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Carol Hardy Vincent

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Congressional Research Service Reports. 72.
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CRS Report for Congress

Land Exchanges: Bureau of Land Management Process and Issues

Carol Hardy Vincent
Specialist in Natural Resources
Resources, Science, and Industry Division

Summary

The Bureau of Land Management (BLM) typically completes dozens of exchanges a year to acquire and dispose of land. The land exchange process generally has five phases: development of an exchange proposal, feasibility evaluation, processing and documentation (including appraisal), decision analysis and approval, and title transfer. Land exchanges have been controversial periodically, with concerns regarding the benefits to the public, determinations of market value, and contradictions in policies and procedures. In response, BLM has implemented changes to the appraisal and exchange processes. There remains a difference of opinion on the usefulness of land exchanges.

Introduction

A land exchange, popularly viewed as a swap or a trade, is a real estate transaction where the disposal (sale) and acquisition (purchase) of land are combined. The Bureau of Land Management (BLM), in the Department of the Interior (DOI), is authorized to exchange land or interests in land under the Federal Land Policy and Management Act of 1976 (FLPMA), as amended by the Federal Land Exchange Facilitation Act of 1988 (FLEFA).¹ An interest in land is something less than full ownership, such as easements or mineral, timber, or water rights.² BLM implementing regulations are contained in 43 C.F.R. §2200. Additional information is contained in BLM's *Land Exchange Handbook*³ and various agency instruction memoranda. Selected provisions of these sources are summarized below. Additionally, Congress sometimes enacts legislation authorizing and governing specific land exchanges. Legislated land exchanges generally follow the process and procedures outlined in this report, unless the statute provides otherwise.

¹ 43 U.S.C. §§1715-1716. These statutes apply to the Forest Service in the Department of Agriculture as well, but this report relates only to BLM. For information on acquisition and disposal authorities of BLM and other land management agencies, see CRS Report RL32393.

² Hereafter, exchange is used to encompass both exchanges of land and interests in land.

³ The Handbook is available at [<http://www.blm.gov/nhp/what/lands/realty/tenure/links.html>].

Exchanges can be used to change the “checkerboard” pattern of federal, state, and privately owned lands in the West that resulted from early land grants. Land consolidation can increase the efficiency of land management while decreasing management costs. Exchanges allow for land transactions on a large scale; they can be used to consolidate hundreds of scattered, isolated tracts that likely would have no chance of sale to the same owner. Also, exchanges may be valuable for facilitating transactions with private landowners who want land instead of cash, and for reconfiguring state lands.

BLM land exchanges have sometimes been controversial. Federal audits performed earlier this decade criticized exchanges for short-changing the public and lacking in clear and consistent authorities. They included audits by the DOI Office of the Inspector General (OIG), the Government Accountability Office (GAO), and The Appraisal Foundation (TAF). These audits received significant attention from Congress, DOI, the media, and interest groups. In response, BLM and DOI implemented changes, perhaps most notably the consolidation of appraisal functions in a new office (discussed below).

BLM typically completes dozens of exchanges each year under FLPMA and acts of Congress. In FY2006, for instance, BLM issued 58 deeds or patents for exchanged lands, totaling 28,397 acres in seven states with an appraised value of \$14.4 million. In the same period, BLM received 21 deeds for land, totaling 26,666 acres with a value of \$6.9 million. BLM also acquired and disposed of lands under other authorities.

Basic Rules for Exchanges

Same State. FLPMA requires that the federal and nonfederal lands in an exchange must be located in the same state.⁴

Public Interest. Land exchanges must be in the public interest. Public land may be exchanged if the Secretary of the Interior determines that the public interest will be “well served” (43 U.S.C. §1716(a)). BLM often trades land to achieve better federal land management, for instance, by consolidating ownership and disposing of land that is isolated or difficult to manage. Under BLM regulations, other considerations include protection of fish and wildlife habitat, cultural resources, watersheds, wilderness, and aesthetic values; enhancement of recreational opportunities and public access; consolidation of lands to improve development; and expansion of communities. The resource values and public benefits of the federal lands to be conveyed may not be more than those of the nonfederal lands being acquired. Further, the intended use of the conveyed federal lands should not conflict significantly with management of adjacent federal and Indian trust lands (43 C.F.R. §2200.0-6(b)). In making an exchange, BLM is to reserve any rights or interests that are needed to protect the public interest, and may impose restrictions on the use of lands conveyed.

