consolidating ownership with the state park could provide additional natural area for habitat and setting purposes.” The Commission finds that the acquisitions of the 97-riverfront acres and the 111-oceanfront acres are both identified in plans adopted by the Commission.

The third requirement is to acquire properties as specifically directed by Acts of the Oregon Legislature. OAR 736-019-0060(1)(c). The Commission finds that no specific act of the legislature is present in this exchange. *Cf.* ORS 390.112 (naming specific properties). However, the Commission notes that ORS 390.630 does authorize the acquisition of land in private ownership along the ocean shore as discussed above related to the 111-acre oceanfront parcel adjoining Bandon State Natural Area.

Finally, the Commission directed the Department to acquire other properties that contribute to the established goals of the Department but were not previously included on a list of properties of interest or identified in a Department plan. OAR 736-019-0060(1)(d). The Oregon Coast Trail relocation and alignment across Bandon Dunes element of this exchange has not previously been included on a list of properties of interest or identified in a Department plan. The Department developed the Oregon Coast Trail: Connection Strategy (2011) plan, but it focused exclusively on closing gaps in the trail, not identifying places for realignment. The Commission finds however that the Oregon Coast Trail acquisition contributes to an established goal and policies. The Commission has adopted OAR 736-009-0021(6)(a), an administrative rule that directs the Department to enter into agreements with landowners as necessary to ensure that location or relocation of a state trail meets the Department’s standards. From a policy standpoint, the acquisition is consistent with the division 19 purpose statement, because it allows the

Department to ensure the general public's access to and enjoyment of sites and it involves developing and maintaining trails for public enjoyment. OAR 736-019-0000(2) and (4).

Under section (2) of OAR 736-019-0060, the Commission has set forth a list of objectives and determined that an acquisition that satisfies one or more of the objectives serves the Department's and the public's interest. The objectives are:

- (a) Protects areas of outstanding natural, scenic, cultural, historic and recreational significance for the enjoyment and education of present and future generations.
- (b) Consolidates state park parcels, trail systems or greenways so that more efficient management and administration of the state park system is made possible.
- (c) Provides a buffer to adjacent or nearby development that may diminish the recreation or conservation values of a state park parcel.
- (d) Provides access to recreation areas for management or protection of state park parcels, and
- (e) Addresses opportunities that may be lost to the Department if acquisition is delayed.

The Commission has provided descriptions of the seven elements of the exchange above. Utilizing, without repeating, those descriptions, the Commission finds that the exchange advances several of the objectives in OAR 736-019-0060(2). The Commission has also made findings under these objectives in the Grouse Mountain Ranch acquisition approval Order __ at __.

In the exchange, the Department will acquire areas of outstanding natural, scenic, cultural, and recreational significance. The reconfigured Bandon State Natural Area will have an addition of approximately one-half mile of ocean shore and one-half mile of New River. The Commission also finds that the occupied western snowy plover habitat is of outstanding natural significance. The Department's recent vegetation inventory determined that "significant natural habitats" are present on the parcel. Outstanding scenic resources protected in the exchange include the ocean shore. The Bullards Beach District Parks Master Plan identifies the "scenic coastline" as a prominent natural feature of the Bandon State Natural Area. OAR 736-018-0045(1)(r). The exchange protects the view from Rocky Creek State Wayside looking north towards Whale Cove through public acquisition of the headland parcels. The Department Archaeologist report identifies a site of potential outstanding cultural significance for the education of present and future generations on the reconfigured Bandon State Natural Area. Finally, the addition of ocean shore constitutes an outstanding recreational area. ORS 390.610(3) declared that the ocean shore is a state recreation area. The Oregon Coast Trail is also an outstanding recreation area; it is designated a statewide significant trail under the Oregon Recreation Trails System Act.

The Commission finds that the exchange also achieves the objective of consolidating state park parcels and trail systems for more efficient management. OAR 736-019-0060(2)(b). The 97-acre riverfront parcel is bordered on the north and west by Bullards Beach State Park. The park master plan identified this parcel as an area of concern because of invasive gorse spreading from that property to the park. The Ocean Shore Management Plan identified the 97-acre riverfront acquisition as the “Coquille River spit inholding” and stated “Along the river shore portion of the spit at Bullards Beach State Park is a privately owned inholding that could be consolidated into the park to provide consistent management.” *Id.* at 181.

