

HAVEL Chris * OPRD

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

February 12, 2014

Dear Oregon Parks and Recreation Commission,

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

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

Thank you for the opportunity to express my concerns.

Diane Bilderback

3830 Beach Loop DR SW

Bandon, OR 97411

dbilderback@mycomspan.com

HAVEL Chris * OPRD

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

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

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

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

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

Sincerely,

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

References

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



OREGON SHORES
CONSERVATION COALITION

February 14, 2014

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

Re: Proposed Land Exchange with Bandon Biota

Dear Chair Graves and Commissioners,

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

Appraisals and the “Monetary Value of the Exchange”

“Overwhelming public benefit” in the context of this proposal means “a Commission determination in the approval of a property exchange that accounts for the natural, scenic, cultural, historic, recreational, and operational benefits of a proposal that are likely to be above and beyond the monetary value of the exchange.” OAR 736-019-0020(8). Therefore, the Commission must have information about the “monetary value of the exchange” prior to making a determination of overwhelming public benefit.

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

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

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

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

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

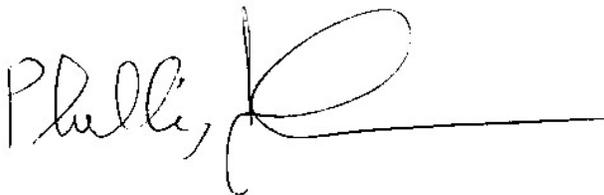
Western snowy plover

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

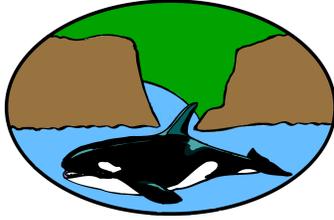
Conclusion

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

Sincerely,

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

Phillip Johnson
Executive Director



ORCA: Oregon Coast Alliance

P.O. Box 857, Astoria OR 97103

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

Protecting the Oregon Coast

Feb. 14, 2014

Via Email

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

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

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

Re: Proposed Land Exchange between OPRD and Bandon Biota

Dear Communications Director and Commissioners,

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

BSNA 280 Acres Appraisal

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

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

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

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

Grouse Mountain Ranch Appraisal

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Thank you,

/s/ Cameron La Follette

Cameron La Follette

Land Use Director

HAVEL Chris * OPRD

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

Dear Commissioners:

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

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

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

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

Thank You,

Greg Combs
Salem, Oregon



United States Department of the Interior



FISH AND WILDLIFE SERVICE

Oregon Fish and Wildlife Office

2600 SE 98th Avenue, Suite 100

Portland, Oregon 97266

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

Reply To: 8539.1001(03)

File Name: Bandon Biota Land Exchange Proposal

TS Number: 14-336

FEB 14 2014

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

Subject: Public Comments on Bandon State Natural Area Exchange Proposal

Dear Ms. Laanen and OPRD Commission,

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

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

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

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

Sincerely,

Paul Henson, PhD
State Supervisor

Acting
for

Sean T. Malone

Attorney at Law

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Via Certified, Return Receipt Requested and Email

March 3, 2014

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

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

Dear Ms. Burke,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



Sean T. Malone
Attorney for ORCA

cc: ORCA

Lisa Van Laanen, Director of Oregon Parks and Recreation Department
Karl Anuta, esq.

BEFORE THE SECRETARY OF THE INTERIOR

**PETITION TO LIST SILVERY PHACELIA (*PHACELIA ARGENTEA*) AS
THREATENED OR ENDANGERED UNDER THE ENDANGERED
SPECIES ACT**



Silvery Phacelia © Oregon Wild

March 7, 2014

Notice of Petition

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PETITIONERS

The Center for Biological Diversity is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center is supported by more than 675,000 members and activists including members in Oregon and California. The Center and its members are concerned with the conservation of endangered species and the effective implementation of the Endangered Species Act.

Oregon Wild, founded in 1974, (formerly the Oregon Natural Resources Council or ONRC) is a nonprofit organization that has been instrumental in securing permanent legislative protection for some of Oregon's most precious landscapes. Oregon Wild works to maintain environmental laws, while building broad community support for our campaigns.

Friends of Del Norte was founded in 1973 as a local non-profit environmental activist group, dedicated to the long-term protection and enhancement of all natural resources of Del Norte County and its surrounding bioregion. We have forty years of success in the resolution of numerous environmental issues.

Oregon Coast Alliance (ORCA) is a non-profit corporation with many members, ranging from people who care about the coast in the northern Willamette Valley and the Portland metro area, to residents of the coast from Astoria to Brookings. On behalf of its members, ORCA advocates for protection of the Oregon coast and its natural and scenic resources; works with coastal residents for protection and restoration of the coast; and aids residents in participation of local land use proceedings to oppose ill-considered development and maintain livable communities.

The Native Plant Society of Oregon is dedicated to the enjoyment, conservation, and study of Oregon's native plants and habitats. Founded in Portland in 1961, NPSO has grown to a statewide network of 13 chapters with nearly 1000 members. For nearly 50 years, members of the Native Plant Society of Oregon have been visiting the wild places of Oregon to enjoy, conserve, and study its natural vegetation.

The **California Native Plant Society** was formed in 1965 and is a statewide non-profit organization of amateurs and professionals with a common interest in California's native plants. Our nearly 10,000 members work to promote native plant appreciation, research, education, and conservation through our five statewide programs and 34 regional chapters in California. Through membership in CNPS, Californians of all walks of life are able to support and engage in opportunities to experience and learn about native plants and their habitats, gardening and landscaping with native plants, restoration of habitat areas, and conservation issues throughout the state.

The **Environmental Protection Information Center (EPIC)** is a community based, non-profit organization that works to protect and restore forests, watersheds, coastal estuaries, and native species in Northern California. EPIC was founded in 1977 when local residents came together to successfully end aerial applications of herbicides by industrial logging companies in Humboldt County. For more than 30 years, the organization has been at the forefront of environmental protection, ensuring that state and federal agencies follow their mandate to uphold environmental laws and protect endangered species.

Klamath-Siskiyou Wildlands Center (KS Wild) is an advocate for the forests, wildlife and waters of the Klamath and Rogue River Basins of southwest Oregon and northwest California. Formed in 1997, KS Wild fights for protection and restoration of the incomparable ecological riches of southwest Oregon and northwest California.

Submitted this 7th day of March, 2014

Pursuant to Section 4(b) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533(b); Section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e); and 50 C.F.R. § 424.14(a), the Center for Biological Diversity, Oregon Wild, Friends of Del Norte, Oregon Coast Alliance, the Native Plant Society of Oregon, the California Native Plant Society, the Environmental Protection Information Center, and Klamath-Siskiyou Wildlands Center hereby petition the Secretary of the Interior, through the United States Fish and Wildlife Service (“FWS,” “Service”), to protect Silvery Phacelia (*Phacelia argentea*) as a threatened or endangered species.

FWS has jurisdiction over this petition. This petition sets in motion a specific process, placing definite response requirements on the Service. Specifically, the Service must issue an initial finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). FWS must make this initial finding “[t]o the maximum extent practicable, within 90 days after receiving the petition.” *Id.*

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EXECUTIVE SUMMARY

Silvery Phacelia (*Phacelia argentea*) is a perennial flowering herb that grows only on coastal sand dunes and sandy bluffs from Coos and Curry counties in southern Oregon to Del Norte County in northern California. Silvery Phacelia has white flowers and reaches 18 inches in height (10-45 cm). Its common names, Silvery Phacelia or Sand-dune Phacelia, are derived from its silvery-looking leaves and stems and its restriction to sandy habitats. Its total global range is restricted to approximately 130 miles of the immediate coast, within which it is patchily distributed and confined to areas of appropriate habitat. Only 36 occurrences of Silvery Phacelia have been documented since the species was formally described in 1916, with 32 being in Oregon and four in California. Seven of these populations appear to have already been extirpated; 22 are presumed to survive, but only 14 are known to be extant. Only four occurrences are considered to have excellent or good viability. Populations are typically small and highly fragmented, and most appear to be declining.