Equal Value. Under law, the value of the lands exchanged are to be equal, or if they are not equal, they are to be equalized by the payment of money up to 25% of the value of the federal lands conveyed in the exchange. The parties in the exchange may agree to waive this payment, within limitations, including if it involves not more than 3% of the value of the federal lands or \$15,000. Another way of equalizing value is for either

⁴ Congress has provided for exchanges involving lands in more than one state.

party to add or remove lands. Further, the Secretary of the Interior may exchange lands that are of “approximately” equal value under certain conditions, including if the value of the federal lands does not exceed \$150,000 (43 C.F.R. §2201.6 and §2201.5).

Costs. Typically, the BLM and other parties share equally in the administrative costs of an exchange, for instance, the cost of the appraisal of lands, mineral examinations, cultural resource surveys, and addressing deficiencies preventing highest and best use of the land. However, the parties can agree that one party may bear costs and responsibilities typically assumed by the other, subject to certain terms.

Assembled Land Exchanges. BLM regulations define an assembled land exchange as consolidation of multiple parcels of federal or nonfederal land for the purpose of one or more exchange transactions over a period of time (43 C.F.R. §2200.0-5(f)). An assembled land exchange may be used to facilitate exchanges and reduce costs, for instance, by consolidating many federal parcels of limited value. In other cases, third parties secure lands that BLM wants to acquire from multiple owners to facilitate negotiations. Both profit and nonprofit organizations have facilitated assembled land exchanges, typically functioning as brokers/agents for the exchange.

Management of Exchanged Lands. Lands acquired by BLM by exchange become public lands and are to be managed under existing law, regulations, and land use plans. Acquired lands that are within the boundaries of an area having an administrative or congressional designation, such as a natural conservation area, become part of that unit or area and are managed accordingly.

Overview of Exchange Process

In practice, exchanges may be proposed by BLM, private citizens, or state or local government officials. BLM is to consider only proposals that conform with land use plans. The Secretary of the Interior may determine that the mining laws and other public land laws do not apply (for up to five years) to federal lands under consideration for exchange, to the extent that such laws authorize the acquisition or possession of the public lands, subject to valid existing rights. BLM advises that many exchanges take between 18 and 24 months, but the time depends on the complexities.

The exchange process typically occurs in five phases: (1) development of an exchange proposal, (2) feasibility evaluation, (3) processing and documentation, (4) decision analysis and approval, and (5) title transfer. BLM field offices take the lead in negotiating and processing exchanges, but BLM headquarters must ultimately concur. During development of an exchange proposal, the federal and nonfederal parties have preliminary discussions to share information about goals and constraints and to screen proposals. They develop a written exchange proposal that includes a legal description of the lands to be conveyed and the responsibilities of the parties. BLM checks the title of the nonfederal land to ensure its acceptability for acquisition and the survey and land status of the federal land to ensure its availability for disposal.

A feasibility report documents the preliminary information on all aspects of the exchange, including the public benefits, consistency with BLM’s land use plan, cost and processing responsibilities, anticipated land uses, analysis of value, schedule for completion, and alternatives. Exchanges involving federal lands valued at more than

\$500,000 are subject to review by the House and Senate Committees on Appropriations. At the feasibility stage, all exchanges require review and concurrence at several levels, including the DOI Solicitor; BLM's National Land Exchange Evaluation and Assistance Team, lands program managers, and state directors; and ultimately the Deputy Director of BLM. If the parties agree to proceed, they sign a nonbinding Agreement to Initiate an Exchange that serves as a framework. The agreement is to address 17 items identified in BLM regulations (43 C.F.R. §2201.1(c)-(g)), and, for exchanges involving third party facilitators, is to include a full disclosure provision.