The exchange would also make management of the trail systems on the reconfigured Bandon State Natural Area more efficient by bringing more of them under state ownership. OAR 736-019-0060(2)(b). The exchange maintain the public trails on the parcel leaving state ownership while bringing other portions of that trail system under Department ownership that are on the 111-acre oceanfront parcel.

Finally, the Commission finds that the exchange addresses an opportunity that may be lost to the Department if delayed. The Bandon Biota contribution provide matching funds for an acquisition under a 2008 National Scenic Byway Program grant awarded for the Pacific Coast Scenic Byway Oregon: Whale Cove – Protecting a Pacific Coast Treasure project. The matching funds are required to leverage the federal grant and a landowner donation for acquisition of the Whale Cove property. The Commission finds that the exchange satisfies more than one of the objectives in OAR 736-019-0060(2).

OAR 736-019-0060(3) requires that the acquisition of real property be “consistent with the Department’s purpose and its long range planning goals”; and be prioritized through a rating system that evaluates an acquisition’s significance “as it relates to the Department’s mission, development and operational costs, geographic distribution, diversity of values, public demand, and other factors connected to its feasibility as a state park.”

The Department’s purpose includes implementation of state policy with regard to outdoor recreation resources by, *inter alia*, protecting Oregon’s scenic landscape; supplying outdoor recreation areas, facilities, and opportunities needed to meet growing needs; and providing hiking trails. ORS 390.010. The Commission has adopted the overarching 2008 Centennial Horizon plan, which includes principles and long-term Department strategies. In considering whether the exchange, on the whole, is consistent with the identified policies of ORS 390.010 and the Centennial Horizon Plan, the Commission discusses the exchange elements coming to the Department one after another, and in doing so addresses some other approval criteria.

The 111-acre oceanfront parcel added to the reconfigured Bandon State Natural Area has been described above to include natural, scenic, cultural, and recreational resources that would be protected through acquisition. OAR 736-016-0000(1).

Specifically, the significant natural features of the parcel include, an approximately one-half mile distance of the ocean shore and the New River, areas of occupied western snowy plover, pink sand verbena, and silvery phacelia habitat, and potential habitat for four plants listed under the state Endangered Species Act. Scenic resources primarily relate to the coastline, identified as a primary natural feature of the adjoining Bandon State Natural Area. Acquisition also brings identified cultural resources into state ownership. Recreation includes hiking, wildlife viewing, and beach activities. The Commission finds that this acquisition advances the Centennial Horizon strategies of securing outstanding habitats; protecting important scenery, expanding protection of beach habitat, and managing properties to restore rare, sensitive, threatened and endangered species. The Commission has rated the 111-acre oceanfront acquisition, then identified as the Lower Fourmile Creek county site, for acquisition stating the site:

“provides access into an area that will become a snowy plover management area, and will need reliable management assurances. The site is located adjacent to the south boundary of Bandon State [Natural Area]. Consolidating ownership with the state park could provide additional natural area for habitat and setting purposes. However, it may not be a feasible site for providing beach access.”
Ocean Shore Management Plan at 181.

The Commission has similarly previously rated the 97-acre riverfront parcel as an acquisition that could be consolidated into Bullards Beach State Park to provide consistent management. Ocean Shore Management Plan at 181. This riverfront parcel is consistent with the state policy to provide public access to public lands and waters that have recreational values. ORS 390.010(3)(k).

The Oregon Coast Trail relocation and alignment across Bandon Dunes element of this exchange is not an apt fit for the Department’s rating system. However, the Commission finds that it is consistent with the Department purpose. Increasing outdoor recreation through the provision of trails for hiking is in the public interest. ORS 390.010(3)(h).

The acquisition of Grouse Mountain Ranch under this rule is addressed in Order No. 14__ at __. The Commission finds that the exchange of real property is complies with OAR 736-019-0060(3).

Under OAR 736-019-0060(4), the Department is to look favorably at exchanges that “enhance the overall management of existing park lands.” The Commission has previously made findings that the exchange would reconfigure the Bandon State Natural Area in a way that has management advantages related to public access and wildlife. The reconfigured Bullards Beach State Park would also address an area of concern identified in the Master Plan, specifically the objective to control gorse on the property. The adopted master plan calls for the Department to “make cooperative agreements with neighbors, especially Moore Mill [previous owner], to control gorse on their property also.”