The Endangered Species Act states that a species shall be determined to be endangered or threatened based on any one of five factors (16 U.S.C. § 1533 (a)(1)). Silvery Phacelia is threatened by at least two of these factors and thus warrants federal protection. Phacelia is threatened by habitat loss and degradation due to invasive plants, off-road vehicles, and coastal development. Phacelia is listed as a threatened species by the State of Oregon, but this designation provides no protection for the plant's habitat. The California Natural Diversity Database ranks Silvery Phacelia as endangered in California, but it is not protected by the state as an endangered species. There are no existing regulatory mechanisms which are adequate to safeguard the species, and without Endangered Species Act protection, it is in danger of extinction in the foreseeable future.

INTRODUCTION

Silvery Phacelia, also known as Sand-dune Phacelia, is a fleshy, perennial herb in the Forget-Me-Not family of flowering plants. It has white or cream flowers and its leaves are thick and coated in long, straight, silvery hairs. The hairs may help to keep salt off the surface of the leaves, decrease water loss in the harsh environment, or reflect excess light (Center for Plant Conservation 2010). It grows along the coast of southwestern Oregon and far northwestern California and nowhere else on Earth.

Silvery Phacelia plays an important role in the environment because its flowers provide a rich source of nectar and pollen for native bees. The number of bees and number of different kinds of bee species in dune vegetation is higher in places where Silvery Phacelia is present (Julian 2012, p. 8, 65).

Unfortunately, Silvery Phacelia is threatened with extinction, and this unique piece of the Northwest's natural heritage is in danger of being erased. There are only around 30 total populations of this plant, and most are small and declining. The plant is threatened by the spread of invasive plants which crowd out its habitat. It is also threatened by off-road vehicle use and coastal development.

This petition presents the available information on the natural history of Silvery Phacelia and then outlines, in the context of the statutory listing factors of the Endangered Species Act, why the plant warrants federal protection with critical habitat designation.

Protecting Silvery Phacelia would help safeguard native bees and other plants and animals that rely on sand-dune habitats. It would also provide additional protections for imperiled coastal species including the Oregon Silverspot Butterfly (*Speyeria zerene hippolyta*) and the Western Snowy Plover (*Charadrius nivosus*).

RANGE

Silvery Phacelia is found only in appropriate habitat patches along 130 miles of the immediate coastline from Coos County, Oregon to Del Norte County, California. This species is not known in California south of Crescent City (Kalt 2008).

Kalt (2008, Table 1 and Appendix A) provides a complete list of populations. Occurrence reports from the California Natural Diversity Database are provided on the cd accompanying this petition (CDFW 2013). A new report identifying six previously unrecorded populations of Phacelia from southern Oregon is also included (Bilderback and Bilderback 2013).

LAND MANAGEMENT/OWNERSHIP

Silvery Phacelia grows on federal land managed by the Bureau of Land Management (BLM) including the New River Area of Critical Environmental Concern, Floras Lake, Four Mile Creek, Lost Lake, and Ophir Dunes in Oregon. It is found on state lands including Lone Ranch State Beach, Bandon State Natural Area, Pistol River State Park, Humbug Mountain State Park, and Cape Blanco State Park in Oregon, and at Tolowa Dunes State Park in California. It also occurs on private lands.

CONSERVATION STATUS

Silvery Phacelia is ranked as a Threatened species by the State of Oregon (Oregon Department of Agriculture 2013, Oregon Biodiversity Information Center 2010). It is a List 1 species in Oregon, meaning it is threatened with extinction throughout its range.

In California, Silvery Phacelia is a California Natural Diversity Database and California Native Plant Society Inventory List 1B.1 species, meaning that it is rare, threatened, or endangered, with a threat code of .1, meaning that it is seriously endangered in California (California Native Plant Society 2013). It is considered a sensitive species as described in the California Environmental Quality Act (14 Cal. Code Reg. §15380). It is not state listed under the California Endangered Species Act (CESA).

Silvery Phacelia was proposed as a Category 2 Candidate for federal listing in 1990, but was dropped from the Candidate list in 1996 when the list was reorganized. At this time it is a

Federal Species of Concern. It is considered to be a Sensitive Species by the Bureau of Land Management.

NatureServe (2013) ranks Silvery Phacelia as globally imperiled (G2) and as imperiled in Oregon (S2) and critically imperiled (S1.1) in California. Its ranking is based on relatively low number of occurrences (27), fairly low number of plants (15,000) over a limited range (less than 2,000 acres), and threats from coastal development, recreation in the form of off-road vehicles and foot traffic, and competition from exotic species such as European Beach Grass (*Ammophila arenaria*). Only four occurrences are considered to have excellent or good viability.

Phacelia argentea has not been assessed by the International Union for Conservation of Nature (IUCN 2013).

POPULATION STATUS

New comprehensive population surveys for Silvery Phacelia are needed.

There are four to five known sites of Silvery Phacelia in California (Rittenhouse 1995, Brian 2006). The number of individual plants in these populations ranges from 15 to an estimated 10,000. At least one of these sites may be extirpated.

There are 34 known sites in Oregon—28 that were reported in Rittenhouse (1995) and six new sites reported in Bilderback and Bilderback (2013). The population sizes of the original Oregon sites range from three individual plants to more than 2,000 plants, but most are under 100 plants. The species is presumed extirpated from its type locality at Chetco, Oregon (Kalt 2008).

Kalt (2008) reports that seven sites are historic or presumed historic, and only 8 are known to be extant, though 22 are presumed to be extant. Combining the 22 presumed extant sites with the 6 new sites (Bilderback and Bilderback 2013) would indicate that there are perhaps 28 surviving *Phacelia* sites, with 14 sites confirmed as extant. It is unclear if the six new populations reported in Bilderback and Bilderback (2013) represent distinct occurrences or should potentially be combined.

Only four occurrences are considered to have excellent or good viability (NatureServe 2013). Kalt (2008) reports that populations are typically small and highly fragmented, and most appear to be declining (see Kalt 2008, Appendix A for the most recent information available on status).

NATURAL HISTORY

Taxonomy

Phacelia argentea (A. Nels. & J.F. Macbr) is known as Silvery Phacelia or Sand-dune Phacelia. Its taxonomic status is accepted (Kartesz 1994) and its Integrated Taxonomic Information System (ITIS) Taxonomic Serial Number (TSN) is 31454. It is in Phylum Anthophyta, Class

Dicotyledoneae, Order Solanales, and Family Boraginaceae (formerly in Hydrophyllaceae). It is also known by the synonym *Phacelia heterophylla* var. *rotundata*.

The genus *Phacelia* is derived from the Greek word for cluster (*phakelos*), based on the dense, congested inflorescence typical of the genus. The species epithet, *argentea*, means silvery, referring to the hairs on the leaves of the plant. Phacelias are also commonly called scorpion weeds, due to the fact that the hairs on some members of the genus can cause severe dermatitis (Oregon Department of Agriculture 2013).

Description

Phacelia argentea is a fleshy perennial herb that is 10-45 cm tall. The technical description is as follows (see Jepson Flora Project 2013):

Perennial herb 10–45 cm, ± fleshy. **Stem:** prostrate to ascending, ± stiff-hairy, not glandular. **Leaf:** thick; blade 20–120 mm, generally > petiole, elliptic to obovate to ± round, lobes 0(2 at base), veins deeply impressed. **Flower:** calyx lobes 3–4 mm, 6–7 mm in fruit, ± not alike, narrowly oblong to ovate; corolla 5–7 mm, bell-shaped, white to cream, limb 4–6 mm diam, scales fused to filament bases, ovate; stamens 6–9 mm, hairy; style 6–10 mm, cleft 1/2. **Fruit:** 3–4 mm, ovoid, stiff-hairy. **Seed:** 1–3, 1.5–3 mm, pitted in ± longitudinal rows.

