

HAVEL Chris * OPRD

From: Diane and Dave Bilderback <dbilderback@mycomspan.com>
Sent: Wednesday, February 12, 2014 5:26 PM
To: oprd.publiccomment@state.or.us
Cc: Phillip Johnson; Fawn Custer
Subject: Comment on Bandon State Natural Exchange

February 12, 2014

Dear Oregon Parks and Recreation Commission,

I am a retired biologist and a Bandon resident who volunteers for the Marine Mammal Stranding Network, have volunteered for State Parks as a docent for the Whale Watch Spoken Here Program and my adopted CoastWatch mile is Mile 96, whose north boundary is about ¼ mile from the north shore of New River along the western edge of the Bandon State Natural Area (Bandon SNA). I am writing to urge you to vote “no” on the Bandon SNA exchange because the January 28, 2014 Wildlife Assessment for the Bandon Land Exchange Proposal, by Vanessa Blackstone, Wildlife Biologist for OPRD concludes, “Overall, the land exchange will have a demonstrable negative impact to at-risk species in the area without mitigation actions, especially the western snowy plover.” (under 6. Management Recommendations, page 14). The greatest threat to the western snowy plover are through increased disturbance from people on the new golf course, through unofficial beach access from the Bandon SNA parcel, and from the Oceanfront Parcel Service Road Access Easement, which all can lead to increased predation pressure. I have walked the shoreline of Bandon SNA since 2005 and so have a clear understanding of how important it is to not have additional people, predators, dogs, kites or other disturbances for the Western Snowy Plover’s survival as a species. I also have walked on the Lost Lake trail to the east shore of New River and know how many people use their ATV’s illegally in this area. How will this area be policed to prevent unauthorized access? The Oceanfront Parcel Service Road Access Easement could be particularly difficult to control access.

If this exchange is approved, I urge the Oregon Parks and Recreation Department to carefully follow the management recommendations that are listed in Section 6. Management Recommendations of the Wildlife Assessment for the Bandon Land Exchange.

Thank you for the opportunity to express my concerns.

Diane Bilderback

3830 Beach Loop DR SW

Bandon, OR 97411

dbilderback@mycomspan.com

HAVEL Chris * OPRD

From: Charlie and Cindy Bruce <ccbruce@peak.org>
Sent: Friday, February 14, 2014 1:23 PM
To: oprd.publiccomment@state.or.us
Subject: Bandon Land Exchange Comments

Dear Commissioners, I would like to voice again by opposition to the proposed exchange as I don't see how forgoing future public use options for very limited coastal lands and sacrificing known conservation values for the Bandon State Natural Area (BSNA) property is in the overwhelming public interest. As an aside, given Bandon has multiple golf courses already, including Bandon Crossing built only 7 years ago and one mile east of the BSNA, this is really absurd. I have nothing against Bandon Biota but from my perspective, OPRC is being overwhelmed with private money for private gain and I find that disgusting.

That said, since it appears from the record that OPRC will support this exchange it's important that you do the best possible job of assuring limited impact to remaining natural resources on BSNA into the future. As outlined in the natural resource assessments for plants and wildlife on the BSNA, there will be negative direct and indirect impacts from loss of the area (and assumed development). Mitigation for those losses should be identified and included as part of the land transactions along with long-term funding to implement mitigation actions. In addition to the Management Recommendations identified in the OPRD Wildlife Assessment, belatedly written for the land exchange, the entire beach area south of China Creek should be added the current Snowy Plover Management Area to help mitigate the likely increased negative impacts to the breeding population. As indicated in the 2013 annual monitoring report for snowy plovers, the entire area is being used now during the nesting season as the population recovers (Lauten et al. 2013). It's also important to note that the species is present year around so habitat is equally important outside the nesting season. It's important to point out again that this state park property (BSNA) is the only state park land along the entire coast that still has snowy plovers where historically they all had birds. In all likelihood, the other state park lands identified for restoration on the north coast for future plover recovery efforts will not be successful due to the small size, lack of any nearby plover breeding areas that would provide a source area for breeding birds, and heavy public pressures.