The Bandon Biota contributions of \$300,000 to the Department dedicated to the control of gorse involved in this exchange is an “other assets” that enhances the overall management of existing park lands. Regarding Cape Blanco State Park, the Curry County State Parks Master Plan (2003) at page 80 states, “The presence of gorse throughout the park is a very serious management threat.” OAR 736-018-0045(1)(n). For Floras Lake State Natural Area, the Curry County State Parks Master Plan (2003) establishes the control gorse and Scot's broom intrusions as a Natural, Scenic and Cultural Resource Management Guidelines for Floras Lake State Natural Area. OAR 736-018-0045(1)(n). Additionally, the Habitat Conservation Plan for the Western Snowy Plover identifies as a management action, restoring coastal dune habitat through the removal of invasive species (*e.g.*, European beachgrass and gorse) as well as lowering the foredune to allow storm wave overwash to occur. See 5.3.2. Goals and Actions Implementing the Conservation Measures, HCP at 5-20. The Commission finds the exchange is an opportunity to enhance the management of multiple state parks.

Having determined that the exchange has applied all elements of OAR 736-019-0060 as required by OAR 736-019-0070(1)(a), the Commission returns to the criteria for exchange in OAR 736-019-0070. Subsection (1)(b) of that rule directs the Department to apply the provisions of either section (2) or (3), determined by whom the exchange is proposed. The Commission finds that section (3) is the applicable section of the rule because Bandon Biota initiated the exchange.

Section (3) provides the procedures the Department will follow when another party initiates an exchange. As such, the Commission does not construe the provisions of OAR 736-019-0070(3) to be criterion that the Commission must analyze to determine whether an exchange may proceed. The Commission generally finds that the Department, in its processing of the exchange request has followed the purpose of OAR 736-019-0070(3). The Department has provided the Commission with staff reports and oral presentations regarding whether the exchange aligns with parks’ mission, strategies, objectives, and work plan; and will accommodate public use and access. The Department has held hearings in areas most affected by the exchange and the Commission has been provided much testimony regarding local community support. The Department prepared the required Surplus Real Property Notification. The Department has also required that the proposer provide environmental reviews and written proposals, starting with the initial August 19, 2010, Bandon Biota submittal. At the Commission’s direction, the Department also conducted its own evaluations of natural and cultural resource impacts and protection. The Commission finds that the Department has employed the procedures provided in OAR 736-019-0070(3).

D. Overwhelming Public Benefit to the State Park System

The ultimate question before the Commission is a discretionary one. The foregoing discussion in this order has established to the Commission’s satisfaction both that it has the authority to act on the request of Bandon Biota and that the Department has acted consistently with the applicable criteria in bringing the exchange forward for the Commission’s consideration. Therefore, the Commission now turns to a determination, for the first time, as to whether the proposed exchange provides an overwhelming public

benefit to the Oregon State Park system, its visitors, and citizens, which is resounding, clear and obvious.

The standard is provided in the Commission's rule. OAR 736-019-0070(4) provides in full:

“To approve an exchange that a party other than the Department initiates, the Commission shall determine that the proposed exchange provides an overwhelming public benefit to the Oregon State Park system, its visitors, and the citizens of Oregon. The Commission has sole discretion to determine whether a proposal provides an overwhelming public benefit to the Oregon State Park system, its visitors, and citizens, which is resounding, clear and obvious. An overwhelming public benefit to the Oregon State Park system, may include, but is not limited to, an exchange in which the Department receives:

“(a) One or more properties in areas of interest listed pursuant to OAR 736-019-0060(1)(a),

“(b) An endowment for long-term stewardship that provides significant and meaningful stewardship resources to the Department, or

“(c) Other contributions to the Oregon State Park system, beyond the property to be received, which the Commission determines when combined with the property to be received by the Department, and when weighed against the property to be transferred out of the Oregon State Park system, along with all of the Departments transaction costs, will result in an overwhelming public benefit to the Oregon State Park system.”

Additionally, the Commission has adopted a definition of “overwhelming public benefit.” OAR 736-019-0020(8) provides in full:

“Overwhelming public benefit” means a Commission determination in the approval of a property exchange that accounts for the natural, scenic, cultural, historic, recreational, and operational benefits of a proposal that are likely to be above and beyond the monetary value of the exchange.”

The Commission adopted OAR 736-019-0020(8) and OAR 736-019-0070(4) as an amendment to the Land Acquisition and Exchange rules in 2011.