Several other species of *Phacelia* occur within or near the range of silvery phacelia: *P. nemoralis* ssp. *oregonensis*, *P. bolanderi*, *P. corymbosa*, *P. egea*, and *P. malvifolia*. *Phacelia nemoralis* ssp. *oregonensis* is distinguished from silvery phacelia by its erect stems (versus decumbent to ascending stems) and leaves with two or more pairs of leaflets (versus leaves entire or with a single pair of basal leaflets); *P. bolanderi* has corollas lavender to bluish or purplish in color (versus white to ivory corollas) and glandular-hairy stems (versus stems eglandular); *P. corymbosa* has glandular, erect or ascending stems (versus eglandular, decumbent to ascending stems), lanceolate to oblanceolate leaves (versus elliptic to orbicular or obovate leaves), and is found only on serpentine soils; *P. egea* has lanceolate to oblanceolate leaves 10-25 cm long, the basal leaves dissected with 7-11 (15) segments (versus elliptic to orbicular or obovate leaves, 5-12 cm long, entire or with a pair of basal leaflets); and *P. malvifolia* has erect stems 20-80 cm long (versus decumbent to ascending stems 10-45 cm long), and leaves with dentate lobes (versus leaves entire or with a pair of basal leaflets) (Oregon Department of Agriculture 2013).

Intergrades between silvery phacelia and *P. nemoralis* ssp. *oregonensis* occur in the ocean bluff habitat of *P. nemoralis*, but differ from the latter taxon by exhibiting a decumbent to procumbent habit, smaller stature, less coarse hairiness with greater silky leaf vestiture, and softer but more dense hairs on the calyx lobes (Oregon Department of Agriculture 2013).

Habitat Requirements

Phacelia argentea grows on unstabilized or semi-stabilized sand dunes, bluffs, and bases of coastal headlands along the northern California and southern Oregon coast (Kalt 2008). Plants are found above the high tide level but below 65 ft (20 m) in elevation (Center for Plant

Conservation 2010). Silvery Phacelia is the only known Phacelia to grow on coastal sand dunes (Rittenhouse 1995). Most of its 130-mile range is unsuitable habitat, resulting in patchy distribution (Rittenhouse 1995). Its distribution is further limited by encroachment of non-native European Beachgrass (*Ammophila arenaria*) which was intentionally introduced in the late 1800's to stabilize sand, but which outcompetes native vegetation. European Beachgrass has altered the structure of sand-dune communities by shifting the historical structure of perpendicular dunes with no fore-dunes to the present configuration of steep, parallel-oriented foredunes that favor non-native plants (Russo et al. 2010). In areas where European Beachgrass is dominant, Silvery Phacelia populations are either small and fragmented or totally nonexistent (Rittenhouse 1995).

Bilderback and Bilderback (2013) found previously unrecorded populations of Silvery Phacelia growing on rocky roadcuts, rocky bluffs, and isolated rocks. They speculate that these habitats are supporting refuge populations because the areas are free of invasive beach grasses and do not have recreational impacts from off-road vehicles and foot traffic (p. 4).

Life History

Silvery Phacelia reproduces primarily via seeds and short rhizomes, and spreads by a branched caudex (Rittenhouse 1995). It appears to require insects for pollination (Rittenhouse and Kiffe 1993), although whether it is self-compatible or requires outcrossing is unknown (Kalt 2008). The primary pollinators appear to be leafcutter bees (*Anthidium palliventre*), bumblebees (*Bombus* sp.), and honeybees (*Apis mellifera*), including endemic bee species of conservation concern (Center for Plant Conservation 2010). The bees spread pollen from flower to flower as they collect it to line burrows and feed developing larvae (Rittenhouse 1993). Julian (2012) found that the number of bees and number of different kinds of bee species in dune vegetation is higher in places where Silvery Phacelia is present (Julian 2012, p. 8, 65).

Germination trials conducted at the The Berry Botanic Garden indicate that seeds germinate readily (between 80 and 100 percent) when subjected to alternating 50°/68° F (10°/20° C) temperatures, whether cold stratified or not. When subjected to constant 68°F (20°C) temperatures, no seeds germinated (Center for Plant Conservation 2010).

SILVERY PHACELIA WARRANTS ENDANGERED SPECIES ACT PROTECTION

The Endangered Species Act states that a species shall be determined to be endangered or threatened based on any one of five factors (16 U.S.C. § 1533 (a)(1)). *Phacelia argentea* is threatened by at least two of these factors and thus warrants federal protection. The plant's range has been curtailed and its habitat continues to be threatened by invasive beachgrass, off-road vehicle use, and recreation. There are no existing regulatory mechanisms which are adequate to ensure its long-term survival. The plant is both rare and threatened, and of approximately 30 potentially extant occurrences, only four are considered to have excellent or good viability (NatureServe 2013). Populations are typically small and highly fragmented, and most appear to be declining (Kalt 2008).

THREATS

MODIFICATION OR CURTAILMENT OF HABITAT OR RANGE

Silvery Phacelia is threatened with extinction due to habitat loss and degradation from non-native plants, recreation including off-road vehicle use, and development (Meinke 1982, Kalt 2008, Oregon Department of Agriculture 2013).

Non-Native Plants

The Oregon Department of Agriculture (2013) and Kalt (2008) cite invasion by non-native plant species as the primary threat to Silvery Phacelia. Invasive plants, including European Beachgrass (*Ammophila arenaria*) and Gorse (*Ulex europaea*), outcompete Silvery Phacelia and render its habitat unsuitable.

Kalt (2008) reports that *all* of the plant's populations are threatened by invasion from European Beachgrass (p. 1). It is clear that European Beachgrass outcompetes Silvery Phacelia because in areas where volunteers have manually removed Beachgrass, Phacelia populations have responded positively (Brian 2006, Kalt 2008, Tolowa Dunes Stewards 2013). Seedling establishment has been observed following manual grass removal and also following an accidental fire at Tolowa Dunes State Park that removed Beachgrass (Nyoka 2003).

Beachgrass, which was planted intentionally to protect roadways, alters dune habitat by accumulating sand at rates that choke out native plants, whereas Beachgrass tolerates deep sand accumulation (Hilton 2005). Under certain conditions, Phacelia can persist for some time beneath a canopy of Beachgrass. At China Creek in Bandon State Park in Oregon, Phacelia persists despite a dense cover of competing grasses and forbs. Kalt (2008) speculates that the population is able to persist because it has access to light since it occurs on the edge of a paved opening on an eroding cliff. It is important to note that at the BLM New River Area of Critical Environmental Concern, removal of Beachgrass with heavy equipment to foster bird nesting habitat has not increased Phacelia populations as has the manual removal of the grass by volunteers at other sites (Kalt 2008).

In the northern part of its range, particularly near Bandon, Oregon, Gorse is a predominant threat. Gorse is an especially aggressive and problematic spreading evergreen shrub that is covered in spines that complicate manual removal. Once it becomes established in an area, it becomes the dominant plant forming monotypic stands that then promote other non-natives by nitrifying soils through microbial nitrogen fixation (Bossard et al. 2000). Kalt (2008) reports that preventing the spread of Gorse into Silvery Phacelia habitat is crucial to the conservation and recovery of Phacelia in Oregon.

Additional non-native and native plant species also threaten Phacelia habitat. Some sites, including Lone Ranch State Beach in Oregon, are threatened by Iceplant (*Carpobrotus edulis*) (Kalt 2008). Encroachment of native plants, likely due to altered sand movement, can also render habitat unsuitable for Phacelia. Christy (2007) reports that expansion of Shore Pine (*Pinus*

contorta), Sitka Spruce (*Picea sitchensis*) scrub, Beachgrass, and Gorse likely eliminated two historical occurrences of Silvery Phacelia at Bandon State Natural Area (p. 15). These populations were last documented in 1984 and 2001, in areas which today are covered by dense growth of Shore Pine and Sitka Spruce.

Development

Coastal development threatens Silvery Phacelia and its habitat. The Oregon Department of Agriculture (2013) states that residential and recreational development is a serious threat to Phacelia that can cause fragmentation or extirpation of populations. Kalt (2008) reports that Phacelia plants known to occur on coastal bluffs have been fragmented and partially extirpated by residential and recreational development, and that development threatens all Phacelia populations on privately-owned lands in Oregon (Appendix A). One example of a development project that threatens Silvery Phacelia is a proposed land exchange that would remove 280 acres of conservation land at Bandon State Natural Area to create a golf course (see <http://www.oregon.gov/oprd/pages/commission-bandon.aspx>).

Development appears to pose less of a threat in California where most populations are on lands managed by public agencies. There is evidence, however, that development threatens some populations in California. For example, letters from the California Coastal Commission Statewide Enforcement Program to the Del Norte County Development Department document unpermitted road changes in support of a subdivision without proper permitting (Cave 2010, 2013).

