



Oregon

John A. Kitzhaber, MD, Governor

Parks and Recreation Department
725 Summer Street NE, Suite C
Salem, OR 97301-1266
(503) 986-0980
FAX (503) 986-0792
www.oregonstateparks.org

April 30, 2014



Paul Rodriguez, Realty Specialist
Bureau of Land Management
Coos Bay District
1300 Airport Lane
North Bend, Oregon 97459

Dear Mr. Rodriguez:

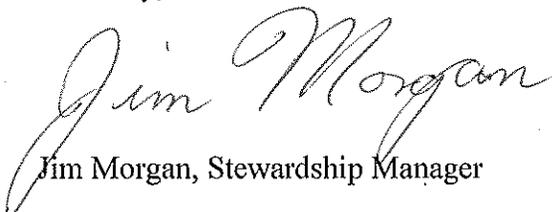
On April 9, 2014, Oregon Parks and Recreation Commission approved an exchange of real property, a 280-acre portion of the Bandon State Natural Area (Attachment A) which is owned and managed by Oregon Parks and Recreation Department (OPRD), for real property and other assets contributed by Bandon Biota LLC. The final order as approved by the Commission is provided in Attachment B.

The portion of Bandon SNA proposed for exchange out of the park system is part of a larger acquisition made in 1968 by OPRD (formerly part of State Highway Commission) acquired from U.S. Department of Interior Bureau of Land Management (BLM). An accompanying deed restriction designated that land use on the subject property would be for public park purposes only. Under conditions for closing in the "Exchange Agreement" (Attachment C), Bandon Biota is obligated to address the BLM restriction in a manner satisfactory to OPRD.

The Exchange Agreement states that Bandon Biota shall take the lead role in facilitating resolution of BLM restriction with cooperation of and at no expense to OPRD. Closing will not occur until the BLM restriction has been addressed in a manner to the satisfaction of OPRD that allows the Department of Interior to consent to conveyance of the Bandon SNA parcel to Bandon Biota, and releases the restriction from the Bandon SNA parcel without cost to OPRD.

The Commission's approval of the exchange directs OPRD to cooperate with Bandon Biota in working with BLM to address the BLM restriction in a manner that ultimately leads to the conveyance of the 280-acre portion of the Bandon SNA parcel to Bandon Biota. We are prepared to respond to any request for additional information that may be helpful in completing this task.

Sincerely,


Jim Morgan, Stewardship Manager

Enclosures

cc: Lisa Van Laanen, OPRD Director

Oregon Parks and Recreation Commission

April 9, 2014

Agenda Item: 7a

Action

Subject: Bandon Exchange – Final Order

Presented by: Jim Morgan

In June 2013, Bandon Biota LLC submitted a proposal to the Oregon Parks and Recreation Department (OPRD) outlining acquisition of a portion of Bandon State Natural Area (SNA) in exchange for other property and in-kind services. On July 17, 2013, the proposed exchange was presented to the Commission. The Commission considered this proposal in the context of the department's land acquisition and exchange policy OAR 736-019-0070. This policy provides criteria for an exchange initiated by parties other than the department. In this instance, the Commission may approve an exchange if the Commission determines that the proposed exchange provides "an overwhelming public benefit to the park system, its visitors, and the citizens of Oregon."

Public input regarding the proposal was provided at two public meetings, and Commission meetings on September 24, 2013, November 20, 2013, and February 5, 2014, and through open solicitation. At the February 5, 2014 meeting, the Commission tabled action on the proposal pending its further review of the documents submitted at that meeting.

With the support of the Department of Justice, the department has updated the final proposed order regarding the Bandon Exchange presented at the February 5, 2015 meeting. The revised order is attached as Exhibit A for the Commission's consideration for approval. Exhibit B includes related wildlife and vegetation reports.

Prior Action by the Commission:

Feb. 20, 2014 - the Commission determined not to proceed with the Grouse Mountain Ranch acquisition for which the Bandon Biota funds were to be used.

Feb. 5, 2014 – Tabled Bandon Exchange action pending review of documents.

Nov. 20, 2013 – Finds that proposed Bandon Exchange meets OAR 736-019-0070 and instructs the department to prepare a final order for Commission consideration of approval.

Sept. 24, 2013 - Proposed Exchange with Bandon Biota - Public Comments

July 17, 2013 – Proposed exchange with Bandon Biota presented to Commission

July 20, 2011 – Bandon Biota provided public comments on proposal

Sept. 22, 2010 - Bandon Biota presented initial exchange proposal

Action Requested:

Staff recommends that the Commission adopt the revised final order in Exhibit A.

Attached Exhibits:

A – Proposed Final Order

B – Coastal Resource Value Reports

Prepared by: Jim Morgan

**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) 14-01
BANDON BIOTA, LLC)

This matter came before the Oregon Parks and Recreation Commission (the “Commission”) on February 5 and April 9, 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; (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, 2013, the Department released the request for exchange proposal as part of the announcement for the July 17, 2013 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 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:
 - 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 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.
18. On January 31, 2014, the Department received new appraisals for the property elements involved in the exchange proposal.
19. On February 4, 2014, the Department received the final reviewed appraisals for the property elements involved in the exchange proposal.
20. On February 5, 2014, the Commission took public comment on the proposed orders and the additional information provided by the Department. The Commission continued its consideration of the matter to afford a reasonable time to review the final appraisals and additional information.

21. On February 20, 2014, the Commission decided not to proceed with the acquisition of Grouse Mountain Ranch and continued the consideration of the Bandon Biota exchange request to its April 9, 2014 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 that 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, and 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, four log cabins, eight horse camp sites, group RV and group tent, hiker biker camp, seven miles of 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 of 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 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 siltassel 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 Department assessed the Bandon State Natural Area parcel for wildlife species using existing data sources. *See* Wildlife Assessment for the Bandon Land Exchange Proposal (January 28, 2014). The parcel contains significant natural habitats as well as highly degraded areas. *Id.* at 2. The assessment identifies at risk species that have the potential to occur or do occur in a study area that includes the Bandon State Natural Area parcel, the 111-acre oceanfront parcel, and the 97-acre riverfront parcel. *Id.* at Table 1. Assessing impacts to at-risk wildlife is necessarily a speculative task based on assumptions about wetland loss that could occur after leaving Department ownership and disturbance and predation that may occur from development of golf facilities. The assessment finds the potential for negative impacts to habitat for wetland obligate birds, the potential habitat for western toads, and the western pond turtle. *Id.* at 9, 12. Western snowy plover also may confront multiple negative indirect impacts, depending on whether human-related disturbance increases from development of golf facilities, particularly if it results in intensification of recreation activities on the ocean shore, which the assessment speculates is likely to occur. The assessment notes that the Bandon State

Natural Area parcel has approximately 16 acres that are designated as Snowy Plover Management Area (SPMA) in the Habitat Conservation Plan (HCP). Because the acreage is not suitable breeding habitat for plover, the Department will submit a minor modification to the HCP to redraw the boundaries of the SPMA (which will also expand to include roughly 59 acres of the 111-acre oceanfront parcel).