Until meaningful mitigation measures are identified for the negative impacts that are sure to occur if the traded property were to be developed, not to mention adjacent private lands already owned by Bandon Biota, the land exchange should not be approved. In addition, reasonable mitigation funding for at least the next 10 years should be quantified and paid for by Bandon Biota since the State of Oregon does not provide any general fund monies to OPRD for park management.

Last, multiple state and federal agencies have been working for several decades now on western snowy plover recovery. This has been a cooperative effort in many ways including personnel and funding and has been a success story for the Pacific coast. What happens on the Bandon State Natural Area into the future also affects recovery efforts along the entire south coast on all ownerships. If anything, OPRD needs to make sure the relationships built up over the years are not lost for just for 18 holes of golf.

Sincerely,

Charlie Bruce
1625 NW 17th.
Corvallis, OR. 97330

References

[The Distribution and Reproductive Success of the Western Snowy Plover along the Oregon Coast - 2013](#). 2013, 67 pg. David J. Lauten, Kathleen A. Castelein, J. Daniel Farrar, Melissa F. Breyer, and Eleanor P. Gaines. ORBIC. Available online: (PDF 7.8 MB).



OREGON SHORES CONSERVATION COALITION

February 14, 2014

Lisa Van Laanen, Interim Director
Oregon Parks and Recreation Department
Members of the Parks and Recreation Commission
Oregon Parks and Recreation Department
725 Summer St. N.E. Suite C
Salem, OR, 97301

Re: Proposed Land Exchange with Bandon Biota

Dear Chair Graves and Commissioners,

The Oregon Shores Conservation Coalition submits these comments on behalf of its members, to address the land exchange proposed by Bandon Biota. Oregon Shores appreciates the efforts of the Commission to gather the required and appropriate information prior to making a final decision. As noted by many participants and members of the Commission, this is the first-ever exchange proposed by a third-party, and the decision will set precedent for how future proposals are reviewed. During the February 5 Commission meeting, several commissioners made statements to the effect that the gathering and release of information in this process has been unprecedented for an acquisition, implying that this effort has gone above and beyond what is required. To the contrary, this process is unprecedented because it has never been done before, and the application of the standards and criteria for this exchange require the review of information that is not usually necessary or required in a typical acquisition process. The types of information made available to the public as part of this process should be the minimum standard for land exchanges (as opposed to simple acquisitions). Moreover, the precedent for such exchanges should include full disclosure of this information to the public far enough in advance to allow the public to study the information before commenting, and to allow the Commission and OPRD staff sufficient time to fully consider those comments. We do not believe that this minimum standard has been met to date.

Appraisals and the “Monetary Value of the Exchange”

“Overwhelming public benefit” in the context of this proposal 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.” OAR 736-019-0020(8). Therefore, the Commission must have information about the “monetary value of the exchange” prior to making a determination of overwhelming public benefit.

Here, the appraisals released on February 4, taken at face value, show that the value and acreage of the coastal parcels to come into the Parks System are considerably below the value and acreage that would go to Bandon Biota. Only the addition of cash (for the possible Grouse Mountain property acquisition, plus some funding for gorse control) balances out the monetary value of the exchange. As noted in previous comments, and as raised by members of the Commission, the exchange for cash, without being tied to a particular property, does not allow for meaningful consideration of compliance with the standards for an exchange. It is difficult, if not impossible, to evaluate the natural, scenic, cultural, historic, recreational, and operational benefits of a cash contribution, as opposed to a specific property acquisition. Oregon Shores understands that the final order for consideration will more clearly tie the Grouse Mountain property to this exchange proposal. For reasons already stated, Oregon Shores does not agree in principal with the trading of coastal lands in exchange for lands in Eastern Oregon.

Beyond these overarching issues, Oregon Shores is concerned about the valuations of the appraisals. For example, it is not clear why the absence of a water right results in de-valuation of the property by \$260,000 (a water right can be a valuable extra benefit, but water rights are not a standard property feature—and in this case there is no doubt that the would-be developer can obtain water for the development). It is also not clear why the valuation of the BSNA property dropped so dramatically from the \$1,960,000 in 2011 to almost one half of that at \$1,055,000 in 2014, despite the facts that land values have generally been increasing during this period, and that the land is now being appraised in light of its development potential as a golf course. The appraisal review documents do not explain this difference. It seems that the Commission would be well served to understand the reasons for the de-valuation of the Park property at such a dramatic rate over such a short period of time. It is also unclear why the lands to be conveyed to the state by Bandon Biota, which according to the appraisals are entirely undevelopable, are valued as highly as they are. Is a parcel on which no structure can be built really worth \$445,000 to anyone other than State Parks?