Exchange processing and documentation includes title review; public notice and comment; identification and resolution of environmental issues (under the National Environmental Policy Act of 1969 (NEPA));⁵ assessments of mineral, cultural, and other resources; Native American and threatened and endangered species consultations; and preparation and review of appraisals. The NEPA analysis and appraisal often are the most challenging and time-consuming activities. During title review, BLM seeks to confirm that it can acquire clear title to the nonfederal land. BLM gives public notice of the exchange in local newspapers, and contacts authorized land users, state and local governments, and the congressional delegation. The notice must invite the public to comment on the exchange. BLM also must give public notice of its decision to approve or disapprove an exchange.

NEPA Analysis. BLM must conduct an environmental analysis in accordance with NEPA. The analysis documents the impact of completing the exchange on the resources, taking into account the likely future uses of the lands. It includes evaluations of resources on the federal and nonfederal lands. Ordinarily, the mineral potential of the lands is evaluated; wildlife and vegetation species are identified; water sources, locations, and rights are detailed; forestry resources are assessed; cultural and historic resources are catalogued; recreational and other land uses are listed; and contaminants are inventoried and the responsibilities of the parties may be addressed.

Appraisal. BLM regulations state that an exchange of lands shall be based on the market value of the federal and nonfederal lands as determined by the Secretary through appraisals, bargaining based on appraisals, or arbitration. In estimating market value, the appraiser is to determine the highest and best use of the property — the most probable use based on market evidence. Factors include historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities that are reflected in prices paid for comparable properties in the open market. Interests in land — such as minerals or water rights — also are considered to the extent consistent with highest and best use, according to BLM regulations. In the absence of current market information, the parties may use other methods to estimate market value. FLEFA provides that disputes over the appraised values of lands can be resolved by arbitration, bargaining, or other methods.

A 2006 DOI Manual sets forth appraisal policies.⁶ Appraisals are to reflect nationally recognized standards. Appraisers are guided by the Uniform Appraisal

⁵ 42 U.S.C. §4321, et seq. The analysis also is governed by regulations of the Council on Environmental Quality (40 C.F.R. parts 1500-1508) and DOI and BLM policies and procedures.

⁶ The manual is available on the website of the DOI National Business Center, Appraisal Services Directorate, at [<http://www.nbc.gov/AppraisalServices/>].

Standards for Federal Land Acquisitions and the Uniform Standards of Professional Appraisal Practice. Both federal employees and contractors may conduct appraisals. The appraiser prepares a report estimating market value that describes the work conducted and sets forth the information and analysis supporting the estimate. Each appraisal report is to be reviewed and approved by a review appraiser.

At the decision analysis and approval stage, all proposed exchanges again require review and concurrence at several levels, as at the feasibility stage. BLM is to publish and distribute a Notice of Decision. After approval, title transfer is the final phase. It involves reviewing the title evidence and land status, issuing the federal patent, and closing the transaction. Also, the parties may sign an exchange agreement committing them to completion, which is legally binding.

Issues

Exchange Controversies. BLM land exchanges have been controversial periodically. Concerns prominent earlier this decade centered on the benefits to the public, determinations of market value, and contradictions in policies and procedures. For instance, a GAO report concluded that the BLM did not follow requirements to show that “the public benefits of acquiring the nonfederal land in an exchange matched or exceeded the public benefits of retaining federal land, raising doubts about whether these exchanges served the public interest.”⁷ Audit reports also criticized BLM for valuing its land at far less than market value, or for overvaluing nonfederal land to be acquired, to make deals more attractive to nonfederal landowners. A report by The Appraisal Foundation determined that there were political pressures to change or ignore qualified market value opinions to create the appearance that exchanges were conducted at market value.⁸ TAF also concluded that inconsistencies among BLM’s guidance and directives resulted in inconsistent development of market value opinions, improper management of appraisal efforts, and lack of compliance with laws and regulations.