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 pre-contact 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 the HCP mentioned above 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. The wildlife assessment notes that the topography of the beach habitat on the oceanfront parcel may allow for easier restoration than other sections of the Bandon State Natural Area and that the incoming acreage has the potential for a positive impact on western snowy plover with implementation of coastal dune habitat restoration.

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;

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 identified the Grouse Mountain Ranch in Grant County as that acquisition. The Commission rejected that acquisition on February 20, 2014. The Commission now directs the Department to pursue one or more appropriate acquisition opportunities for Commission approval as additions to the state park system.

(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 * * * 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 exchanged 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.

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 nor 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 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 Department received new appraisals on January 31, 2014 that 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 were subject to independent review in compliance with OAR 736-019-0100(1)(b), which the Department received on February 4, 2014 and resulted in a change to the final reviewed value for the Bandon State Natural Area component and a confirmation of the appraised value for the 111-acre oceanfront parcel and the 97-acre riverfront parcel. 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 it 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 a 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 sand verbena, 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).

Although the area leaving state ownership is entirely Secondary Protection Area, the Department's Wildlife Assessment identifies that an approximately 16-acre portion of the 280-acre parcel is designated as SPMA in the HCP. The assessment notes:

“This acreage is composed of a shore pine (*Pinus contorta*) dominated plant community (Bacheller 2013a), which is not suitable breeding habitat for plover. Since half the acreage is native vegetation relatively free of invasives (Bacheller 2013a), these 16 acres are a very low priority to receive any treatments to convert to plover breeding habitat.” Wildlife Assessment for the Bandon Land Exchange Proposal at 13-14.

Because the acreage is not suitable breeding habitat for plover, the Department will submit a minor modification to the HCP to redraw the boundaries of the SPMA, which will also expand to include roughly 59 acres of the 111-acre oceanfront parcel in the reconfigured Bandon State Natural Area. The Commission agrees with the assessment that the restoration of coastal dune habitat within the SPMA would “provide more benefit to the plover than retaining the 16 acres of shore pine.” *Id.* at 14. As such, the Department has engaged the US Fish & Wildlife Service to adjust the mapped boundaries of the SPMA to reflect the proposed changes and increased habitat protection opportunity.

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. Further, the areas leaving state ownership is neither currently suitable western snowy plover habitat nor is it planned for enhancement for plover habitat given its distance inland from the ocean and the New River and the low chance that it could be used to support a breeding pair. In sum, because the reconfigured Bandon State Natural Area continues to achieve the purposes of that ownership and the HCP, 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 Bandon State Natural Area 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, the Commission considers that element to be an “other asset” that will eventually lead to 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 three elements that the Commission considers “acquisitions” are the 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.

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 establish and maintain a list of properties of interest which upon Commission approval the Department is authorized to acquire as they become available. OAR 736-019-0060(1)(a). The Department prepared, and the Commission adopted on July 17, 2013, the 2013-15 Land Acquisition Priorities list. The property that is an element of this exchange that is on that list is 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).

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 of "other assets" provides 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 rating system employs an Acquisition Evaluation Criteria form that considers the factors enumerated in OAR 736-019-0060(3) in the context of various provisions the Commission has adopted in division 19, including the scope and purpose in OAR 736-019-0000, the policy of OAR 736-019-0040, and the criteria for acquisition and exchange in OAR 736-019-0060 and 736-019-0070. All of the rating system factors derive from the provisions of division 19.

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 736-019-0000(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

Oregon Parks and Recreation Commission meeting April 9, 2014
Agenda Item 7a, Exhibit A: Bandon Exchange – Final Order

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 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 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. Thus, the “monetary value of the exchange” must be identified in order to undertake the consideration of overwhelming public benefit. The 280-acre portion of the

Bandon State Natural Area proposed for exchange to Bandon Biota appraised in 2011 at \$1,960,000 and most recently, the final reviewed value is \$1,055,000. The 111-acre oceanfront parcel property coming into the state park system appraised at \$800,000 in 2010 and \$445,000 in 2014; the 97-acre riverfront parcel appraised at \$220,000 in 2010 and \$171,000 in 2014. The monetary value of the exchange includes the \$2,500,000 currently directed toward the Department's acquisition of an addition to the state park system. Additionally, Bandon Biota has contributed \$450,000 towards Whale Cove acquisition and the \$300,000 towards gorse control. The Commission finds that the monetary value of the Bandon Biota contribution to the exchange is \$3,866,000, without accounting for the coast trail contribution, and the Department contribution to the exchange is \$1,055,000. From a simple monetary standpoint, the Commission finds that monetary value of the exchange to the state park system is in excess of three to one.

The Commission did not, however, 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 acquire 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. For example, wetland acreage under Department management will increase, but may include less freshwater wetland types.

The Commission finds that such tradeoffs are 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 an element of the exchange is an area 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.

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 Grouse Mountain Ranch property to provide the Commission assurance that if it approved the exchange, the terms of the exchange can be met. However, the Commission ultimately decided not to proceed with that acquisition. To be clear, Bandon Biota is providing \$2,500,000 as part of the exchange.

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:

“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 Meredith's 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.”

While provision 4 quoted above furthers the Department's responsibility to structure agreements in furtherance of prudent use of public monies under OAR 736-019-0040, the Commission has determined not to proceed with the Grouse Mountain Ranch acquisition as the priority acquisition for which the Bandon Biota funds are to be used. The Commission hereby directs the Department to identify other real property that, 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 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 achieving 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. The Commission directs the Department to identify other real property for its future consideration and approval under provision 4 of the assistance agreement. 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

Oregon Parks and Recreation Commission meeting April 9, 2014
Agenda Item 7a, Exhibit A: Bandon Exchange – Final Order

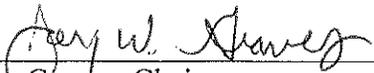
this exchange, the Commission recognizes that there is now less of the Bandon State Natural Area, but viewed as a whole, there is more to the state park system.