Even taking the appraisals at face value, the department would be receiving lands worth 60% of the value of the property to be traded away. This would be highly questionable—even if not technically unallowable—if this were a straight land exchange. Bandon Biota is making up the difference through a cash contribution (which may or may not go to Grouse Mountain), but this in itself creates a very dangerous precedent). We would urge the Commission to give very serious thought to whether exchanges should take place when the value of the actual lands being exchanged is not at least reasonably comparable.

Oregon Shores comment
Bandon Biota Exchange Proposal
Parks Commission – February 14, 2014

If the Commission does proceed with this exchange, one way to reduce the disparity would be to remove the northern corridor or “chimney” (as it has been described) of the Bandon SNA land that runs up to Twomile Creek (without adding back land elsewhere—it is beneficial that the western boundary of the parcel to be traded has been pulled back further from the shore). That would somewhat reduce the acreage to be traded, thus reducing the difference in value. This would also assure that the creek and its riparian zone, and the wetlands that lie within this corridor, will be protected. Among other things, this would help to preserve habitat for migratory birds, another concern raised by the wildlife assessment.

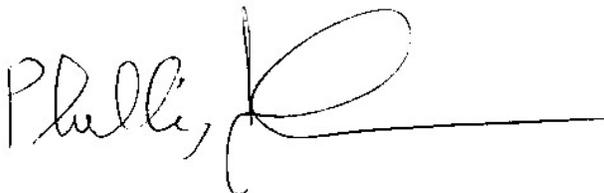
Western snowy plover

The “Wildlife Assessment for the Bandon Exchange” was only released on Jan. 28, a week prior to the Commission meeting. This did not allow sufficient time to analysis and comment by the public (which the Commission acknowledged by providing an all-too-brief additional nine days for comment). The assessment raised serious questions about potential impacts to the federally listed Western snowy plover. The department went to considerable lengths to develop a Habitat Conservation Plan for the management of the snowy plover (a public process in which Oregon Shores invested a great deal of time). It is absolutely essential that the department and Commission fully consider the implications, and develop a clear plan to respond to the concerns raised by the assessment and assure that the HCP will be maintained. And it is essential that this information be released with adequate time for public consideration in advance of any vote to accept the property exchange. This, again, should be part of the precedent-setting process for consideration of this and all future land exchanges.

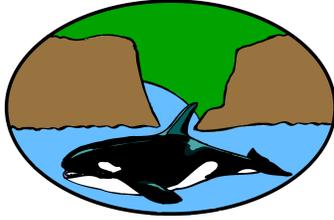
Conclusion

Because the BSNA property is part of the management area for Western snowy plover required for compliance with federal law, the property cannot be deemed “no longer useful, needed or required for Parks purposes.” Further, in the absence of the cash contribution, the proposal does not meet the criteria for exchange. Oregon Shores believes that cash, without connection to a particular property, cannot be evaluated for compliance with the applicable criteria. If the cash contribution is tied to the Grouse Mountain acquisition, Oregon Shores believes that the exchange does not meet the overwhelming public benefit standard because the loss of coastal acreage cannot be adequately compensated by the acquisition of land in Eastern Oregon. Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip Johnson", followed by a long horizontal line extending to the right.

Phillip Johnson
Executive Director



ORCA: Oregon Coast Alliance

P.O. Box 857, Astoria OR 97103

(503) 391-0210 <http://www.oregoncoastalliance.org>

Protecting the Oregon Coast

Feb. 14, 2014

Via Email

Oregon Park and Recreation Department Communications Director Chris Havel:
Chris.havel@oregon.gov

Oregon Parks and Recreation Assistant Vanessa DeMoe:
Vanessa.demoe@state.or.us

Oregon Parks and Recreation Department
725 Summer St. NE, Suite C
Salem, OR 97301

Re: Proposed Land Exchange between OPRD and Bandon Biota

Dear Communications Director and Commissioners,

Oregon Coast Alliance offers the following brief comments on the materials recently made available to the public concerning the Bandon Biota exchange and related Grouse Mountain acquisition.