Off-road Vehicles and Recreation

The Oregon Department of Agriculture (2013) cites off-road vehicle (ORV) use, equestrian and pedestrian use, and trampling by livestock as threats to Silvery Phacelia.

Off-road vehicle use has long been known to threaten Phacelia populations. Meinke (1982) recommended that Phacelia sites be protected from excessive recreational use and off-road vehicles. Vehicles both directly crush Phacelia plants and change the structure of the sand which can render habitat unsuitable.

Although Silvery Phacelia primarily occurs where ORV use is not specifically allowed, trespass by ORV users is a common occurrence in most of its presently known locations (Kalt 2008). ORV damage to Silvery Phacelia is of particular concern at Tolowa Dunes State Park in California, Pistol River State Park in Oregon, and on other state-managed lands where enforcement is generally lacking and Silvery Phacelia habitat is easily accessible immediately off public roads. It is also similarly threatened on some private lands, notably Two Mile Creek south of Bandon, Oregon (Kalt 2008).

A report from Tolowa Dunes Stewards (2013) provides photo documentation of Silvery Phacelia populations at Tolowa Dunes State Park that have been crushed and bisected by off-road vehicles

(p. 1). The report documents ORVs repeatedly traversing and damaging established mounds of Phacelia. Figures 1 and 2 below show ORV tracks in Phacelia and additional photo documentation of ORV damage to Phacelia at the park is provided with the cd of reference materials accompanying this petition.



Figure 1. ORV Tracks in Silvery Phacelia at Tolowa Dunes State Park. Photo by Tolowa Dunes Stewards 2011.



Figure 2. ORV Tracks Bisecting Silvery Phacelia at Tolowa Dunes State Park. Photo by Tolowa Dunes Stewards 2011.

The problems with ORV use crushing Phacelia at Tolowa Dunes have been exacerbated by Del Norte County authorizing ORV trails in Phacelia habitat in defiance of state planning requirements (see Cave 2010, 2013).

OVERUTILIZATION

Illegal removal for horticultural purposes has been cited as a threat to Silvery Phacelia (Brian 2002, Kalt 2008, Oregon Department of Agriculture 2013).

DISEASE AND PREDATION

Phacelia argentea is not known to be threatened by disease or predation at this time.

INADEQUACY OF EXISTING REGULATORY MECHANISMS

Silvery Phacelia is threatened with extinction due primarily to habitat loss and degradation, and existing regulatory mechanisms are not adequate to ensure its continued existence.

One of the primary threats to Phacelia is competition from non-native plants such as European Beachgrass and Gorse. There are no programs in place to prevent the spread of these plants into Phacelia habitat. Volunteer efforts have manually pulled Beachgrass with some success in small areas, but these endeavors have been small and limited in scope and lack funding.

Because some Phacelia populations occur in areas that are occupied by or adjacent to habitat that supports other federally listed species such as the Silver-Spot Butterfly and Snowy Plover, the plant could theoretically benefit from protections in place for these species. Due to documented threats from invasive plants, ORVs, and development, however, Phacelia needs mechanisms in place that will specifically safeguard the plant and its habitat.

Phacelia is a Federal Species of Concern but this designation provides no regulatory protection. It is considered to be a Sensitive Species by the Bureau of Land Management, but mitigation measures provided to Sensitive Species are discretionary. Phacelia is ranked as a Threatened species by the State of Oregon, but this designation provides no protection for the plant's habitat. Although Phacelia is considered to be Endangered by the California Natural Diversity Database, and as Sensitive under the California Environmental Quality Act, it is not protected as a listed species under the California Endangered Species Act.

Phacelia derives habitat protection from development on State and BLM lands, but populations in these places are threatened by invasive plants and by ORV use. Unauthorized ORV use and lack of enforcement threatens the plant in areas where riding is officially prohibited. Off-road vehicle use is currently permitted in certain areas at Tolowa Dunes State Park (see Cave 2010 July 8 letter) and this facilitates rider encroachment into theoretically closed areas (Tolowa Dunes Stewards 2013). There are no local regulations that are adequately protecting Phacelia from ORVs. In fact, the County of Del Norte has taken actions that exacerbate ORV riding in Phacelia mounds (see Cave 2010, 2013).

There are no existing regulatory mechanisms to ensure the survival of Phacelia in light of the multiple threats its habitat is facing.

OTHER FACTORS

Because Silvery Phacelia is restricted to sandy habitats on the immediate coast, it is likely at risk from rising sea-levels and increased storm surge due to global climate change. The plant's narrow band of habitat is limited by development inland and by the ocean seaward, making it highly vulnerable to extirpation from coastal squeeze.

Most Phacelia populations are small and appear to be declining (Kalt 2008). It is well established in the scientific literature that small, isolated populations are at heightened risk of extinction.

The widespread decline of native pollinators could also threaten Silvery Phacelia (Oregon Department of Agriculture 2013).

CONCLUSION

There are approximately 28 surviving sites of Silvery Phacelia, only a handful of which have good viability. The plant is documented to be threatened by invasive plants, ORV damage, and development. It may also be threatened by collection, coastal squeeze, decline of native pollinators, and limited range. There are no existing regulatory mechanisms which adequately safeguard the species. A 2008 Status Review and Field Inventory for Silvery Phacelia conducted for the Service concluded that without ongoing management to control invasive non-natives, impacts from uncontrolled ORV use, and conversion of habitat by development, Phacelia is in danger of extinction (Kalt 2008). The information provided in this petition indicates beyond question that Silvery Phacelia may warrant protection under the Endangered Species Act. Petitioners thus urge the Service to promptly issue a positive 90-day finding and commence a status review for this rare plant.

REQUEST FOR CRITICAL HABITAT DESIGNATION

Petitioners urge the Service to designate critical habitat for Silvery Phacelia concurrently with listing. Critical habitat as defined by Section 3 of the ESA is: (i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) the specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5).

Congress recognized that the protection of habitat is essential to the recovery and/or survival of listed species, stating that: classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species' continued existence... If the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, then the ultimate

effectiveness of the Endangered Species Act will depend on the designation of critical habitat. H. Rep. No. 94-887 at 3 (1976).

Critical habitat is an effective and important component of the ESA, without which Silvery Phacelia's chance for survival diminishes. The need to designate critical habitat for this rare plant is magnified by the threats the species is currently facing from off-road vehicle recreation (see Tolowa Dunes Stewards 2013) and from developments such as subdivisions (see Cave 2010, 2013) and the golf course that is planned to be carved out of Bandon State Natural Area (see <http://www.oregon.gov/oprd/pages/commission-bandon.aspx>). Petitioners thus request that the Service propose critical habitat for this rare plant concurrently with its proposed listing.

On behalf of all parties,

A handwritten signature in black ink, appearing to read "Tierra Curry".

Tierra R. Curry, M.Sc.
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Center for Biological Diversity
PO Box 11374
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Via First Class Mail and Email

March 20, 2014

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Re: Petition to List Silvery Phacelia under the Endangered Species Act

Dear Ms. Burke and Ms. Van Laanen,

On behalf of Oregon Coast Alliance (ORCA), I would like to apprise you of the Petition to List Silvery Phacelia as Threatened or Endangered under the Endangered Species Act, which was filed on March 7, 2014. *See* Exhibit A. The Center for Biological Diversity in coalition with other organizations filed the petition, which highlights the critical role that Bandon State Natural Area plays in the current survival of this imperiled species. The petition specifically acknowledges the removal of “280 acres of conservation land at Bandon State Natural Area to create a golf course” as exactly the kind of threat most detrimental to Silvery Phacelia in its struggles to survive. The proposed golf course will unnecessarily encroach upon habitat needed to sustain and recover Silvery Phacelia.

In addition to its obligations under the Recreation and Public Purposes Act (RPPA), National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Federal Land Policy and Management Act (FLPMA), as outlined in ORCA’s letter of March 3, 2014, the listing of Silvery Phacelia would pose further obligations and hurdles to the proposed exchange of portions of Bandon State Natural Area between the Oregon Parks and Recreation Department and Bandon Biota LLC. For example, additional listed species would make the Bandon State Natural Area even more significant than it already is, and, therefore, the conveyance of any part of Bandon State Natural Area to private hands would almost certainly be prohibited: “[n]o

public lands having national significance shall be conveyed pursuant to the act.” 43 C.F.R. § 2741.5(b). See ORCA Letter of March 3, 2014.