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 11th DAY OF APRIL,

2014. FOR THE COMMISSION:



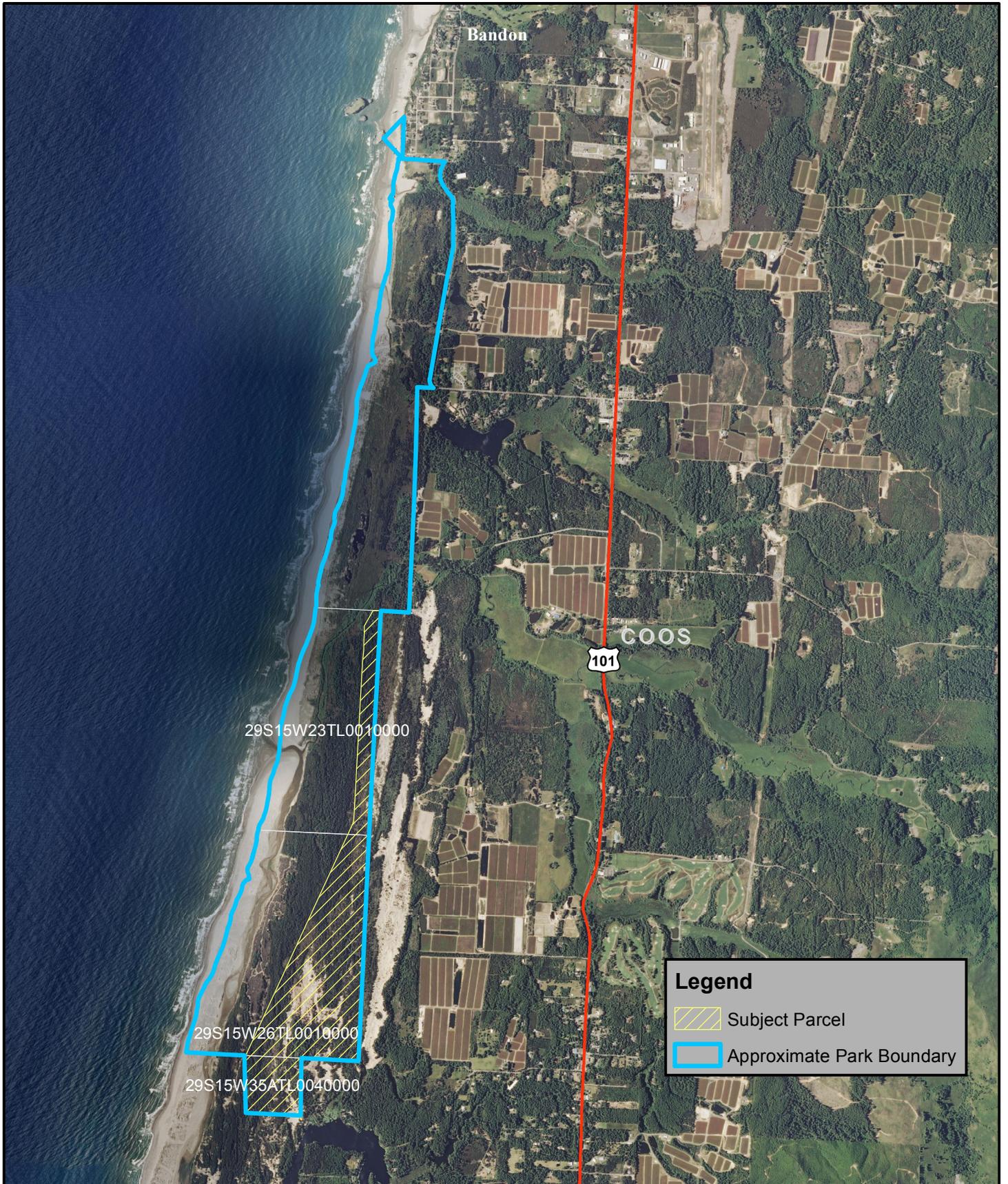
Jay Graves, Chair
Oregon Parks and Recreation Commission

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.

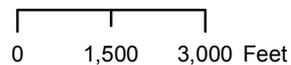
Copies of all documents referenced in this order are available for review at the Department's office in Salem (and are posted on the Department's website).

Bandon SNA

Oregon Parks & Recreation Dept.
725 Summer St. NE, Suite C
Salem OR, 97301



This product is for informational purposes and may not have been prepared for, or be suitable for legal, engineering, or surveying purposes. Users of this information should review or consult the primary data and information sources to ascertain the usability of the information.



NAD 1983 HARN Oregon Statewide Lambert Feet Intl



NMOB-02888 1/14/2014

E:1/21/2014

P:never

amb 01212014

EXCHANGE AGREEMENT

EFFECTIVE DATE: November 20, 2013

BETWEEN: STATE OF OREGON acting by and through the Oregon Parks and Recreation Commission on behalf of the Oregon Parks and Recreation Department ("OPRD")

AND BANDON BIOTA, LLC, a Delaware Limited Liability Company ("Biota")

OPRD and Biota are sometimes individually referred to herein as a "party" or collectively as "parties."

RECITALS

a. OPRD is the owner of certain real property with all improvements thereon and rights appurtenant thereto commonly known as the Bandon State Natural Area, an 878-acre property, more or less, in Coos County, Oregon of which a 280-acre portion, more or less, has been identified as being of interest to Biota. The legal description of this 280-acre portion is attached as **Exhibit A** (the "Bandon Parcel"). The Bandon Parcel includes no ocean frontage and no property to the west of the westward dunal line.

b. Biota is the owner of a 111-acre property and a 97-acre property which have been identified as being of interest to OPRD. Their legal descriptions are attached as **Exhibit B** (the "Oceanfront Parcel") and **Exhibit C** (the "Bullards Beach Spit Parcel"). The Oceanfront Parcel adjoins the Bandon State Natural Area to the south and the west, with its westernmost boundary on the ocean shore. The Bullards Beach Spit Parcel is located along the west side of the Coquille River on the Bullards Beach spit, directly south of Bullards Beach State Park.

c. Biota is a part owner of a property commonly known as the Sheep Ranch at the Bandon Dunes Golf Resort (the "Sheep Ranch Parcel") over which OPRD has identified an interest in an easement to allow for the realignment of a section of the Oregon Coast Trail (the "Coast Trail Easement") by rerouting a section of the Trail over the Sheep

Ranch Parcel.

d. Together, the Oceanfront Parcel, the Bullards Beach Spit Parcel, and the Coast Trail Easement are sometimes referred to herein as the "Biota Exchange Properties."

e. OPRD has identified a 13-acre property, more or less, owned by a third party, as being important for resource protection (the "Whales' Cove Parcel"). The Whales' Cove Parcel is comprised of forest, grassy coastal prairie, and rocky coastal headland at Whales' Cove near Depoe Bay. Whales' Cove is the only marine area in Oregon's territorial sea where all marine life is protected. The Whales' Cove Parcel shall be managed for its natural resource and scenic values and as a principal component of the overall Whales' Cove ecology, providing critical habitat for coastal wildlife and also including a 3,000+ year old Native American midden site. The Whales' Cove Parcel will protect the viewshed from the Rocky Creek State Scenic Viewpoint.

f. OPRD has identified a 6,300-acre property, more or less, as being of interest to OPRD. The legal description is attached as **Exhibit E** ("Grouse Mountain Ranch"). Grouse Mountain Ranch is comprised of forested and open land in Grant County with stream frontage on Beech Creek, including several outbuildings and houses, including a ranch house. It provides scenic values from several peaks and high ground and exceptional natural and wildlife habitat with developed jeep and walking trails and two ponds.