BSNA 280 Acres Appraisal

The BSNA appraisal in particular makes no effort at all to identify and account for ecosystem values -- yet that is the essence of what the Oregon public would be losing if the Biota exchange takes place. The appraisal uses only the assumption, as required in OAR 736-019-0100 (1) (j) that the appraiser base the appraisal on the highest and best use for which the potential buyer wants to use it.

But the Parks rules do not require the appraisal to be *limited* to the purchaser's highest and best use goal. Give the high value of ecosystem services, including ecological integrity, solitude, wildlife habitat, unspoiled viewshed, silence, sand dune experience and similar values inherent in the 280 acres of BSNA, the appraisal should have made some effort to estimate ecosystem values.

Though the appraisal does make a passing reference, stating at p. 29, “it is evident that the highest and best use of the subject property in a legal context is almost certainly that of low intensity recreational uses and/or conservation,” this does not go nearly far enough. There is no effort to evaluate in market terms the cluster of values such as those enumerated above that define low intensity recreation and conservation. Thus, the appraisal fails to present a true picture of the BSNA acreage’s values to the Oregon citizenry, or to evaluate them monetarily.

The four comparables are similar: largely ‘unimproved’ parcels, though likely having less ecosystem integrity than BSNA’s parcels – one of them being the Bandon Crossings golf course. In none of these comparables was any attempt made to estimate the ecosystem values involved, which were apparently not well reflected in the actual market transactions either.

Grouse Mountain Ranch Appraisal

ORCA notes that the initial OPRD Staff Report dated July 17, 2013 described the Grouse Mountain Ranch as a property of 6,100 acres. The *Vegetation and Habitat of Grouse Mountain Property: An OPRD Assessment of Natural Resource Values*, dated October 4, 2012, states that it is “approximately 6,524 acres of land.” The IRR-Boise review appraisal (January 18, 2014) and the AgVantage appraisal (Aug. 20, 2013) describe Grouse Mountain Ranch as a 6,476 acre property. The proposed *Draft Final Order* before the Parks Commission prepared in January 2014 for the Commission’s consideration describes the property as “an approximately 6,300 acre property,” i.e., a 176 acre difference.

We point this out to show that the public has every right to be confused about how much land is being purchased, where exactly it is, and which portions of the property will be purchased with public money. Most importantly, the appraisals cover 176 acres of land more than that described in the Draft Final Order. What does this mean – will OPRD be purchasing 6,300 acres of land or 6,476 acres of land? Or will Parks be purchasing the larger amount of land, with the 176-acre difference going for some other, unspecified, purpose than a state park?

The Biota exchange money will cover only \$2.5 million of the purchase price; the remainder of the \$4.5 million price (nearly half) from public funds. These matters are currently opaque, have been from the beginning, and apparently will remain so.

However, it is clear from the Review Appraisal that the Meredith house and adjacent small acreages by themselves will cost \$2 million. OPRD staff are quoted as saying, “The House Parcel [approximately 200 acres] will remain encumbered by a Deed of Trust requiring OPRD to pay another \$2 million in the timeframe specified.” (Grouse Mountain Review Appraisal, p. 8). ORCA is opposed to use of any public monies whatsoever to purchase a mansion for grossly inflated values, for which no reasonable public purpose can be determined, and which has no historic value.

Values between the appraisal and the review appraisal differ significantly. The IRR-

Boise review appraisal gave Grouse Mountain a value of \$4.55 million; the AgVantage appraisal of \$3.95 million. ORCA raises this point as a question of public policy in relation to public monies to be extended purchasing this property. Surely the lower value should be the one accepted by OPRD.