The history of the adoption of OAR 736-019-0070(4) provides helpful context as the Commission undertakes its determination. The Commission developed the standard in response to its concern over an anticipated increase in the role that land exchanges, particularly those initiated from outside the Department, would play as the Department's acquisition budget gets smaller. Minutes, January 26, 2011 meeting. To avoid the risk that local community interest might drive exchanges and to fulfill its responsibility to the state park system, the Commission crafted a standard to maintain its focus on its mission

and to be able to evaluate exchanges to make sure that the Department received properties of interest and clearly of an equalized value. *Id.*

The Commission has been provided much comment regarding overwhelming public benefit in a general sense. However, as demonstrated by both the rulemaking history and the text of the OAR 736-019-0040, the Commission's inquiry is not whether a proposal provides a generalized overwhelming public benefit, but, more specifically "an overwhelming public benefit to the Oregon State Park system, its visitors, and citizens." To construe the standard otherwise would be to "omit what has been inserted" contrary to the general rules of statutory construction of statutes and administrative rules. ORS 174.010.

The Commission's inquiry is not, however, without guidance. As mentioned, OAR 736-019-0020(8) defines "overwhelming public benefit" such that the Commission must account for the natural, scenic, cultural, historic, recreational, and operational benefits of a proposal that are likely to be above and beyond the monetary value of the exchange. The Commission did not intend an exchange analysis to be a rote valuation exercise. Subsections (a) to (c) of OAR 736-019-0070(4) provide some guidance, but not a definitive list of what an overwhelming public benefit to the Oregon State Park system, may include: one or more properties in areas of interest; an endowment for long-term stewardship that provides significant and meaningful stewardship resources to the Department, or other contributions to the Oregon State Park system, beyond the property to be received, which the Commission determines when combined with the property to be received by the Department, and when weighed against the property to be transferred out of the Oregon State Park system, along with all of the Departments transaction costs, will result in an overwhelming public benefit to the Oregon State Park system.

The Commission also finds that the four criteria in OAR 736-019-0000 provide context for construing "overwhelming public benefit to the Oregon State Park system, its visitors, and citizens." In sum, those are to the best and most significant sites to protect the state's most valuable natural, scenic, cultural, historic, and recreational resources; where consistent with resource protection provide general public access to such sites, include historical themes in development master plans, and to foster the citizen's appreciation and enjoyment of outdoor recreation resources. OAR 736-019-0000(1)-(4).

The Commission has thoroughly discussed and detailed the elements of the exchange proposal in this order. In considering the benefits to the state parks system, its visitors and Oregonians, the Commission has considered some of the natural, scenic, cultural, recreational, and operational benefits. The exchange makes changes on the ground to the Department's ownerships, particularly in Coos County, where there is a net decrease of roughly 72 acres of Department land, but a change of ownership for nearly 500 acres of land. The Commission has described herein the land that it would provide in exchange and those that it would receive. One consideration is that ocean shore is one of the state's most valuable natural and recreational resources. The Department's Snowy Plover HCP establishes New River as a significant site for protecting a threatened state natural resource. The Department's botanical, habitat and cultural reports unsurprisingly

demonstrate that while the Department would gain some important habitat and cultural areas, they would come at a loss of others. The Commission finds that is to be expected when nearly 500 acres of land is changing ownership. The exchange offers operational benefits to the Department in that it adds adjacent lands to existing parks and provides resources to address the issue of gorse, an issue that comes up in the park master plans, the ocean shore management plan, and the western snowy plover HCP. The Commission also understands that an exchange of this proportion will make some alterations to recreation. However, the Commission finds that the exchange is structured, where possible to afford the continuation of existing recreation by retaining public trail access over exchanged lands. The exchange also includes perfecting the alignment of the Oregon Coast Trail over Bandon Dunes. The Commission hopes that this trail development will also foster the public's appreciation and enjoyment of that outdoor recreational trail resource.

The Commission finds that two of the elements of the exchange are areas of interest on the Commission's 2013-15 Land Acquisition Priorities list. The funding of the Whale Cove acquisition is identified on the list. The Commission notes that ultimately the Department will not be the owner of those lands. Nevertheless, the visitors to the Rocky Creek State Wayside and the citizens of Oregon traveling the Highway 101 scenic byway will be beneficiaries of the natural view of the Whale Cove area. The second property on the list is Grouse Mountain Ranch.