g. Biota has a goal of eradication of gorse as an invasive plant species on the southern Oregon coast and is willing to contribute funds to OPRD for gorse control, on the following OPRD properties: (i) Bullards Beach; (ii) Cape Blanco; (iii) Floras Lake Natural Area; and (iv) that portion of the Bandon State Natural Area that is north of the Bandon Parcel (the "Gorse Management Areas").

h. Biota desires to construct a walking-only championship links course designed by Gil Hanse, to be known as "Bandon Links," and to include a clubhouse, caddie house, putting course, short-game facility with par-3 course and practice range, and related facilities, to provide jobs and educational opportunities for the residents of Coos and Curry Counties, as well as in-state and out-of-state visitors to Bandon Links.

i. OPRD has a mission to provide and protect outstanding natural, scenic, cultural, historic and recreational sites for the enjoyment and education of present and future generations.

j. All OPRD real property transactions are subject to approval by the Oregon Parks and Recreation Commission (the "Commission"), after due public process and consideration.

k. Biota has initiated contact with OPRD about an exchange for the Bandon Parcel.

l. OPRD desires to maintain a reservation right, after the conveyance to Biota of the Bandon Parcel as contemplated herein, to acquire the Bandon Parcel before Biota offers to sell or transfer it to an unrelated third party (the "Bandon Parcel Reservation Right").

m. OPRD desires to establish rights and restrictions relating to access to the ocean shoreline through the Bandon Parcel (the "Bandon Parcel Shoreline Access Restriction").

n. OPRD desires to reserve an undeveloped, natural corridor access easement across the Bandon Parcel for the benefit of OPRD (the "Bandon Parcel Natural Corridor Access Easement").

o. Biota desires to reserve a service road access easement for maintenance, emergency and employee vehicles providing access to Biota from the nearest available public road to the south of the Oceanfront Parcel, over and across the easternmost portion of the Oceanfront Parcel to the Bandon Parcel (the "Oceanfront Parcel Service Road Access Easement").

p. OAR 736-019-0070(4) sets forth the criteria for consideration of an exchange that a party other than OPRD initiates, specifically that

"[t]o 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."

q. The parties believe that the exchange of property and other consideration contemplated by this Agreement meet the "overwhelming public benefit" standard of OAR 736-019-0070(4).

NOW, THEREFORE, in consideration of the mutual promises and conditions contained herein, the parties, intending to be legally bound, agree as follows:

1. Acquisition and Transfer of Properties. OPRD shall convey the Bandon Parcel to Biota in exchange for Biota conveying to OPRD the Biota Exchange Properties and for Biota's entering into and performing its obligations under the Whales' Cove Assistance Agreement, the Grouse Mountain Assistance Agreement, and the Gorse Control Contribution Agreement (each such agreement as defined below).

2. Consideration. The consideration for this Agreement is comprised of the following:

2.1 Consideration for OPRD. As consideration for OPRD to convey the Bandon Parcel to Biota, OPRD shall receive the Biota Exchange Properties and:

2.1.1 Biota shall enter into an agreement with OPRD concurrently with this Agreement in substantially the form attached hereto as **Exhibit F** and incorporated herein by reference (the "Whales' Cove Assistance Agreement"), pursuant to which Biota shall contribute, or cause to be contributed, \$450,000 for the acquisition of the Whales' Cove Parcel by a governmental entity. Biota's contribution towards acquisition of the Whales' Cove Parcel is not contingent on Closing under this Agreement and shall be made on or before January 15, 2014. This obligation shall survive any termination of this Agreement.

2.1.2 Biota shall enter into an agreement with OPRD concurrently with this Agreement in substantially the form attached hereto as **Exhibit G** and incorporated herein by reference (the "Grouse Mountain Ranch Assistance Agreement"), pursuant to which Biota shall contribute \$2,500,000 for the purchase of Grouse Mountain Ranch by OPRD. Such contribution shall be made in three (3) equal annual

installments of \$833,334 each, the first payment to be made on or before December 31, 2013; the second payment to be made on or before June 30, 2014; and the third and final payment to be made on or before June 30, 2015. If Closing under this Agreement occurs prior to any such payments, Biota shall, at Closing, fully contribute all amounts required under the Grouse Mountain Ranch Assistance Agreement. If Closing does not occur under this Agreement, any amounts deposited under this Section 2.1.2, including accrued interest, if any, shall be returned to Biota.

2.1.3 Biota shall enter into an agreement with OPRD concurrently with this Agreement in substantially the form attached hereto as **Exhibit H** and incorporated herein by reference (the "Gorse Control Contribution Agreement"), pursuant to which Biota shall contribute funds to OPRD for use in gorse control on the Gorse Management Areas. As a part thereof, Biota shall pledge to contribute \$300,000 for such gorse control on the Gorse Management Areas, to be paid in 5 equal annual installments of \$60,000 each on January 15 of every year beginning in 2014. In the event the closing of the transactions contemplated under this Agreement does not occur, OPRD shall not be required to refund to Biota any payments already made pursuant to the Gorse Control Contribution Agreement, and Biota shall not be required to make any such additional payments.

2.2 Consideration for Biota. As consideration for Biota to convey the Biota Exchange Properties, and to enter into and perform its obligations under the Whales' Cove Assistance Agreement, the Grouse Mountain Ranch Assistance Agreement and the Gorse Control Contribution Agreement, Biota shall receive the Bandon Parcel.

2.3 Earnest Money. The parties acknowledge that the execution of and performance under the Whales' Cove Assistance Agreement serves as an unusual form of "earnest money" under this Agreement, in that Biota's obligation to contribute \$450,000 is unconditional upon execution of this Agreement and the Whales' Cove Assistance Agreement, and such contribution must be made by Biota pursuant to the terms of the Whales' Cove Assistance Agreement

whether or not this Agreement remains in effect or Closing under this Agreement ever occurs.

3. Closing.

3.1 Escrow Instructions. Upon execution of this Agreement, the parties shall deposit a copy of this Agreement with First American Title Insurance Company, Coos Bay, Oregon (the "Escrow Agent"). Vickie Rossback, Senior Title Officer, shall oversee the escrow (the "Exchange Escrow"). The parties shall execute such reasonable additional and supplementary escrow instructions as may be appropriate to enable the Escrow Agent to comply with the terms of this Agreement, but if any term of this Agreement conflicts with any supplementary escrow instructions, the term of this Agreement controls.

3.2 Closing Date and Location. Subject to the satisfaction of all the conditions in Section 6 below, the closing of the transactions described in Section 1 above ("Closing") is to be held and delivery of all items to be made at Closing under the terms of this Agreement are to be made at the offices of the Escrow Agent on or before June 30, 2015 (the "Closing Date"). Each party shall proceed with due diligence to remove or satisfy all such conditions with all reasonable speed. If all such conditions have been met or waived, Closing shall occur as early as possible in advance of June 30, 2015. The time of Closing may be extended if the parties agree it is reasonably necessary or desirable to do so in order to accomplish the removal or satisfaction of any such conditions.