It has recently become known that the mineral rights were severed from Grouse Mountain rights, approximately a third of which inhere separately in a corporation called EOM Ltd (*see* letter from Thomas Lowther, EOM Principal, to OPRD Commission, dated November 27, 2013, *and* letter from Martin Conway, representing EOM Ltd., to OPRD Commission dated February 4, 2014). OPRD did not publicly acknowledge having received any letters on this subject until February 7, 2014, nor has conducted any kind of title analysis of the property that has been made available to the public.

The AgVantage appraisal (prepared August 20, 2013, but made available to the public February 7, 2014) dismissively says (p. 22), “Mineral rights typically are not a factor in this market. Most minerals are intact with the surface and there has been no commercial leasing or production activity in the area. Sub-surface mineral and geothermal rights were not investigated within the appraisal process.”

The only mention of mineral rights in the Boise review appraisal (dated January 18, 2014) is, “No opinion is expressed as to the value of subsurface oil, gas or mineral rights, if any, and we have assumed that the property is not subject to surface entry for the exploration or removal of such materials, unless otherwise noted in our appraisal.” (p. 37).

Yet the initial letter from EOM Ltd. To the Parks Department was dated November 27, 2013. Why did the appraisal and appraisal review mention mineral rights so dismissively, given that the Department already knew about them *before* the appraisal and review appraisal were completed – or at least, in plenty of time for both to be amended to include mineral rights before public release?

In fact, it was stated at the February 7, 2014 Parks Commission meeting by staff from the Oregon Department of Justice that severed mineral rights need not be considered at the time of purchase, but rather *after purchase is complete*. This seems a cavalier way of using state monies for purchase of land for public use. As pointed out by the Feb. 4, 2014 EOM letter, such mineral rights are entirely inconsistent with the acquisition criteria in OAR 736-019-0060, as mineral rights are considered the “dominant estate” in Oregon law.

ORCA doubts it is in the public interest to purchase a large parcel of land under the OPRD acquisition criteria with the severed mineral rights *completely* unaccounted for as they have been in both the policy debate and the appraisals. Conservation values would be heavily impacted if mineral extraction took place at Grouse Mountain subsequent to purchase; and substantial public money could be implicated in purchasing such rights to avoid extraction. Why has not even a cursory review of mineral rights been undertaken, and made public, on Grouse Mountain Ranch?

Conclusion

As stated often before, Oregon Coast Alliance opposes the Bandon Biota exchange and acquisition of Grouse Mountain Ranch to fulfill the requirements of the exchange. As the process continues towards Commission approval of the proposed exchange/acquisition, ORCA's concerns only grow. This is a very unsound use of State funds, and sets a terrible precedent of approving purchase of cherished coastal state park lands by a private developer to develop for-profit uses.

Thank you,

/s/ Cameron La Follette

Cameron La Follette

Land Use Director

HAVEL Chris * OPRD

From: <crawlindirt@gmail.com>
Sent: Friday, February 14, 2014 3:22 PM
To: oprd.publiccomment@state.or.us
Subject: Bandon; Say No

Dear Commissioners:

On behalf of nature lovers everywhere, I implore you to reject the transfer of Bandon State Natural Area to a golf course developer. The state got this land in a bargain sale from the federal government with the promise it would be managed on behalf of the public. The current proposal is for a municipal course but does not provide any long-term assurance against further developed. Once the developer buys his way out of the BLM interest, there will be no restrictions on how it is developed or managed. The idea that Parks will be able to buy back the property if the developer sells in the future is not realistic. And if the property is important enough for Parks to want an option to buy it back then why in heck are you letting it go now? It makes no sense.

Please, just say no to a golf course on the Bandon State Natural Area. Golf Travel Magazine quoted the developer as saying he already has enough land for a "pretty good" golf course, he just wants our public land to make it superlative. He can already create jobs and opportunities for young caddies without this public land. To approve this transfer would be terrible public policy and set a precedent that will make the commission entertain all manner of future proposals.

I am glad the decisions on Bandon State Natural Area and Grouse Mountain are separate. I support a new state park at Grouse Mountain - find another way to fund it.

Your vote on trading away public land with no strings attached will go down in history. It may be viewed as either the beginning of a land grab for well-connected developers, or the end of private interests attempting to take from the public that which belongs to us all. The dunal system at Bandon State Natural Area is not just some grassy field. It contains rare plants and provides an important buffer for snowy plovers. It should remain a natural area owned and managed by State Parks.