Another legal hurdle arises from the mere consideration of the Silvery Phacelia as a listed species. The petition requires that the U.S. Fish and Wildlife Service (USFWS) prepare findings. The District Court for the District of Oregon has already determined that such findings constitute significant new information under NEPA, see *Cascadia Wildlands v. Bureau of Land Management*, 6:12-cv-00095-AA (Dec. 21, 2012) (finding BLM failed to take a hard look at significant new information from a “12-Month finding on a Petition to List a Distinct Population Segment of the Red Tree Vole as Endangered or Threatened”), and, therefore, any NEPA document prepared for the proposed exchange would have to be supplemented a later date to account for the USFWS’ findings.

ORCA recapitulates our often-expressed concern to both BLM and the Oregon Parks and Recreation Department that the 280 acres proposed for exchange to Biota are critically important, unique and vulnerable dunal habitat on the Oregon Coast. In light of these issues, ORCA here again reiterates that the conveyance and development of the Bandon State Natural Area acreage would be detrimental to native, vulnerable species, and additionally is legally proscribed under Federal environmental laws. As with ORCA’s previous letter, ORCA trusts that the BLM has informed the Oregon Parks and Recreation Department about the legal ramifications of the petition to list Silvery Phacelia. ORCA appreciates your efforts in these matters that affect the environment and the public interest on our coast.

Sincerely,



Sean T. Malone
Attorney for ORCA

cc: ORCA
Karl Anuta, esq.

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Via First Class Mail and Email

April 2, 2014

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Re: The Bandon State Natural Area reversionary clause and the \$ 2,500,000 component of the proposed Parks Department-Bandon Biota LLC exchange

Dear Director and Commissioners,

On behalf of Oregon Coast Alliance (ORCA), I would like to address two issues raised by the Commission’s proposed findings and a recent letter I received from the Bureau of Land Management (BLM): the \$2,500,000 component of the exchange and the Bandon State Natural Area reversionary clause. I also incorporate by reference all prior testimonies and exhibits provided by ORCA on prior iterations of the proposed Biota exchange.

I. Reversionary Clause

It is clear from past efforts that the Parks Commission will attempt to eliminate the reversionary clause by making an *upfront* payment to BLM by the Parks Department or Bandon Biota of the reverter’s Fair Market Value as theoretically allowed in the 1968 deed granting most of Bandon State Natural Area to the State of Oregon “for public parks purposes only.” It is apparent that the Parks Department would like to rely on the following language in the deed to eliminate the reversionary clause: “The Secretary, or his delegate, may in lieu of said forfeiture of title, require the patentee to pay the United States an amount equal to the difference...between price paid...and...fair market value...to be determined by the Secretary or his delegate.” However, in a March 26, 2014 letter to ORCA, Coos Bay District Manager Patricia Burke explained that:

The original patent split the ownership of the affected land into two major components: 1) the restricted right to use the land which is held by the R & PP patentee [Parks Department], and 2) all other rights, *which are held by the United States* and are the subject of the current transaction...conveyances to eliminate the restrictions of reversionary interests *will be under either BLM's sale or exchange authority*.

(emphasis added). Furthermore, the letter adds, "If the area is identified in a Resource Management Plan as suitable for disposal then *additional analysis would occur* if a conveyance of lands or interest in land is pursued through sale or exchange to OPRD." Thus, any such attempt to convey or sell the reversionary interest still requires *a transfer or conveyance* to eliminate the restrictions of reversionary interests that *must* be under either the BLM's sale or exchange or authority.

In other words, even the Parks Commission's attempts¹ to eliminate the reversionary clause will require that BLM list the property as a property to dispose of pursuant to the Federal Land Policy and Management Act (FLPMA), and subsequent analysis pursuant to the National Environmental Policy Act (NEPA) will be required. Because of the presence of or effect on listed species under the Endangered Species Act (ESA), the NEPA analysis will likely entail the more burdensome Environmental Impact Statement (EIS) rather than an Environmental Analysis (EA), in addition to the consultation requirements with the U.S. Fish and Wildlife Service (USFWS) pursuant to the ESA. As the attached BLM letter concedes, there is simply no way to avoid the implication of these federal statutes. To do otherwise would clearly violate federal law.

The above analysis is premised not only on the Recreation and Public Purposes Act (RPPA), but also the clear import of the planning language in the deed: "If the patentee or its successors do not comply with the provisions of the approved plan of development...the Secretary or his delegate...may declare the terms of this grant terminated in whole or in part. The patentee, by acceptance of this patent, agrees that such declaration shall be conclusive as to the facts found by the Secretary or his delegate and shall, *at the option of the Secretary or his delegate* operate to revert in the United States, full title to the land involved in the declaration." To the extent that triggering the reversionary clause is a discretionary act by the Secretary or his delegate, the RPPA makes clear that an "attempt" to convey an interest automatically triggers the reversionary clause, and, regardless of that provision, any conveyance of the reversionary interest must go through BLM's exchange or sale authority, triggering the aforementioned federal environmental laws. The quest to dissolve the reverter by upfront FMV payment cannot be made except at the Secretary's "option" i.e., as a result of full analysis under FLPMA, NEPA, and the ESA. Simply put, the Parks Department's transparent efforts to avoid these federal statutes, promulgated to ensure that the public is informed about environmental impacts and to ensure the continued survival and recovery of endangered and threatened species, is without merit.

A similar, unlawful attempt to amend the BLM's Survey and Manage Guidelines through a consent decree was recently struck down by the Ninth Circuit Court of Appeals in

¹ In fact, it is ORCA's position that this "attempt" itself triggers the reversionary clause pursuant to the plain language of the RPPA, as noted below.

Conservation Northwest v. Sherman, 715 F.3d 1181 (9th Cir. 2013). There, the issue was “whether a district court may approve a resolution of litigation involving a federal agency through a consent decree, which substantially and permanently amends regulations that the agency could only otherwise amend by complying with statutory rulemaking procedures.” Here, a transfer of the reversionary clause would be an attempt to substantially and permanently amend the Coos Bay District Resource Management Plan without complying with the statutory requirements in FLPMA and NEPA. *See also Klamath-Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549 (9th Cir. 2006) (BLM impermissibly changed the terms and conditions of Survey and Manage without complying with the procedural requirements of FLPMA; under FLPMA, “if the BLM wishes to change a resource management plan, it can only do so by formally amending the plan pursuant to 43 C.F.R. § 1610.5-5”). To identify the Bandon State Natural Area for disposal in the Resource Management Plan, either through reversion to BLM or conveyance of the reversionary clause by payment, transfer of the parklands must occur by *formal amendment of the Resource Management Plan*.

In addition, as noted by the Ninth Circuit in *Conservation Northwest*, “[b]ecause the [changes at issue] trigger[ed] the § 1610.5-5 requirements under FLPMA, they also trigger[ed] the NEPA requirements under 40 C.F.R. § 1502.9(c)(1)(i).”² (quoting *Boody*, 468 F.3d at 561). As explained in *Conservation Northwest* and *Boody*, the low threshold to trigger formal amendment procedures

ensure[s] that whenever resource management plans are changed in any meaningful way, the changes must be made via amendment (i.e., supported by scientific environmental analysis and public disclosure). This is consistent with FLPMA's requirement that BLM ensure the views of the general public and third-party participation are adequately incorporated into the land planning process.

Boody, 468 F.3d at 557 (internal quotation marks omitted). In other words, “BLM must amend a management plan when an action is proposed that changes either the scope of resource uses or the terms, conditions and decisions of the plan.” *Id.* at 556. Here, listing the Bandon State Natural Area as a site for exchange or disposal is a change in the resource uses or terms, conditions and decisions of the plan. Therefore, the Parks Department cannot avoid these requirements *under any circumstance* in which the BLM would relinquish the reversionary clause.