3.3 Closing Costs. For the purpose of this Agreement, Closing costs are defined as escrow fees, boundary line adjustment or lot line adjustment fees, recording fees, and any other additional Closing costs identified in this Agreement. Biota shall pay all of the Closing costs associated with the Bandon Parcel and the Biota Exchange Properties.

3.4 Title Insurance Premiums. Biota shall pay the title insurance premium for the Bandon Parcel and OPRD shall pay the title insurance premiums for the Biota Exchange Properties.

3.5 Attorney Fees. The parties shall pay the fees and costs of their own attorneys.

3.6 Prorations. The real property taxes will be prorated between the parties as of the Closing Date.

3.7 OPRD's Obligations at Closing. On or before Closing, OPRD shall deliver to the Escrow Agent the following documents:

- 3.7.1 a bargain and sale deed in substantially the Oregon statutory form, duly executed and acknowledged in recordable form, conveying marketable title in the Bandon Parcel to Biota (the "Bandon Parcel Deed"), subject to no interest, defect, restriction, encumbrance contract, reservation, exception or claim, except: (a) the Permitted Exceptions (as defined below); (b) the Bandon Parcel Reservation Right, as described in Section 5A.1.2 below and subject to OPRD's and Biota's satisfaction or waiver under Sections 6.1.3 and 6.2.3 below, respectively; (c) the Bandon Parcel Shoreline Access Restriction, as described in Section 5A.1.3 below and subject to OPRD's and Biota's satisfaction or waiver under Sections 6.1.3 and 6.2.3 below, respectively; and (d) the Bandon Parcel Natural Corridor Access Easement, as described in Section 5A.1.4 below and subject to OPRD's and Biota's satisfaction or waiver under Sections 6.1.3 and 6.2.3 below, respectively.
- 3.7.2 the Coast Trail Easement, as described in Section 5A.1.1 below and subject to OPRD's and Biota's satisfaction or waiver under Section 6.1.3 and 6.2.3 below, respectively, duly executed and acknowledged in recordable form by Biota;
- 3.7.3 a title commitment from First American Title Insurance Company to issue to Biota an ALTA owner's standard coverage title insurance policy insuring Biota's title to the Bandon Parcel in the dollar amount of the appraised value established under the Appraisals (as defined in Section 5.3 below);
- 3.7.4 a duly executed and acknowledged consent and release from the Department of the Interior for the conveyance of the Bandon Parcel by OPRD to Biota for Biota's intended use, in form and substance satisfactory to OPRD;
- 3.7.5 the Whales' Cove Assistance Agreement, executed by OPRD and delivered concurrently with this Agreement;

- 3.7.6 the Grouse Mountain Ranch Assistance Agreement, executed by OPRD and delivered concurrently with this Agreement;
- 3.7.7 the Gorse Control Contribution Agreement, executed by OPRD and delivered concurrently with this Agreement;
- 3.7.8 OPRD's supplemental escrow instructions, if any;
- 3.7.9 OPRD's acceptance of the Biota Exchange Properties, pursuant to ORS 93.808;
- 3.7.10 a certification of non-foreign status;
- 3.7.11 any additional documentation required by the Escrow Agent in order to close; and
- 3.7.12 sufficient funds to close the transaction.

3.8 Biota's Obligations at Closing. On or before Closing, Biota shall deliver to the Escrow Agent the following documents:

- 3.8.1 a statutory warranty deed in substantially the Oregon statutory form, duly executed and acknowledged in recordable form, with the addition of a signature block for OPRD to evidence its approval pursuant to ORS 93.808 conveying marketable title, in the Oceanfront Parcel to OPRD (the "Oceanfront Parcel Deed"), subject to no interest, defect, restriction, encumbrance, contract, reservation, exception or claim, except the Permitted Exceptions, and the Oceanfront Parcel Service Road Access Easement, as described in Section 5A.1.5 below and subject to OPRD's and Biota's satisfaction or waiver under Sections 6.1.3 and 6.2.3 below, respectively;
- 3.8.2 a statutory warranty deed in substantially the Oregon statutory form, duly executed and acknowledged in recordable form, with the addition of a signature block for OPRD to evidence its approval pursuant to ORS 93.808 conveying marketable title, in the Bullards Beach Spit Parcel (the "Bullards Beach Spit Parcel Deed") to OPRD, subject to no interest,

- defect, restriction, encumbrance, contract, reservation, exception or claim, except the Permitted Exceptions;
- 3.8.3 the Coast Trail Easement, duly executed and acknowledged in recordable form by Biota;
 - 3.8.4 title commitments from First American Title Insurance Company to issue to OPRD ATLA owner's standard coverage title insurance policies insuring OPRD's title, subject only to the Permitted Exceptions for the Oceanfront Parcel, the Bullards Beach Spit Parcel and the Coast Trail Easement, all such policies to be in the dollar amounts of the appraised value established under the Appraisals;
 - 3.8.5 a duly executed and acknowledged consent and release from the Department of the Interior for the conveyance of the Bandon Parcel by OPRD to Biota for Biota's intended use, in form and substance satisfactory to Biota;
 - 3.8.6 the Whales' Cove Assistance Agreement, executed by Biota and delivered concurrently with this Agreement;
 - 3.8.7 the Grouse Mountain Ranch Assistance Agreement, executed by Biota and delivered concurrently with this Agreement;
 - 3.8.8 the Gorse Control Contribution Agreement, executed by Biota and delivered concurrently with this Agreement;
 - 3.8.9 Biota's supplemental escrow instructions, if any;
 - 3.8.10 a certification of non-foreign status;
 - 3.8.11 any additional documentation required by the Escrow Agent in order to close; and
 - 3.8.12 sufficient funds to close the transaction.

3.9 Brokers. OPRD has not employed any broker or finder in connection with the transactions contemplated in this Agreement and has taken no other action, which employment or action would give rise to a valid claim against Biota for a brokerage commission, finder's fee, or other like payment. Biota has employed one (1) or more brokers or finders in connection with the transactions contemplated in this Agreement, but believes that such employment or action will not give rise to a valid claim, suit or action against OPRD under any circumstances. Each party agrees to indemnify, defend and hold the other and its directors, managers, employees and agents, harmless from any claim suit or action arising out of such party's representation in this Section 3.9 (including any reasonable attorneys' fees and expenses incurred in connection with any such claim, suit or action).

4. Title Matters.

4.1 Title Reports. Within thirty (30) days after the Effective Date of this Agreement, OPRD shall furnish to Biota for the Bandon Parcel, and Biota shall furnish to OPRD for the Biota Exchange Properties, preliminary title reports showing the condition of title to the Bandon Parcel and the Biota Exchange Properties, respectively, together with copies of all exceptions listed in the reports (the "Title Report(s)").