Under the request for exchange, at the Department's direction Bandon Biota will provide \$2,500,000 into an escrow account established for the acquisition of real property as an addition to the state park system. Although not required by division 19, the Commission expressed to the Department that in instances where land is leaving the park system, the Commission's evaluation of the overwhelming public benefit of such a proposal would benefit from identifying specific land coming in to the park system. To that end, the Department secured a purchase and sale agreement for the specific incoming real property to provide the Commission assurance that if it approved the exchange, the terms of the exchange can be met. To be clear, Bandon Biota is providing \$2,500,000 as part of the exchange. By separate land acquisition approval order, the Commission is approving the acquisition of Grouse Mountain Ranch under OAR 736-019-0060. That transaction is separate and distinct. Should for any reason that transaction not proceed, the Commission's approval of this exchange would not be impacted. Bandon Biota is providing \$2,500,000 whether the Department uses it for Grouse Mountain Ranch as anticipated, or for the acquisition of one or more acquisitions that satisfy the criteria in OAR 736-019-0060.

Bandon Biota and the Department entered into the Grouse Mountain Ranch Assistance Agreement, effective November 20, 2013. The Grouse Mountain Ranch assistance agreement expressly provides:

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“4. Other Use of Payments. If OPRD determines in good faith that it is unable to close on its purchase of Grouse Mountain Ranch, or if OPRD has no further payment obligations to the Merediths under the Grouse Mountain Purchase and Sale Agreement, then at OPRD’s election it may use the payments made by Biota under this Agreement for its purchase of other real property, provided that the Oregon Parks and Recreation Commission has reasonably determined (whether or not such determination is made prior to Closing under the Exchange Agreement) that such other real property, in conjunction with the other consideration under the Exchange Agreement, provides an overwhelming public benefit to the Oregon State Park system, its visitors, and the citizens of Oregon.”

The Grouse Mountain Ranch acquisition is described in detail in the Commission’s Approval Order 14-____ also proposed for adoption this day.

The structure of that agreement between Bandon Biota and the Department has much to do with an aspect of the Commission’s review. The Commission is called on to further determine that the overwhelming public benefit to the Oregon State Park system, its visitors, and the citizens of Oregon is of a “resounding, clear, and obvious” nature. The three adjectives are permutations of a theme – we know it when we see it. “Resounding” means unmistakable, emphatic; “clear” means “easy to perceive, understand, or interpret” and “obvious” means “easily perceived or understood; clear, self-evident, or apparent.” The Commission established by rule that the determination is in its sole discretion, which is appropriate given the standard.

The Commission clarifies what “resounding, clear, and obvious” does not mean. It does not mean that an exchange must be without detractors or controversy. Nor does it mean that the Commission must be pleased to have the real property exchanged out of Department ownership gone. It is possible, as happened here, that the Commission is exchanging land that is “useful” to the Department, but either not “needed” or not “required” as authorized under ORS 390.121(3).

Although Bandon Biota is committing to a particular level of funding, the Commission is less able to evaluate monetary benefits to the state park system than it is an incoming asset. Money in and of itself is not precluded from achieve the overwhelming public benefit standard for this Commission. At the same time, the Commission is resolute that the Oregon State Park System is generally not for sale. Understanding that the Commission had set a high standard, Bandon Biota has now presented a request that includes six elements each of which provides a benefit to State Park System and meets needs identified by this Commission in various planning exercises over the years. With the addition of the Grouse Mountain Ranch or a suitable alternative, the Commission finds that the exchange proposal provides an overwhelming public benefit to the Oregon State Park system, its visitors, and citizens, which is resounding, clear and obvious.

In approving this exchange the Commission is cognizant that this precedent serves to set a high bar for future land exchanges initiated by outside party that must

likewise satisfy the overwhelming public benefit to the state park system standard. The Commission finds that to be appropriate. A theme of the Commission's recent conversation around the State Park System Plan was the need to be creative to allow the Department to do more with less. This exchange embodies that principle. In approving this exchange, the Commission recognizes that there is now less of the Bandon State Natural Area, but viewed as a whole, there is more to the state park system.

III. Conclusion

The Commission concludes that the proposed exchange provides an overwhelming public benefit to the Oregon State Park system, its visitors, and citizens, which is resounding, clear and obvious. Therefore, the Commission approves the exchange request of Bandon Biota as provided in this order.

DATED THIS __ DAY OF FEBRUARY, 2014.

FOR THE COMMISSION:

Jay Graves, Chair
Oregon Parks and Recreation Commission

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained pursuant to ORS 183.484 by filing a petition for review within 60 days from the service of this final order.

Copies of all documents referenced in this order are available for review at the Department's office in Salem (and are posted on the Department's website)