BLM has thus made it clear that regardless of how the Parks Department approaches the reversionary clause, BLM must comply with the aforementioned environmental laws. As someone familiar with these statutes, I assure you this will take many years to accomplish, and, even if the analysis is performed, there is a significant likelihood that the analysis could be challenged and found to be arbitrary and capricious, because of the ecological values of the BSNA acreage in question. Regardless, any attempt to convey, transfer, seek to pay the value of, or otherwise eliminate the reversionary clause will violate the Recreation and Public Purposes

² 40 C.F.R. § 1502.9(c)(1)(i) provides that “Agencies shall prepare supplements to either draft or final draft environmental impact statements if the agency makes substantial changes in the proposed action that are relevant to environmental concerns.”

Act. The statute is clear that a reversionary interest such as that in the 1968 BLM deed of Bandon State Natural Area *must* be held by the United States. If that reversionary interest is conveyed to a third party with the knowledge that it will be used for something other than recreational uses, then that will trigger RPPA's provision that:

[i]f at any time after the lands are conveyed by the Government, the grantee or its successor attempts to transfer title to or control over these lands to another or the lands are devoted to a use other than that for which the lands were conveyed without the consent of the Secretary, *title to the lands shall revert to the United States.* (emphasis added).

43 U.S.C. § 869-2(a).

Another issue raised by the ongoing Parks Department's proposed exchange is that it violates 43 U.S.C. § 869-2(a). That provision states:

[i]f at any time after the lands are conveyed by the Government, the grantee or its successor *attempts* to transfer title to or control over these lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the secretary, title to the lands shall revert to the United States.

The definition of "attempt" is to "[t]o make an effort; endeavor" and "[t]o try to perform, make, or achieve." Here, the Commission has been undertaking an "attempt" to transfer the property via exchange for quite some time now, and, as a result, "the title of the lands shall revert to the United States." It is ORCA's position that the reversionary clause has *already been triggered* as a result of the Parks Department's proposed exchange. As ORCA has repeatedly maintained, the Parks Commission has no authority to transfer the Bandon State Natural Area to Bandon Biota or any other applicant. The right to transfer the Bandon State Natural Area lands granted to Parks Department lies with, and only with, the BLM.

Finally, under 43 U.S.C. § 869-3, any transfer of the reverter clause to OPRD, if ultimately possible, could not be dissolved for twenty-five years:

"The Secretary may authorize transfers of title or changes in use in accordance with the provisions of section 869-2 of this title with respect to any patent heretofore issued under any Act upon application by a patentee qualified to obtain a conveyance under section 869-1(a) or 869-1(c) of this title. *If the Secretary, pursuant to such an application, authorizes such transfer or use, all reverter provisions and other limitations on transfer or use, under sections 869 to 869-4 of this title or any other Act affecting the lands involved, shall cease to be in effect twenty-five years after the Secretary authorizes the transfer or use for a changed or additional purpose under the provisions of this section.*" (emphasis added).

Thus, according to the plain import of the RPPA, even if it were assumed that the reversionary clause could be transferred, it could not be eliminated for twenty-five years. Bandon State Natural Area would continue to be used for "public parks purposes only" for the length of time

the reverter was still in effect, even in the unlikely event that all other statutory requirements allowing BLM to transfer the 280 acres were satisfied.

II. \$ 2,500,000 component of the exchange

The first issue is related to the \$ 2,500,000 that is now proposed as the principal component of the proposed exchange with Bandon Biota LLC. The \$ 2,500,000 is not allocated to the purchase of any specific property at any specific time in the future. Accepting money for parklands creates a disturbing vision of the Parks Department, in which the Parks Department is selling parklands to a private developer to undertake a pet project – in this case, the opportunity for Bandon Dunes to build its *sixth* golf course – at the expense of Oregonians’ interest in their public parklands. This creates a dangerous precedent: it creates not only an appearance of impropriety but a structure to destroy Oregon’s cherished state park system at the whim of any developer with enough money to fulfill their ambitions. Worse yet, this precedent is forged on Oregon’s coastal parks – the crown jewel of the State Park system, famous nationwide. In essence, Oregon’s state parks now have a “For Sale” sign hanging at their entrance. If this “exchange” is approved, it will represent a sad day for Oregonians.

Second, even if the Commission were to go down this slippery slope and approve the exchange, the Commission will violate the mandatory criteria in chapter 736, division 19 as it relates to the \$2,500,000 component. The applicable criteria must be satisfied for the *entire* exchange, including the financial component, not simply the property at issue. Certain provisions from chapter 736, division 19 apply to the “exchange” and the “proposal,” but others apply more specifically to the property. For those that apply to the “exchange” or the “proposal,” those provisions must be satisfied for all components, not simply the property. For example, OAR 736-019-0060(3), amongst others, applies specifically to properties: “the acquisition or exchange of all real property shall be consistent with the Department’s purpose and its long-range planning goals, and shall be prioritized through a rating system.” This provision could only be satisfied by addressing the properties in the exchange, not the \$ 2,500,000.

OAR 736-019-0060(4) also applies specifically to properties: “The Department will look favorably at opportunities for acquisitions and exchanges that enhance the overall management of existing park lands.” This provision certainly cannot be satisfied by \$ 2.5 million, as there is no way to calculate enhancement of parkland management with no specific property involved.

For example, the \$ 2,500,000 for an unspecified property cannot satisfy the mandatory requirement in OAR 736-019-0070(3)(b) to “[i]nquire whether the local county and local communities support the exchange.” Importantly, this provision applies to exchanges and not acquisitions. The money is currently proposed for an exchange, but will be used as an acquisition for some unspecified property in the future. In doing so, the Commission is attempting to sidestep this provision presently, and avoid the provision for some unspecified property at some unspecified future date. As with the above, this provision applies to “exchanges,” not simply properties as other provisions provide, and, therefore, this provision, as it relates to the \$2,500,000 cannot be satisfied absent identification of some property.

OAR 736-019-0070(3)(c) requires that the Commission “[d]etermine whether the exchange will accommodate public use and access, and be in the best interest of the Department.” Again, this provision applies to the “exchange,” not simply a property within the exchange. No such determination pursuant to OAR 736-019-0070(3)(c) can be made because the \$2,500,000 cannot “accommodate public use and access” for an unspecified property.

Finally, OAR 736-019-0070(3)(f)(A) and (B) also cannot be satisfied. Those provisions state:

“(f) Require that all proposals made to the Department be in writing with adequate detail for the Department to evaluate the transaction for:
(A) Natural resource impacts and protection,
(B) Cultural resource impacts and protection”

This provision applies to “proposals,” not “property.” Here, the \$2,500,000 cannot be used to determine natural and cultural resource impacts and protection for an unspecified piece of property, assuming one is ever identified. If there was a specified parcel, then it is possible that these provisions could be satisfied. In the absence of some property, approval of the exchange will violate all criteria of this provision.

Not only will this exchange create the precedent that Oregon’s parklands are for sale to the highest bidder, necessarily diminishing the value of the Parks Department in the eyes of Oregonians, but it will also violate numerous rules as provided above. Approving this exchange is a lose-lose scenario, and the Commission should not diminish its credibility, set the public State Park system on the road to ruin at the hands of private development, and violate state law.

III. Conclusion

The proposed exchange is legally impermissible in *any* form because it assumes the Parks Department has power to transfer 280 acres of the Bandon State Natural Area out of the Parks Department’s ownership to an unqualified applicant for non-public park purposes. However, only the BLM has power over change in land ownership or use. ORCA thus encourages the Parks Department comply with federal and state law and reject the entire proposed exchange. Approval of the proposed Biota exchange is neither leadership nor stewardship. It is only an effort to cash in on opportunities for short-term gain at the expense of the public’s cherished coastal parks, which in addition would set a very dangerous precedent for the future.

Sincerely,

A handwritten signature in blue ink that reads "Sean T. Malone". The signature is written in a cursive style with a large initial "S" and "M".

Sean T. Malone
Attorney for ORCA

cc: ORCA

Karl Anuta, esq.