4.2 Title Review. A party (the "Reviewing Party") shall have thirty (30) days following receipt of the Title Report(s) from the other party (the "Responding Party") pursuant to Section 4.1 above, to review the Title Report(s) and to notify the Responding Party, in writing, of the Reviewing Party's objection to any exceptions shown in the Title Report(s). If the Reviewing Party timely notifies the Responding Party that it objects to any exceptions in a Title Report, the Responding Party shall have thirty (30) days after receiving such objection notice to do any of the following with regard to each objected-to exception: (a) remove the exception; (b) provide the Reviewing Party with reasonable assurance of the manner in which the exception shall be removed before Closing; or (c) inform the Reviewing Party that the exception shall not be removed.

4.3 Permitted Exceptions.

4.3.1 If the Responding Party does not timely remove an objected-to exception pursuant to Section 4.2(a) above, or timely provide the Reviewing Party with assurances that the objected-to exception shall be

removed before Closing, pursuant to Section 4.2(b) above, or if the Reviewing Party, in its sole discretion, is dissatisfied with any objected-to exception that the Responding Party has said it shall not remove, then the Reviewing Party may terminate this Agreement by written notice to the Responding Party given within thirty (30) days after expiration of the thirty (30) day response period in Section 4.2 above. If the Reviewing Party does not so terminate this Agreement, any exceptions that the other party has not agreed to remove shall be "Permitted Exceptions." In addition, zoning ordinances, building restrictions, taxes due and payable for the current tax year and reservations in federal patents and OPRD deeds are Permitted Exceptions.

4.3.2 On or before ninety (90) days before the Closing Date, OPRD shall furnish to Biota for the Bandon Parcel, and Biota shall furnish to OPRD for the Biota Exchange Properties, updated Title Reports. For any exceptions appearing in the updated Title Reports that are not Permitted Exceptions, a party may object to such exceptions, and the other party may respond to such objections, pursuant to Sections 4.2 and 4.3.1 above.

4.4 Mineral and Geothermal Rights. The Oceanfront Parcel and the Bullards Beach Spit Parcel shall be conveyed to OPRD together with all mineral and geothermal rights owned by Biota. The parties acknowledge that, notwithstanding anything else in this Section 4, the Bandon Parcel will be conveyed to Biota subject to reservations of all rights in mineral deposits and geothermal rights in favor of the United States, Bureau of Land Management. The Bandon Parcel is also subject to a reservation of all rights by OPRD in mineral and geothermal resources as set forth in ORS 273.775. If Biota desires, and at its cost, Biota may seek relinquishment of the mineral and geothermal reservation from the Oregon Land Board prior to Closing, but in no event shall Closing be delayed or conditioned upon such relinquishment. OPRD agrees to cooperate in such process, at no cost or expense to OPRD. The reservation of these mineral and geothermal rights will be deemed Permitted Exceptions.

4.5 BLM Reverter Restriction. The Bureau of Land Management, when conveying the Bandon State Natural Area to the State of Oregon, retained a limited right of reverter. OPRD shall support transfer

of the BLM reverter restriction to other comparable property owned by OPRD. Biota shall take the lead role, and OPRD shall cooperate at no out-of-pocket cost or expense to OPRD (other than the value of the transfer of the restriction to other OPRD property), in facilitating the movement of the BLM restrictions or any other resolution to eliminate this reverter restriction on the Bandon Parcel. Closing will not occur until the BLM restriction has been moved or otherwise addressed in a manner satisfactory to OPRD that allows the Department of the Interior to consent to the conveyance of the Bandon Parcel to Biota, and release the reverter restriction from the Bandon Parcel, without cost to OPRD, or reversion of any other portion of Bandon State Natural Area that results from the removal of this restriction. The parties acknowledge that, notwithstanding anything else in this Section 4, such BLM title exception shall not be a Permitted Exception.

5. Pre-Closing Activities.

5.1 Environmental Audits. Each party shall obtain, prior to Closing and at the expense of Biota, a Phase I environmental audit (an "Audit") of the real property to be conveyed to said party according to the terms of this Agreement and shall provide a copy of the Audit to the party conveying said real property according to the terms of this Agreement at least fifty (50) business days prior to Closing. Each party shall provide to the other party with the Audit, in writing, the notifying party's disapproval of any recognized environmental conditions shown in the Audit. If a party notifies the other party that it disapproves of any recognized environmental condition, the party receiving notice will have twenty (20) business days after receiving the disapproval notice for response to either: (a) remove the recognized environmental condition; or (b) provide the notifying party with reasonable assurance of the manner in which the recognized environmental condition will be removed, further assessed, or mitigated before the transaction closes; or (c) inform the notifying party that the recognized environmental conditions, or one or more of them, will not be removed or addressed. If a party that has been notified does not remove the recognized environmental condition or provide the notifying party with assurances that the objected-to conditions will be removed before Closing, or if a party, in its sole discretion, is dissatisfied with any condition that the other party has said it will not remove, the dissatisfied party may terminate this Agreement by written notice to the other party given within ten (10) business days after expiration of the twenty (20) day response period.

5.2 Surveys. Biota shall provide to OPRD within ninety (90) days after the Effective Date of this Agreement, at its sole cost and expense: (a) a boundary survey of the Bandon Parcel reasonably acceptable to OPRD; and (b) any boundary surveys of the Biota Exchange Properties in Biota's possession or control.

5.3 Appraisals. Under OPRD Administrative Rules, specifically OAR 736-019-0100, OPRD is required to obtain current appraisals for the Bandon Parcel and the Biota Exchange Properties (the "Appraisals") prior to Closing. The Appraisals shall be obtained by OPRD, with 50% of the cost to be reimbursed by Biota at Closing as an additional Closing cost.

5A. Remaining Open Items.

5A.1 Generally. The parties have specified in the Recitals and Section 3 above that certain transaction specifics need further development prior to Closing in order for them to become definitive terms of the overall exchange transaction contemplated in this Agreement. These transaction specifics are the five (5) "Open Items" set forth below.

5A.1.1 Coast Trail Easement: a separate easement agreement that allows OPRD to realign the Oregon Coast Trail from its current route. Such easement shall provide unlimited, non-motorized public access at all times and shall be located at or near the eastern boundary of the Sheep Ranch Parcel, then south until it crosses Whiskey Creek Road (such easement not to be on or alongside Whiskey Creek Road) and then shall connect south of the road on the Sheep Ranch Parcel or other property owned by Biota to the Oregon Coast Trail on adjacent property to the south and west. Such easement shall be constructed and maintained by OPRD, and be a minimum of 20 feet wide at all points and located so that the trail construction within the easement shall not involve any steep slopes, highly-erosive soils or wetlands. The exact location of the easement shall be reasonably determined by Mike Keiser or Biota's designee (as representative of Biota) and the Director of OPRD or his designee. OPRD shall provide notice to Biota of any need to access the easement across the Sheep Ranch or other Bandon Biota Parcel for construction or maintenance of the trail. Biota subsequently may

relocate part or all of the trail to another mutually acceptable, reasonable location as similarly determined by Keiser or Biota's designee and the Director of OPRD or his designee, and at the cost of Biota.