Thank You,

Greg Combs
Salem, Oregon



United States Department of the Interior



FISH AND WILDLIFE SERVICE

Oregon Fish and Wildlife Office

2600 SE 98th Avenue, Suite 100

Portland, Oregon 97266

Phone: (503) 231-6179 FAX: (503) 231-6195

Reply To: 8539.1001(03)

File Name: Bandon Biota Land Exchange Proposal

TS Number: 14-336

FEB 14 2014

Lisa Van Laanen
Interim Director
Oregon Parks and Recreation Department
725 Summer St. N.E. Suite C
Salem, OR 97301

Subject: Public Comments on Bandon State Natural Area Exchange Proposal

Dear Ms. Laanen and OPRD Commission,

We are submitting the following comments regarding the land trade proposal from Bandon Biota that involves Bandon State Natural Area (SNA) and adjacent lands within the range of the federally threatened Pacific Coast population of the western snowy plover (*Charadrius nivosus nivosus*).

Our review of the OPRD wildlife assessment for the Bandon land exchange proposal resulted in four main concerns about potential impacts to snowy plovers and commitments outlined in OPRD's Habitat Conservation Plan (HCP):

1. We are concerned that predators may increase within the areas managed for snowy plovers (SPMA) on Bandon SNA due to development of golf course and recreational uses on the exchanged lands.
2. We are concerned that disturbance of nesting plovers may increase due to greater access to the Bandon SNA from the adjacent lands proposed for recreational development, including greater use of trails to the beach, through occupied snowy plover habitat.
3. Modifications to the HCP may be necessary to address snowy plover habitat, currently classified as RMA, to consider reclassification as SPMA, if OPRD gains ownership.
4. We are concerned about the stated uncertainty regarding funding and ability to meet HCP commitments and maintain compliance under the associated Incidental Take Permit, if additional predation and human disturbance redirects funding from necessary habitat management.

We look forward to working with OPRD on any measures to conserve snowy plovers and their habitat, and incorporating any necessary modifications to the HCP.

Sincerely,

Paul Henson, PhD
State Supervisor

Acting
for

Sean T. Malone

Attorney at Law

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Via Certified, Return Receipt Requested and Email

March 3, 2014

Patricia Burke
Coos Bay Office District Manager
Bureau of Land Management
1300 Airport Lane
North Bend OR 97459
(541) 756-0100
BLM_OR_CB_Mail@blm.gov

Re: BLM's Reversionary Interest in the Bandon State Natural Area

Dear Ms. Burke,

On behalf of Oregon Coast Alliance (ORCA), I would like you to address several issues that ORCA anticipates occurring in the event that the Bandon State Natural Area (BSNA) land exchange between the Oregon Parks and Recreation Department (OPRD) and Bandon Biota LLC (Biota) is approved. ORCA's primary concern is that, despite the fact that the BLM holds a future interest in the BSNA, the OPRD appears to be under the mistaken understanding that it can relinquish the BSNA into private ownership for development of a golf course. ORCA believes that OPRD has no authority to approve an exchange where it fails to hold all the sticks in the bundle of property rights. ORCA's other concerns are largely related to BLM's obligations under the Recreation and Public Purposes Act (RPPA), National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Federal Land Policy and Management Act (FLPMA), and the Administrative Procedures Act (APA), as outlined below.

OPRD acquired most of Bandon SNA, including the 280 acres proposed for transfer to Biota, through a 1968 purchase from the Bureau of Land Management (BLM) pursuant to the RPPA. The parcel was conveyed to the OPRD at less than fair market value, and the BLM held a reversionary interest that would be triggered if the lands are utilized for a purpose other than that for which the lands were conveyed or in a manner inconsistent with the terms of the conveyance. *See* 43 C.F.R. § 2741.9(a). "A reversion occurs automatically upon termination of

the prior estate.” Black’s Law Dictionary, 1345 8th ed. The qualified uses for the conveyance were for park purposes only. Because golf is not a qualified use and Biota is not a qualified applicant (see below), the BLM acquires the BSNA via the reversionary clause. A reversionary interest is automatic, and, therefore, the BLM assumes full title to the property.