Jerry Perez, BLM State Director (via email)

Patricia Burke, BLM Coos Bay District Manager (via email)

E. Bradley Grenham, DOI Reg Solicitor Office (via email)

Enclosure: BLM letter dated March 26, 2014 to Oregon Coast Alliance



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

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IN REPLY REFER TO

2740 (ORC040)

MAR 26 2014

Mr. Sean T. Malone
259 E. Fifth Ave.
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Eugene, Oregon 97401

Dear Mr. Malone:

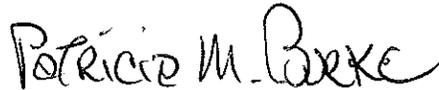
We received your letter regarding the proposed Bandon State Natural Area/Bandon Biota land exchange on March 4, 2014. I would like to provide some background information that should help to clarify the process and the Bureau of Land Management's (BLM) involvement. The proposed exchange involves a parcel of land conveyed to the Oregon Parks and Recreation Department (OPRD) by the BLM pursuant to the Recreation and Public Purposes Act (R&PP). The subject parcel was conveyed to OPRD at less than fair market value at the time of conveyance. When Federal lands are conveyed at less than fair market value, the United States is required to reserve a reversionary interest in the lands that may be invoked if the lands are utilized for a purpose other than that for which the lands were conveyed or in a manner inconsistent with the terms of the conveyance. The qualified use for the initial R&PP patent is for public park purposes only. Current discussions between OPRD and Bandon Biota propose to use the subject parcel as a golf course.

In the event the original patentee (OPRD) wishes to transfer title or change the authorized use to a non-conforming third party use, the restrictions of the title (e.g. reversionary interest) would have to be eliminated. There are two alternatives for eliminating a reversionary interest as an encumbrance on the title: 1) Revestiture and Reconveyance in which the United States would regain title to the land through reversion and subsequently reconvey the land, without such a restriction through sale or exchange; and 2) Conveyance of the Reversionary Interest in which the United States would convey the reserved reversionary interest as a partial interest in the land to the patentee through sale or exchange. The original patent split the ownership interest of the affected land into two major components: 1) the restricted right to use the land, which is held by the R&PP patentee, and 2) all other rights, which are held by the United States and are the subject of the current transaction (payment for, and conveyance of, the reversionary interest). Payment for the restricted right of use occurred at the time of patent. Payment for the remaining rights, i.e. the reversionary interest, is calculated at 100 % of current fair market value less the actual dollar amount paid for the restricted use when the original patent was issued. Conveyances to eliminate the restrictions of reversionary interests will be under either the BLM's sale or exchange authority.

Conveyances of lands or interest in land through sale or exchange to OPRD must be in conformance with the BLM's current Resource Management Plan. The subject lands are not identified as suitable for disposal out of Federal ownership in the current Coos Bay District BLM Resource Management Plan. The fact that the original conveyance would have been in conformance with the land use plan in effect at the time is not sufficient to consider the lands or interests in land for disposal in present. Currently, the BLM Coos Bay District is in the early stages of revising its current land use plan and we plan on identifying the subject parcel as suitable for disposal in the new plan. If the area is identified in a Resource Management Plan as suitable for disposal then additional analysis would occur if a conveyance of lands or interest in land is pursued through sale or exchange to OPRD.

Thank you for your interest in this area. If you have further questions please call our Realty Specialist, Paul Rodriguez, at (541) 751-4462.

Sincerely,

A handwritten signature in black ink that reads "Patricia M. Burke". The signature is written in a cursive style with a large, prominent "P" and "B".

Patricia M. Burke
District Manager

NATIONAL COAST TRAIL ASSOCIATION

PO Box 11045 – Portland, OR <http://www.CoastTrails.org/> / 503-335-3876

“Keeping the Coast for Everyone”

through advocacy, education and action
for public access, trails and coastal preservation

April 4, 2014

Oregon State Parks Commission

725 Summer Street NE, Suite C
Salem, Oregon 97301

The purpose of this letter is to provide the Oregon State Parks Commission with updated comments on the current revised proposal with *Bandon Biota* regarding an exchange of real property and funds for 280 acres of the *Bandon State Natural Area*.

We believe our comments are consistent both with our mission of “*Keeping the Coast for Everyone*,” and also that of the *Oregon Parks and Recreation Department (OPRD)* to “provide and protect outstanding natural, scenic, cultural, historic and recreational sites for the enjoyment and education of present and future generations.”

In addition to the original input we provided last year (dated July 14th, 2013) to the *Commission*, part of which we are restating here for greater impact and enhanced clarity, we offer our comments as follows:

Proposal has Significantly Changed: Not an “Exchange” but a “Sale”

Bandon Biota's original proposal in 2010 was turned down by the *Commission*, apparently since the specific land exchange being offered did not meet the requirement of overwhelming public benefit. *Bandon Biota's* current proposal for 2014 is now essentially the same as the original in terms of the specific lands being exchanged, the primary significant difference being the addition of \$2.5 million which will apparently be placed into the state park's land acquisition budget. Given the *Commission's* rejection of the original proposal, accepting the current proposal gives both the appearance of, and essentially represents, a “sale” rather than a land “exchange.”

Precedent potentially Jeopardizes State Park Lands: Sets an Unacceptable Precedent

The *Commission's* acceptance of the current proposal, given their past rejection of the same lands, would set a unacceptable precedent. This proposal looks from the outside like and it essentially represents a “sale” with a cash offer now being provided rather than an appropriate “exchange” of land. The land that is again being offered was previously (2010) considered as not sufficient to meet the “overwhelming public benefit” criteria. Approving the current proposal would, in our opinion, set a precedent that potentially jeopardizes the continued existence of state park land anywhere and at anytime in the future. No park land would be safe from a cash fund proposal with this kind of precedent available. *We understand that a specific parcel (Whale Cove) of land would be acquired, and that other unspecified lands would also apparently be acquired by State Parks in the future, however, again, these acquisitions are not “exchanges” but purchases.*

Proposal apparently “Inoperable:” Loss of State Park Land, Potential Litigation

It is acknowledged that there is a *Bureau of Land Management (BLM)* revisionary clause that runs with the property proposed for “exchange.” As we understand it, under that clause if the intended use of the land changes from the purposes of recreation and conservation, then the *BLM* retakes ownership. *Bandon Biota* would then have to convince the *BLM* that the land should leave federal ownership for a profit making purpose, notwithstanding the existing Endangered Species Act and potential habitat issues in that regard, which would then seem highly unlikely. That means that moving forward to approve the current proposal would result in a *Bandon Biota* project that is virtually impossible to implement. That would surely lead to *Bandon Biota* asking for its \$2.5 million back, and that would put both *State Parks* and *Bandon Biota* in a difficult position.

Given all this, it is hard to comprehend why the *Commission* would move forward, unless *Bandon Biota* is going to relinquish all claim to the \$2.5 million, regardless of outcome, and that would appear to be unrealistic. In short, moving forward to approve the current proposal would seem to potentially lead to an entirely “inoperable” project. And, in the end would result in the loss of existing state park lands and possibly future litigation over who gets to keep the cash, which would seem to make no sense for any of the parties to pursue.

In summary . . .

- Approving the current proposal, in our opinion, *technically would not be a land exchange* that meets the “overwhelming public benefit” criteria - either in spirit or in fact, or both.
- Given the significant amount of money now being offered along with the same properties that were turned down by the *Commission* in the original 2010 proposal, *the current proposal essentially represents a “sale” of state park land.* That would create an unacceptable precedent since it would undermine the intent of the current land exchange policy, and potentially have negative impacts to the preservation of any state park lands in the future.
- Given the fact that *State Parks will apparently lose this land,* due to the *BLM* revisionary clause, and given that *Bandon Biota* is unlikely to realize any benefit, approval of this proposal will potentially result in years of further disputes and possible litigation. Those sort of outcomes appear to make no sense and would, in our opinion, be an unfortunate use of scarce *Parks Department* resources.

Therefore, **we respectfully recommend that the *Commission* reject the current proposal being offered by *Bandon Biota*.** Our overall intent is essentially the same as our previous input in 2013. We wish to avoid setting bad precedent and to preserve the *Bandon State Natural Area* as it currently exists. We also want to maintain and potentially enhance the values of conservation for wildlife and recreation for future generations. That approach is consistent with the essential vision and mission of both our *Association*, and would also appear to be with *State Park's* mission.

Thank you for your consideration, respectfully,



Al LePage, Executive Director

cc: Board of Directors, *National Coast Trail Association*

From: [Mike Schaer](#)
To: OPRD.publiccomment@state.or.us
Subject: ""No" on Biota Exchange
Date: Friday, April 04, 2014 4:45:55 AM

Good day,

I believe the State of Oregon has no legal authority to transfer dedicated lands to be used as parks & recreation by the B.L.M. for the general public to be converted to commercial use by Michael Keiser or any other for profit endeavor. If this transaction should be considered, than all for profit organizations should have the opportunity for same said property at public auction.