- 5A.1.2 Bandon Parcel Reservation Right: a reservation in the Bandon Parcel Deed in favor of OPRD, giving OPRD and any non-profit or governmental assigns of OPRD the right to acquire the Bandon Parcel from Biota at fair market value before Biota offers to sell or transfer it to an unrelated third party, such right to be exercised within one (1) year of notice and closing to occur within one (1) year thereafter;
- 5A.1.3 Bandon Parcel Shoreline Access Restriction: a reservation in the Bandon Parcel Deed in favor of OPRD, establishing rights and restrictions relating to access to the ocean shoreline through the Bandon Parcel, including the installation by Biota of symbolic fencing, or other methods to passively control access as appropriate, to visually discourage access along the western edge of the Bandon Parcel except through the Bandon Parcel Natural Corridor Access Easement;
- 5A.1.4 Bandon Parcel Natural Corridor Access Easement: a reservation in the Bandon Parcel Deed in favor of OPRD for an undeveloped, natural trail across the Bandon Parcel from the old BLM parking lot to the east of the Bandon Parcel to the Oceanfront Parcel to the west, located at or near the southern boundary of the Bandon Parcel. Such easement shall provide unlimited, non-motorized public access at all times. Such easement shall be constructed and maintained by OPRD, and be a minimum of 20 feet wide at all points and shall be located so that the trail construction within the easement shall not involve any steep slopes, highly-erosive soils or wetlands, nor shall there be any crossings of the easement for the benefit of Biota. The exact location of the easement shall be reasonably determined by Mike Keiser (as representative of Biota) and the Director of OPRD or his designee. OPRD shall provide notice to Biota of any need to access the easement across the Bandon

Parcel for construction or maintenance of the trail. Biota subsequently may relocate part or all of the trail to another mutually acceptable, reasonable location as similarly determined by Keiser or Biota's designee and the Director of OPRD or his designee, and at the cost of Biota.

5A.1.5 Oceanfront Parcel Service Road Access Easement: a reservation in the Oceanfront Parcel Deed in favor of Biota, for a service road access easement for maintenance, emergency and employee vehicles providing access to Biota from the nearest available public road to the south of the Oceanfront Parcel, over and across the easternmost portion of the Oceanfront Parcel to the Bandon Parcel. The easement shall be located so that the road construction within the easement shall not involve any steep slopes, highly-erosive soils or wetlands.

5A.2 The parties shall in good faith attempt to create the necessary documentation for such Open Items, and once such documentation is agreed upon, that Open Item ceases to be an Open item (and the condition to closing related thereto is deemed satisfied). If, however, the parties are unable to agree on how to resolve any Open Items, they shall submit such Open Items to be finalized through mediation as a condition precedent to either party commencing litigation regarding the Open Items. In such an event, the parties shall participate in good faith in a process in which a mediator assists and facilitates the parties in reaching a mutually acceptable finalization of the Open Items. The mediator shall have no authority to bind the parties to finalize the Open Items. The mediator shall be selected by the parties' mutual agreement, but in the absence of such agreement, each party shall select a temporary mediator and those mediators will jointly select the permanent mediator. All costs of mediation, if any, are to be shared equally by the parties; provided, however, that OPRD is not required to pay any mediation costs unless it is able to and does enter into a personal services contract with the mediator in a form and amount reasonable to OPRD, in its reasonable discretion. The schedule and time allowed for mediation shall be acceptable to both parties.

6. Conditions to Closing. The conditions set forth in Section 6.1 and 6.2 below are for the benefit of the parties as indicated and may be waived, in whole or in part, only by the party benefitted by the condition. Any waiver of such condition shall be

in writing. Neither party is liable to the other for damages arising from the termination of this Agreement due to failure to meet a condition.

6.1 OPRD's Conditions. OPRD's obligation to close this transaction is conditioned upon the delivery into escrow by Biota of all items required under Section 3.8 above, and the satisfaction or waiver of the following:

- 6.1.1 pursuant to Sections 3.7.4 and 4.5 above, the BLM reverter restriction has been moved or otherwise addressed in a manner satisfactory to OPRD.
- 6.1.2 OPRD's receipt of approval from the Commission of this transaction as contemplated in this Agreement.
- 6.1.3 all of the Open Items having been resolved to OPRD's reasonable satisfaction, such that they are no longer Open Items.

6.2 Biota's Conditions. Biota's obligation to close this transaction is conditioned upon the delivery into escrow by OPRD of all items required under Section 3.7 above, and the satisfaction or waiver of the following:

- 6.2.1 pursuant to Sections 3.7.4 and 4.5 above, the BLM reverter restriction has been moved or otherwise addressed in a manner satisfactory to Biota.
- 6.2.2 Biota's successful completion of county, state and federal permitting so that the Bandon Parcel may be utilized by Biota for Bandon Links, in the fashion intended by Biota.
- 6.2.3 all of the Open Items having been resolved to Biota's reasonable satisfaction, such that they are no longer Open Items.

7. Possession. Possession of the real property exchanged under this Agreement will pass to the other party upon Closing. Notwithstanding, pursuant to this Agreement, Biota, at its expense, may conduct non-intrusive testings on the Bandon Parcel in connection with its project, including without limitation golf course layout, environmental testings, soil suitability testings, water well testings, and wildlife habitat testings, necessary for land use and

other regulatory permitting as required by the county, state, and federal governments. Biota shall indemnify, defend and hold OPRD harmless from and against any and all losses, claims, damages, and liabilities arising out of or resulting from Biota's inspections and testings, unless and to the extent OPRD's gross negligence or intentional acts contributed to the losses, claims, damages, or liabilities.

8. Acknowledgment of Condition of Property.

8.1 OPRD's Acknowledgment. OPRD represents that:

8.1.1 It has executed this Agreement on the basis of its own examination and personal knowledge of the Oceanfront Parcel and the Bullards Beach Spit Parcel;

8.1.2 Biota has not made any representations, warranties or agreements concerning matters relating to the Oceanfront Parcel or the Bullards Beach Spit Parcel, other than as set forth in this Agreement;

8.1.3 Biota has not made any agreement or promise to alter, repair or improve any of the parcels it intends to exchange herein; and

8.1.4 OPRD takes the Oceanfront Parcel and the Bullards Beach Spit Parcel in the condition, known or unknown, existing at the time of this Agreement. OPRD acknowledges OPRD is acquiring said Parcels "AS IS" and that no party has made any warranties, except as reflected in this Agreement and in the deeds to be delivered at Closing, regarding the condition of said real properties.