ORCA’s primary concern is that OPRD has no legal authority to exchange fee title to any portion of BSNA when the BLM holds a future interest in those same lands. The BSNA acreage becomes BLM’s property automatically upon change of ownership or if the lands are used for a different purpose, which is the entire basis for the proposed exchange. OPRD cannot exchange land that it does not have a present interest in, and even if the BLM wanted to sell the BSNA land, then it would have to comply with the aforementioned statutes *before* disposing of the property.

Once the BLM obtains BSNA lands via the reversionary interest, the BLM cannot simply sell or dispose of the BSNA without complying with the FLPMA, which requires that all resource management decisions “shall conform to the approved [land use] plan.” 43 C.F.R. § 1610.5-3(a). Section 203 of FLPMA governs sales of public lands, which must be satisfied if the BLM proposes to dispose of the lands after acquisition.

Assuming the BLM satisfies with all the substantive and procedural requirements to sell or dispose of public land, the BLM would be required, at the very least, to prepare an Environmental Assessment. However, given the presence of threatened species, the BLM would most likely have to prepare an Environmental Impact Statement. For example, the *Wildlife Assessment for the Bandon Land Exchange Proposal*, January 2014, concedes significant impacts to the snowy plover if title to the land is transferred to Biota and a golf course is constructed:

“multiple negative indirect impacts to western snowy plover are likely. These include increased disturbance from people attracted by the golf course, unofficial beach access from the Bandon SNA parcel; plover avoidance of suitable habitat, and increased usage of the Lost Lake; increased predation pressure; and increased predation during disturbance events. Specifically, negative indirect effects to plover are highly likely from the Oceanfront Parcel Service Road Access Easement as well as the development of golf facilities on the Bandon SNA parcel.”

See Lauten 2013, Figures 8 and 9 (showing plover nest locations likely subject to additional harm and stress as a result of golf course development).

Furthermore, BSNA, including the proposed exchange acreage, contains populations of Pink sand-verbena, which is state Endangered, and also a Federal Species of Concern. BLM participated in an interagency Conservation Strategy for Pink sand-verbena in 2006. The Strategy states, “The objective of the management actions presented in this Conservation Strategy is to maintain or increase the numbers and stability of pink sand-verbena by maintaining

and restoring habitat in each of the populations. The ultimate goal is to remove the need to list the species as threatened or endangered.

This will be accomplished by protecting all known populations of the species on public lands included in this Conservation Strategy. These populations will not knowingly be subjected to development or habitat degradation through land management actions. Efforts will be made to limit the impacts of recreational use...as appropriate to the anticipated use and site characteristics.” (p. 19).

Likewise, BSNA contains populations of Silvery phacelia, a State threatened plant which is also a Federal Species of Concern. Clearly, BSNA is a sensitive ecosystem with many rare and fragile plant and animal species. Some are Federally listed, others are not as yet; but the presence of all these make it clear that this is an important, rare coastal dunal habitat.

NEPA analysis must be done prior to any action being taken. NEPA contains strict timing requirements to ensure that environmental considerations are factored into government decision-making. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (“[a]n assessment must be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.”). The phrase “early enough” means “at the earliest possible time to insure that planning and decisions reflect environmental values....” *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (quoting 40 C.F.R. § 1501.2). Furthermore, “[a]n agency shall commence preparation of [a NEPA document] *as close as possible* to the time the agency is developing or is presented with a proposal” 40 C.F.R. § 1502.5 (emphasis added).¹ The BLM’s failure to satisfy its NEPA obligations is ripe for judicial review pursuant to the Administrative Procedure Act.