Regards,

James M. Schaer
Sassamanesh
Hybrid Striped bass
88804 Windhurst Ln.
Bandon,Or. 97411

April 5, 2014

Lisa van Laanen, Director
Oregon Parks and Recreation Department
725 Summer Street NE, Suite C
Salem, Oregon

RE: The Bandon State Natural Area/Bandon Biota land exchange

Dear Director and Commissioners:

As a lifetime resident of the State of Oregon, I have attended and spoke at two of the hearings on this issue as well as the informational meeting in Bandon. I had a conversation some time ago with Coos Bay Bureau of Land Management staff on the reversionary clause on this property. It is very clear to me that opponents of this land trade have done their due diligence in determining that OPRD has “triggered” the reversionary clause and this land trade should be denied.

The mission of OPRD is to “provide and protect outstanding natural, scenic, cultural, historic and recreational sites for the enjoyment and education of present and future generations”. Oregon’s coastal areas are of greatest importance. At the OPRD informational meeting in Bandon, it was brought up by staff that OPRD’s goal is to also protect these significant lands from development. So, why has this land trade proposal gone on for such a long time? The Bandon State Natural Area is very unique and needs to be preserved based on OPRD’s own mission statement. It should not be lost to a private golf course development. This goes beyond the scope and intent of OPRD’s mission and BLM goals for public lands.

Thank you for your dedication to the Oregon State Parks system and the opportunity to comment on this issue. It is imperative OPRD maintain these lands for the public as a whole by denying the request.

Sincerely,

Sharon Waterman
87518 Davis Creek Lane
Bandon, Oregon 97411

From: [Margaret Stephens](#)
To: OPRD.publiccomment@state.or.us
Subject: Biota revised "exchange"
Date: Sunday, April 06, 2014 1:15:33 PM

Dear Commissioners:

I continue to oppose the loss of any part of Bandon State Natural Area.

A few points:

- \$2.5 million held in escrow is not an exchange.
- It would not be in the overwhelming public benefit to lose this natural publicly-owned area to a for-profit developer.
- Even considering this proposal is a waste of time - it would likely be prohibited by previous land donation agreements that state that the land is to be used for a public park - only.
- We need to retain BSNA as a contiguous natural area of dune and shore; it shouldn't be hacked up into pieces in order to allow construction of another golf course for the rich to play in. The Oregon Coast belongs to all of us and the wildlife that live there.

Sincerely,
Margaret Stephens
Salem, Oregon



OREGON SHORES
CONSERVATION COALITION

April 8, 2014

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

Re: Agenda Item 7a: Proposed Land Exchange with Bandon Biota

Dear Director Van Laanen, Chair Graves and Commissioners,

The Oregon Shores Conservation Coalition appreciates the opportunity to provide additional comment on the ongoing consideration of the land exchange proposed by Bandon Biota.

To date, Oregon Shores has not taken a position on the underlying exchange, focusing instead on the process of consideration, given its precedent-setting importance in determining how the “overwhelming public benefit” standard will be applied when exchanges of state park land are proposed with private parties. Our concern has been that full information regarding any such exchange be made available to the public, with sufficient advance notice to allow the public to analyze the information and respond meaningfully. We have refrained from taking a final position, because we—along with the rest of the public—lacked all the relevant facts. Up to this point, we have argued that a decision would be premature.

The properties offered by Bandon Biota in exchange for lands within the Bandon State Natural Area certainly have ecological value, so we have kept an open mind about the ultimate decision. It is with some regret, then, that we must at this point oppose the exchange, and urge the Commission not to follow through with the transaction that is currently under consideration.

Oregon Shores understands that the Grouse Mountain property is no longer being considered as part of this exchange. While we believe that the exclusion of the eastern Oregon property is the right decision, given its lack of comparability to the coastal land to be exchanged, the Commission has not yet identified an acquisition property to take the place of the Grouse Mountain ranch in balancing the exchange. Oregon Shores believes that without identifying all properties involved in the exchange, neither the Department and Commission nor the public can determine whether the overwhelming public benefit standard is being met, and the transparency of the public process is thus undermined. The transaction essentially becomes a sale of park land, which we consider inappropriate and a dangerous precedent.

Cash for Land

Oregon Shores remains concerned that the “exchange” of State Parks property for cash is equivalent to a partial sale of public park land and is not consistent with the mission and values of the Oregon State Parks system. Taken at face value, the appraisals show that the value and acreage of the coastal parcels to come into the State Parks system are considerably below the value and acreage that would go to Bandon Biota. Only the addition of cash (initially for the proposed Grouse Mountain property acquisition, plus some funding for gorse control) balances out the monetary value of the exchange. As noted in previous comments, and as raised by members of the Commission, the exchange for cash, without being tied to a particular property, does not allow for meaningful consideration of compliance with the standards for an exchange. It is difficult, if not impossible, to evaluate the natural, scenic, cultural, historic, recreational, and operational benefits of a cash contribution, as opposed to a specific property acquisition. Oregon Shores understands that the exchange contract states that the cash contribution must be used for the acquisition of a property that meets the overwhelming public benefit standard. Oregon Shores is concerned that the deferral of the analysis for the incoming property is inconsistent with the regulations governing exchanges and does not allow for determination of compliance with the relevant standards for this exchange.

Oregon Shores has previously raised questions and concerns about the appraisals, and those concerns have not yet been addressed. Oregon Shores expects that the Commission must obtain the valuation for the highest and best use of land under accurate appraisals for all parcels involved in the exchange.

Even in light of the appraisals that have been obtained by the department, the public would receive property of considerably lesser value than that which would be conveyed to Bandon Biota. However, Oregon Shores continues to question the high valuation of the Bandon Biota parcels, given that they are entirely undevelopable, and the reduction of value of the Bandon SNA parcel on the grounds that it lacks a water right, given that Bandon Biota clearly does have access to water. There is a strong appearance that the gap in actual financial value is greater than the appraisals being relied on make it appear, to the benefit of Bandon Biota and the detriment of the public.

Oregon Shores comment
Bandon Biota Exchange Proposal
Parks Commission – April 8, 2014

Western snowy plover

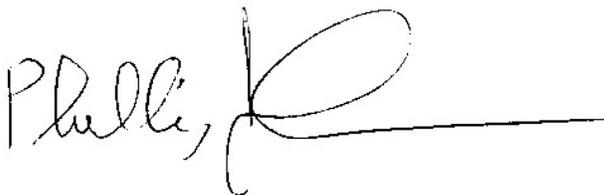
Oregon Shores understands that as a result of the exchange the BSNA will be “reconfigured” to include more shorefront acreage and ultimately may serve as better plover habitat. However, the proposed order does not address the fact that currently the BSNA acreage to be traded includes land within the habitat conservation plan that is “necessary” and “required” for compliance with the federal Endangered Species Act. Addressing this issue should occur before the exchange is approved.

Conclusion

Oregon Shores believes that cash, without connection to a particular property, cannot be evaluated for compliance with the applicable criteria. Despite the proposed order’s assurances that park land is generally not for sale, Oregon Shores is concerned that this “exchange” format sets a precedent and sends the message that, in fact, for the right price, park land is for sale. We have consistently acknowledged that the lands proposed for exchange by Bandon Biota have ecological value, and that the parcels in question could thus conceivably be part of an exchange that on balance would benefit the public. It remains possible that an exchange involving these parcels might yet be arranged that would meet the overwhelming public benefit standard. We do not categorically oppose any such exchange. However, we do state categorically that it is not appropriate to balance an exchange with cash, unconnected to a specific parcel, requiring that the public accept on blind faith that the “overwhelming public benefit” standard will be met later. Approving this exchange under the present circumstances would not meet the standard for an open, transparent public process. The Commission should shelve this matter until and unless an exchange of actual, physical properties is proposed and can be evaluated.

Thank you for the opportunity to provide these comments.

Sincerely,

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

Phillip Johnson
Executive Director
Oregon Shores Conservation Coalition
(503) 754-9303