8.2 Biota's Acknowledgment. Biota represents that:

8.2.1 It has executed this Agreement on the basis of its own examination and personal knowledge of the Bandon Parcel;

8.2.2 OPRD has made no representations, warranties or agreements concerning matters relating to the Bandon Parcel, other than as set forth in this Agreement;

8.2.3 OPRD has made no agreement or promise to alter, repair or improve the Bandon Parcel, other than as set forth in this Agreement;

8.2.4 Biota takes the Bandon Parcel in the condition, known or unknown, existing at the time of this Agreement. Biota acknowledges that Biota is acquiring the Bandon Parcel "AS IS" and that OPRD is making no warranties, except as reflected in this Agreement and in the deed to be provided at Closing, regarding the condition of the real property.

9. Default. If all of the conditions to Closing set forth in Section 6 above have been satisfied or waived, and one party has delivered to the Escrow Agent all documents as required under Section 3.7 or 3.8, as the case may be, and the other party refuses or fails to close, then that party shall have all remedies available to it under law or equity, including, without limitation, specific performance.

10. Instruments of Further Assurance; Good Faith. The parties shall execute and deliver to the other at or after Closing any further instruments and documents as either may reasonably request in order to carry out any of the provisions of this Agreement. The parties shall act in good faith in all respects relative to the transactions contemplated by this Agreement.

11. Notices.

11.1 Addresses. "OPRD's Address" and "Biota's Address" means the addresses set forth below. Any notices, demands or other communications required under this Agreement shall be made in writing and delivered by one of the following methods to OPRD's Address or Biota's Address, as the case may be, unless one party modifies its Address by notice to the other party, given in accordance with Section 11.2 below.

OPRD's Address	Biota's Address
<p>Oregon Parks and Recreation Department ATTN: Tim Wood, Director 725 Summer Street, N. E. Suite C Salem, OR 97301</p> <p><i>With a copy, which shall not be deemed notice, to:</i></p> <p>Chris Matthews Senior Asst. Attorney General Oregon Department of Justice Business Transactions Section 1162 Court Street, NE Salem, OR 97301</p>	<p>Bandon Biota, LLC ATTN: Michael Keiser 2450 North Lakeview Avenue Chicago, IL 60614</p> <p><i>With a copy, which shall not be deemed notice, to:</i></p> <p>Steven H. Corey, Esq. Corey, Byler, Rew, Lorenzen & Hojem P. O. Box 218 Pendleton, OR 97801</p>

11.2 Delivery.

Method of delivery	When notice deemed delivered
In person (including by messenger service)	the day delivered, as evidenced by signed receipt
Email	the day sent (unless sent after 5:00 p.m., P.S.T., in which case the email shall be deemed sent the following business day)
US Mail (postage prepaid, registered or certified, return receipt requested)	the day received, as evidenced by signed return receipt
Courier delivery (by reputable commercial courier)	the day received, as evidenced by signed receipt

If the deadline under this Agreement for delivery of a notice is a Saturday, Sunday or federal or State of Oregon holiday, such deadline shall be deemed extended to the next business day.

12. No Third-Party Benefits. This Agreement is not intended, and may not be deemed or construed, to confer any rights, power or privileges on any person, firm, partnership, corporation or other entity that is not named as a party to this Agreement.

13. Governing Law; Consent to Jurisdiction. This Agreement is governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, "**Claim**") between OPRD (or any other agency or department of the State of Oregon) and Biota that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the jurisdiction of the Circuit Court of Marion County in the State of Oregon. In no event shall this Section 13 be construed as a waiver by the State of Oregon of any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the eleventh amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court. Each party hereby consents to the exclusive jurisdiction of such court, waives any objection to venue and waives any claim that such forum is an inconvenient forum.

14. Entire Agreement. This Agreement constitutes and contains the entire agreement between the parties and supersedes any prior negotiations, correspondence, understandings, and agreements between the parties, whether written or oral, respecting the subject matter contained in this Agreement.

15. Amendment. This Agreement may be amended or modified only by a written instrument signed by both parties.

16. Counterparts. This Agreement may be executed in two counterparts, both of which is an original, and which together are deemed one and the same Agreement, notwithstanding that both parties are not signatories to the same counterpart.

17. Survival. The parties intend for the provisions in the following Sections to survive Closing: the parties' representations in Section 8; and the parties' obligations under Section 10.

18. Time is of the Essence. Time is of the essence in relation to the parties' performance of any and all of their obligations under this Agreement.

19. No Waiver of Performance. No waiver by a party of performance of any provision of this Agreement by the other party shall be deemed a waiver of nor prejudice the other party's right to otherwise require performance of the same provision, or any other provision.

19. Severability. If any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if this Agreement did not contain the particular term or provision held to be invalid.

20. No Presumption against Drafter. No inference, presumption or conclusion shall be drawn against either party by virtue of that party having drafted this Agreement or any portion hereof.

21. Force Majeure. A party shall not be liable for any delay in performance under this Agreement, other than payment of any money to the other party, if such delay is caused by strikes, lockouts, riots, floods, explosions, earthquakes, tornados, storms, wars, acts of public enemies, insurrections, acts of God, shortages of labor or materials or any other such causes not within the control of the first party.

22. Exhibits. This Agreement contains the following Exhibits which are attached hereto and by this reference incorporated herein:

- Exhibit A: Bandon Parcel
- Exhibit B: Oceanfront Parcel
- Exhibit C: Bullards Beach Spit Parcel
- Exhibit D: [Intentionally Omitted]
- Exhibit E: Grouse Mountain Ranch
- Exhibit F: Whales' Cove Assistance Agreement
- Exhibit G: Grouse Mountain Ranch Assistance Agreement
- Exhibit H: Gorse Control Contribution Agreement

23. Statutory Disclaimer. **THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS THAT IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, IN ALL ZONES. BEFORE SIGNING**

OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO VERIFY THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010.

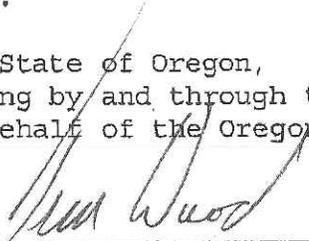
24. Special Consent to Assignment. Prior to closing under the Exchange Agreement, Biota may assign all of its right, title and interest in, and obligations under, this Agreement to a non-profit, 501(c)(3) entity created by Biota in connection with its assignment of its interest in the Exchange Agreement to such entity, provided that such entity expressly assumes all of Biota's obligations hereunder by written instrument of even date with such assignment. Except as expressly provided in this Section 24, neither party may assign any of its right, title or interest in, or obligations under, this Agreement.

[remainder of page intentionally left blank]

The parties have signed this Agreement as of the date first written above.

OPRD:

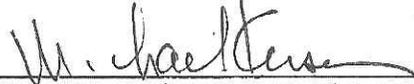
The State of Oregon,
acting by and through the Oregon Parks and Recreation Commission
on behalf of the Oregon Parks and Recreation Department

By: 

Tim Wood, Director

BIOTA:

Bandon Biota, LLC,
a Delaware Limited Liability Company

By: 

Michael Keiser, President of Keiser Properties, Inc.,
which is the General Partner of Bandon Dunes, LP,
which is the sole member of Bandon Biota, LLC