BLM Reforms. In response, BLM took steps to increase oversight of exchanges; demonstrate how exchanges serve the public interest; ensure that land is properly valued; and ensure that exchanges are completed in compliance with law, regulation, and policy. In 2003, BLM formed The Appraisal and Exchange Workgroup, composed of staff from federal and state agencies, to advise the agency on changes needed to address problems with appraisals and exchanges raised in audits.⁹ BLM chose to implement many of the group’s recommendations, including those to strengthen management of exchanges; build public confidence; develop new authorities; enhance training and skills; facilitate exchanges with states; strengthen the ability to reach agreement on value; define the role of facilitators; and develop guidance for processing legislated exchanges.

⁷ U.S. General Accounting Office, *BLM and the Forest Service: Land Exchanges Need to Reflect Appropriate Value and Serve the Public Interest*, GAO/RCED-00-73 (Washington, DC: June 2000), p. 4.

⁸ The Appraisal Foundation, *Evaluation of the Appraisal Organization of the Department of Interior Bureau of Land Management* (Washington, DC: Oct. 9, 2002), p. 9-10.

⁹ *Appraisal and Exchange Workgroup Final Report*, presented to the Bureau of Land Management, U.S. Dept. of the Interior, May 2003.

A significant change involved consolidating real estate appraisal functions from several DOI bureaus into a new Appraisal Services Directorate (ASD), effective November 12, 2003. An independent appraisal office, to protect appraisers from possible political pressures, had been recommended by audit reports for decades. Under the reorganization, to separate the appraisal function from realty decisions, appraisers report to the ASD rather than to DOI realty personnel. A 2006 GAO report found that this consolidation “vastly improved” the objectivity of appraisers, but that some problems remained. For instance, some of the appraisals did not appear to comply with industry standards, making their accuracy uncertain. The extent to which any such problems applied to BLM exchanges is unclear, as they were not separately identified in the analysis.¹⁰ In other changes, the ASD developed a web-based system for DOI agencies to submit and track requests for appraisals, DOI issued a consolidated handbook for appraisals, and BLM revised its *Land Exchange Handbook*.

Opposition and Support for Land Exchanges. Some critics have suggested discontinuing exchanges on the grounds that they have been problematic and are inherently difficult. GAO, among others, has recommended that Congress consider ending exchanges in favor of buying and selling land for cash. The agency has observed that exchanges can be complicated, because a landowner must find another who is willing to trade, wants to acquire what is being offered, and owns a desired parcel of about the same value. With cash sales, sellers could sell unwanted parcels and use the cash to buy parcels they prefer. Advocates believe that this approach takes the subjectivity out of estimating value through appraisal, procures the best price, and simplifies transactions because there is no requirement to equalize value or act within the same state.

Some observers assert that newer BLM authority to sell or exchange land and keep the money in special accounts for subsequent acquisitions has superseded a need for FLPMA exchanges. Specifically, the Federal Land Transaction Facilitation Act (43 U.S.C. §2301) provides for the sale or exchange of land identified for disposal under BLM’s land use plans. The proceeds are available to acquire certain lands containing exceptional resources. A second law is more limited. The Southern Nevada Public Land Management Act (SNPLMA, P.L. 105-263) allows BLM to sell or exchange land around Las Vegas, with proceeds available to acquire environmentally sensitive lands in Nevada. Advocates prefer these authorities because land values can be determined through the market and agencies can purchase lands independent of annual appropriations.

BLM, among others, supports exchanging land under FLPMA for the many uses noted above under “Introduction.” Exchange supporters claim that controversies over valuing properties with unique attributes or in high-growth areas are as likely to occur for land that is sold or acquired as for land that is exchanged. Further, BLM contends that the majority of exchanges are not controversial. Exchange advocates also contend that BLM has had limited and steadily decreasing funding for land acquisitions over the past several years, and that BLM thus needs exchange authority to acquire additional valuable land. Finally, exchange proponents assert that reforms have addressed concerns with exchanges and appraisals.

¹⁰ U.S. Government Accountability Office, *Interior’s Land Appraisal Services: Actions Needed to Improve Compliance with Appraisal Standards, Increase Efficiency, and Broaden Oversight*, GAO-06-1050 (Washington, DC: Sept. 2006), p.13 and p. 15.