

Comprehensive document on exchange authority

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United States Department of the Inte

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MEMORANDUM

TO: Secretary
THROUGH: Solicitor
FROM: Marian Blank Horn /s/
Associate Solicitor
Division of General Law

SUBJECT: Land Exchanges

This memorandum discusses the processes for exchanging federal-owned and Department-administered lands or interests in land for state, local or privately-held lands or interests. The various statutory authorities for and the steps common to exchanges are reviewed. While we also have included, as requested, a listing of several highly visible, pending exchanges, it should be known that the Department annually handles routine land exchanges numbering in the hundreds. This memorandum is the combined product of several attorneys in the Office of the Solicitor and realty specialists in the bureaus and offices.

I. Statutory Authorities

Four statutes provide the general authority for exchanges of Interior-administered lands: the Land and Water Conservation Fund Act, the Federal Land Policy Management Act, the National Wildlife Refuge System Administration Act, and the Fish and Wildlife Management Act of 1956, as amended. In addition, there are numerous statutes which provide specific authority for exchanges in Alaska or other geographic areas, and for exchanges that meet particular program purposes. Many of the statutes have similar provisions, including a common requirement that the lands or interests exchanged be of equal value, or be "equalized" with payments of cash. ~~However, because each statute has minor variations,~~ the first step in any exchange process is to determine the statutory authority being relied upon for the exchange, and to consult and proceed within the constraints of that authority.

The Land and Water Conservation Fund Act, 16 U.S.C. § 4601-22(b), authorizes the Secretary to acquire private property or interests within a unit of a national park system, or other miscellaneous area under his jurisdiction, in exchange for federally-owned property or interests administered by the Department. The Federally-owned property must be (a) suitable for exchange, (b)

located in the same state as the private property to be acquired, and (c) approximately equal in value or susceptible to being equalized with payments of cash. In addition, federal timber lands that are subject to harvest under a sustained yield program may not be exchanged. If requested by the state, political subdivision, or party in interest, a public hearing must be held in the area where the lands are located.

Section 205 of the Federal Land Policy Management Act, 43 U.S.C. § 1715, authorizes exchanges, with respect to federal lands or interests managed through the Bureau of Land Management, that are consistent with the mission of the Department and applicable land use plans. Section 206 of the Act, 43 U.S.C. § 1716, permits exchanges of federal lands or interests managed through the Bureau of Land Management if the public interest will be well-served, after giving full consideration to better federal land management and state and local needs. The federal lands or interests to be exchanged under section 205 or 206 must be located in the same state as the private lands or interests to be acquired, and the value of the properties exchanged must be equal. The values may be equalized with cash payments up to 25% of the total value of the federal property to be transferred, but the payment is to be reduced to as small an amount as possible. The non-federal lands or interests acquired may be transferred to the appropriate bureau or office for administration.

The National Wildlife Refuge System Administration Act, 16 U.S.C. § 668dd(b)(3), permits exchanges of federal lands or interests under the Department's jurisdiction, that have been determined to be suitable for disposition, for non-federal lands or interests of approximately equal or equalized value for inclusion in the National Wildlife Refuge System. The Fish and Wildlife Act of 1956, as amended, 16 U.S.C. § 742f(a)(4), authorizes exchanges of federal property for land, water, or interests in land or water, that will be used for the development, advancement, management, conservation, and protection of fish and wildlife resources.

The Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1621(f), and the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 3192(b), provide general authority for land exchanges in Alaska that are based upon equal value, equalization of value with cash payments, or, if in the public interest, the values may be unequal. Section 22(f) of ANCSA permits exchanges for land consolidations, facilitating land management or development, or other public purposes. Section 1302(h) of ANILCA authorizes the Secretary to exchange lands and interests (including lands within conservation system units) in Alaska that meet the purposes of ANILCA. In addition, section 1302(i) of ANILCA, 43 U.S.C. § 3192(i), authorizes exchanges for lands contiguous to conservation system units that are owned or validly selected by the state of Alaska.