ORCA also believes that if the BLM proposes to dispose of the BSNA lands, then the BLM would also have to initiate consultation with the FWS as a result of acquiring land with listed species and disposing land with listed species. If the BLM wishes to dispose of the lands pursuant to section 203 of FLPMA, it must initiate consultation with the knowledge of the significant impacts conceded in the *Wildlife Assessment for the Bandon Land Exchange Proposal*. Listed species on the property, and/or heavily affected by human activities on the property because of substantial habitat use on the lands and nearby, include the threatened snowy plover (with numerous nests identified in exhibits A and B), threatened coho salmon, and

¹ NEPA analysis would also require that the BLM present a reasonable range of alternatives to simply disposing the property. *See Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000) (a pre-existing contract ‘eliminate[s] the opportunity to choose among alternatives.’); *American Wildlands v. U.S. Forest Serv.*, CV-97-160-M-DWM (D. Montana 1999) (holding that normal deference to agency decision making is inapplicable ‘if the objectivity of the agency decision making is questionable’ and that “[o]therwise, there would be no check on the ability of an agency to circumvent environmental laws by simply going through the motion sand conducting environmental assessments on the basis of predetermined or presupposed findings”).

threatened marbled murrelet, and, therefore, an subsequent dispossession of the property would require formal consultation.

If Biota purports to acquire title from the OPRD under the terms of the Recreation and Public Purposes Act (RPPA), this would conflict with the RPPA's provision that only governmental entities and qualified non-profit organizations can acquire a patent or lease of BLM land. Biota is not a qualified applicant because Biota is neither a governmental entity nor a non-profit organization. The RPPA specifically omits for-profit corporations. *See* 43 C.F.R. § 2740.0-1 ("These regulations provide guidelines and procedures for transfer of certain public lands under the Recreation and Public Purposes Act as amended (43 U.S.C. 869 *et seq.*); 43 C.F.R. § 2741.2 ("Applications for any recreational or public purpose may be filed by States, Federal and State instrumentalities and political subdivisions, including counties and municipalities, and nonprofit associations and nonprofit corporations that, by their articles of incorporation or other authority, are authorized to acquire land.")). Therefore, Biota cannot acquire title from the BLM.

Even assuming Biota could be a qualified applicant, 43 C.F.R. § 2741.5(b) mandates that "[n]o public lands having national significance shall be conveyed pursuant to the act." The presence of threatened species under the ESA makes the BSNA land of national significance. *See TVA v. Hill*, 437 U.S. 153, 175 (1978) ("Declaring the preservation of endangered species a national policy, the 1966 Act directed all federal agencies both to protect these species and 'insofar as is practicable and consistent with the[ir] primary purposes,' 'preserve the habitats of such threatened species on lands under their jurisdiction.")). Under NEPA, the presence of endangered species makes the inevitable proposal to dispose of the land significant. *See* 40 C.F.R. 1508.27(b)(9) (significance under NEPA must be determined based on "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973"). Therefore, BLM cannot dispose of the property because it has national significance.

Finally, the BLM cannot approve an application to dispose of public land until after satisfying the planning requirements in section 202 of FLPMA. *See* 43 C.F.R. § 2741.5(e). The planning requirements of section 202 of FLPMA are significant. *See* 43 U.S.C. 1712. The planning requirements of section 202 mandates application of the principles of "multiple use sustained yield," "give priority to the designation and protection of areas of critical environmental concern," "consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values." 43 U.S.C. 1712. Finally, BLM must "allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands." *Id.* ORCA intends to participate to the fullest extent provided under applicable law.

The Administrative Procedure Act “by its terms, provides a right to judicial review of all ‘final agency action for which there is no other adequate remedy in a court,’ § 704 and applies universally ‘except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law,’ § 701(a).” *Bennett v. Spear*, 520 U.S. 154, 175 (1997). Here, if the exchange moves forward, the BLM will have made a *de facto* final agency action that is reviewable under the APA, and the BLM will have failed to follow the procedures prescribed by the ESA, NEPA, and FLPMA. Allowing the exchange to move forward would, therefore, subject the BLM to immediate litigation.

ORCA trusts that BLM has already communicated the requirements of Federal law to OPRD about the many obligations and hurdles that must be dealt with before a proposed BLM property disposal could even be considered, as BLM is likely to be more knowledgeable about these than OPRD could be. ORCA has also explained the Federal issues to OPRD, in testimony before the Parks Commission. ORCA appreciates your efforts in these matters that affect the environment and the public interest on our coast.

Sincerely,



Sean T. Malone
Attorney for ORCA

cc: ORCA

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