In addition to the general authorities discussed above, over the years many statutory provisions have been enacted which provide

very specific exchange authority to acquire land in a particular geographic area or administrative unit under the jurisdiction of the Department. For example, a 1962 statute authorized exchanges to acquire land within the boundaries of the Point Reyes National Seashore, California. 16 U.S.C. § 459c-2. A 1957 statute authorized exchanges to acquire lands suitable for the conservation of wildlife for the National Key Deer Refuge, Florida. 16 U.S.C. § 696.

Other statutes provide land exchange authorities for limited purposes. One example is the National Historic Preservation Act, as amended, 16 U.S.C. § 470h-3, which authorizes exchanges of comparable historic property after consultation with the Advisory Council on Historic Preservation and determinations that the exchanges will adequately insure the preservation of the property. Another example is the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1260(b)(5), which permits exchanges of certain coal interests in accordance with the provisions of section 206 of the Federal Land Policy and Management Act, discussed above. Other statutes permit exchanges affecting certain Indian reservations, reclamation projects, the National Wild and Scenic Rivers System, and the National Trails System. See, 43 C.F.R. Part 2270.

The bureaus and offices also have developed regulations, manual provisions, and operating instructions which govern the exchange processes. General procedures applicable to exchanges by the Bureau of Land Management are contained in 43 C.F.R. Part 2200. Regulations have been promulgated by the National Park Service to implement the National Historic Preservation Act, 36 C.F.R. Part 18, and by the Bureau of Reclamation for its projects, 43 C.F.R. Parts 403 and 406.

Part II of this memorandum reviews steps that are common to many of the exchange processes.

II. Exchange Procedures

An initial step in any exchange is the obvious one: the identification of the lands or interests to be exchanged. Congress may have specified the lands or interests to be exchanged, a bureau may have identified potential exchange property through a general management or land use plan, or a private party may make an exchange proposal to the Department. Adequate land descriptions or maps will be needed and surveys also may be necessary, particularly if there is any dispute with regard to boundaries. In identifying the lands or interests to be considered for an exchange, the statutory purposes for and limitations on the exchange must be considered. Additional factors are the type of interest to be conveyed (surface, subsurface, or other) and access needs.

Further, all the parties to the land exchange process must be identified, including not only the non-federal landowners but any

third parties who might have claims to the property. It is important to establish at the outset of the exchange process whether the non-federal landowners are interested in the exchange and willing to enter into negotiations. Many exchanges are not completed because the private owner does not wish to convey his property or the Department cannot find land attractive to the owner. Consideration also must be given to whether there are any ownership disputes or claims that would affect the availability of the properties for an exchange.

Given the statutory requirement for most exchanges that the properties exchanged be equal or equalized in value, and the relevance of value to public interest determinations for those exchanges where equal value is not a requirement, a preliminary value estimate will help to determine whether the properties are at least comparable in value. Appraisals of the federal and non-federal properties generally are required before exchanges may be effected. Appraisals for the Department usually are performed by independent appraisers under contract in accordance with the "Uniform Appraisal Standards for Federal Land Acquisitions" developed by the 1973 Interagency Land Acquisition Conference, and are reviewed by qualified realty specialists in the bureau or office responsible for the federal property. If equalization of values with cash payments from the Department will be necessary to effect the exchanges, the availability (or unavailability) of appropriated funds for the cash payments must be determined.

The valuation of the properties being considered for exchange is the area of greatest dispute between the private landowners, the Department, and third parties. At present, the only means for resolving the disputes is through negotiations. There is no established recourse to an administrative (e.g., an arbitrator) or judicial tribunal since the Department is responsible for determining value.

There are a number of other administrative actions which may be necessary in any given exchange and which may result in substantial costs and delays to the parties to the exchange. Compliance with the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), generally requires an environmental assessment and either a finding of no significant impact or the preparation of an environmental impact statement. Other administrative actions which may be required include: a determination of the ~~consistency of the proposed exchange with general management or~~ land use plans of the Department; consultation under the Endangered Species Act, 16 U.S.C. § 1536; a determination of eligibility under the National Historic Preservation Act, 16 U.S.C. § 470f; and a consistency determination under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1). A mineral resource evaluation or a cultural inventory also may be necessary. Finally, where relevant, the use to be made by the non-federal party of the federal lands or interests exchanged may have to be determined and evaluated. Any one of these steps

could raise difficult issues regarding a particular proposed exchange requiring adjustments or extensive additional work.

Before an exchange may be effected, notice to the state or local government or the interested public may be required or appropriate. For Bureau of Land Management exchanges, a "notice of realty action" must be published in the Federal Register and in local newspapers and the public must be given an opportunity to comment. Copies of the notice may be provided to the state governor, local governing bodies, and interested parties such as adjoining landowners and current land users. 43 C.F.R. § 2201.1. In addition, if an exchange is controversial, a public meeting may be held.

In an exchange process, the non-federal landowner usually provides such acceptable evidence of title as meets the title standards of the Department of Justice, and a preliminary title opinion is provided by the Solicitor's Office before the exchange agreement is executed. The exchange agreement, at a minimum, must describe the lands or interests in land to be exchanged, all reservations and interests in the property, and all terms, conditions and covenants. Deeds to the United States generally are prepared in accordance with a 1963 Department of Justice publication, "A Procedural Guide for the Acquisition of Real Property by Government Agencies."

After the deeds for the properties are executed, they are exchanged by the parties and recorded in accordance with state laws. After recordation, the appropriate division or regional office of the Solicitor's Office will prepare a final title opinion. The Department may be required to publish notice of the conveyance in the Federal Register and notify the state governor and the local government.

Throughout the exchange process, it is essential that each bureau or office involved in the exchange maintain complete administrative records that support the determinations and decisions made with regard to the exchange. If a completed exchange should be challenged in court, the court will look to the administrative record to determine whether the exchange was reasonable or arbitrary, capricious or an abuse of agency discretion. 5 U.S.C. § 706. A recent example of judicial review turning on the adequacy of the administrative record is the court opinion regarding the St. Matthew Island exchange in Alaska, in which the district judge examined the public interest determination for the exchange and held the exchange invalid. National Audubon Society et al. v. Clark, Civil No. A 83-125 (D. Alaska November 30, 1984).

The steps required in any given exchange process will vary depending on the statutory authority, applicable bureau regulations and procedural guidelines, and the particular circumstances surrounding the exchange. For example, if the non-federal party is a state rather than a private landowner,

somewhat different steps will be followed although basic requirements with regard to such matters as acceptable appraisals, sufficient title evidence, and properly executed conveyance documents generally will continue to apply. If specific exchanges of property are to be initiated, attorneys in the Office of the Solicitor and realty specialists in the bureaus and offices should be called upon early in the process for their experience and expertise regarding land exchanges.

Land exchange transactions generally are complex and subject to extensive time delays due to the many steps involved, as outlined above, and because often multiple agencies within the Department or other, separate executive agencies (e.g., the Forest Service or the General Services Administration) are involved. Of the proposed land exchanges listed at the end of this memorandum, several have been kicking about the Department for quite some time.

If there is interest in expediting a given land exchange proposal, we suggest that a high-level official be designated to spearhead the exchange, and/or that a Department inter-bureau task force be appointed which includes members from each affected bureau or external agency who represent each required discipline to accomplish the task. High-level emphasis at the Department, and if necessary, at other agencies, on the need for quick action and effective coordination, and dedicated, full-time work by a task force can result in significant time savings.

III. Pending Exchanges

The following is a list of the private properties that are involved in some of the more highly visible land exchanges which are pending^{1/} or may be considered:

Lawrence Rockefeller's J-Y Ranch, Grand Teton National Park.
Hearst property, Grand Canyon National Park.
Davis and other properties, Kaloko-Honokohau National
Historical Park.
Channel Island National Park, Malibu.
Water Island, Virgin Islands.
Lee Ranch, McKinley County, New Mexico (coal exchange).

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^{1/} Of course there are many land exchanges pending which involve Departmental lands throughout the country. For example, the Bureau of Land Management estimates that on October 1, 1984, it had 480 land exchange proposals pending. Records concerning the pending exchanges are kept in the state offices.