

# CRS Report for Congress

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## Land Exchanges: Bureau of Land Management Process and Issues

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

### Summary

Land exchanges are the primary means for the Bureau of Land Management (BLM) to acquire and dispose of land. The land exchange process typically has three phases: scoping, documentation (including appraisal), and title transfer. Land exchanges have been controversial for years. Recent audits have raised 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, with additional reforms underway. The effect of these changes is not fully clear. There remains a difference of opinion on the usefulness of land exchanges. This report will be updated as circumstances warrant.

### 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).<sup>1</sup> An interest in land is something less than full ownership, such as easements or mineral, timber, or water rights.<sup>2</sup> BLM implementing regulations are contained in 43 C.F.R. 2200. Additional information is contained in BLM's *Land Exchange Handbook* and various agency instruction memoranda. Selected provisions of these sources are

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<sup>1</sup> 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 other BLM acquisition and disposal authorities, as well as the acquisition and disposal authorities of other land management agencies, see CRS Report RL32393, *Federal Land Management Agencies: Background on Land and Resources Management*, coordinated by Carol Hardy Vincent.

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

summarized below.<sup>3</sup> Additionally, Congress sometimes enacts legislation authorizing and governing specific land exchanges.

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; for instance, they can be used to consolidate hundreds of scattered, isolated tracts that likely would have no chance of sale to the same owner. Further, exchanges may be valuable for facilitating transactions with private landowners who want land instead of cash, and promoting state school trust land reconfiguration.

In practice, BLM typically completes dozens of exchanges each year under FLPMA and acts of Congress. In FY2003, for example, BLM issued 132 deeds or patents for exchanged lands, totaling 21,701 acres in eight western states with an appraised value of \$37.9 million. In the same period, BLM received 26 deeds for land, totaling 13,191 acres with an appraised value of \$37.6 million. BLM also acquired and disposed of lands under other authorities.

BLM land exchanges have long been controversial. Recently, federal audits have criticized exchanges for short-changing the public and lacking in clear and consistent authorities. They include audits by the DOI Office of the Inspector General (OIG), the Government Accountability Office (GAO), and The Appraisal Foundation (TAF). These audits have received significant attention from Congress, DOI, the media, and interest groups. In response, BLM and DOI have implemented changes, and additional reforms are being pursued. Because changes are ongoing, their impact is not entirely clear.

## Basic Rules for Exchanges

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

**Public Interest.** Land exchanges must be in the public interest. Specifically, public land may be exchanged if the Secretary of the Interior determines that the public interest will be “well served” by the exchange.<sup>5</sup> 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

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<sup>3</sup> Where complete information is needed, the authorities themselves should be consulted.

<sup>4</sup> Congress has provided for exchanges in different states. This report does not address legislated exchanges.

<sup>5</sup> 43 U.S.C. §1716(a).

federal and Indian trust lands.<sup>6</sup> 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. Another way of equalizing value is to add or remove lands from either side. The parties in the exchange may agree to waive the payment to equalize values, within limitations.

**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.<sup>7</sup> 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 those proposals that conform with land use plans or plan amendments. 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 one and two years, but the time may be shorter or longer depending on the complexities. There is no general maximum time frame.

The exchange process typically occurs in three phases: scoping, documentation, and title transfer. BLM field offices take the lead in negotiating and processing exchanges, but BLM headquarters must ultimately concur. During scoping, BLM assesses the

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<sup>6</sup> 43 C.F.R. §2200.0-6(b).

<sup>7</sup> 43 C.F.R. §2200.0-5(f).

feasibility of the exchange. This process usually takes between one and two months. To assess the feasibility, the parties might obtain a preliminary estimate of the values of the lands to be exchanged. 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 the review and concurrence of the Solicitor of the Interior Department, BLM's National Land Exchange Team, lands program managers, and ultimately the Deputy Director of BLM. If BLM and other parties agree to proceed with an exchange proposal, they sign a nonbinding agreement that serves as a framework for the exchange and addresses responsibility for actions and costs.

Documentation is typically the longest part of the process, often requiring 6 to 24 months. It includes title review; public notice and comment; identification and resolution of environmental issues (under the National Environmental Policy Act of 1969 (NEPA));<sup>8</sup> 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 assure 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 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.

Appraisals are to reflect nationally recognized standards. Appraisers are guided by the Uniform Appraisal Standards for Federal Land Acquisitions and the Uniform Standards of Professional Appraisal Practice. Both federal employees and contractors may conduct appraisals, and BLM regulations specify certain qualifications of appraisers.

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<sup>8</sup> 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.

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 qualified review appraiser.

At the decision stage, all proposed exchanges require another review and concurrence of the Solicitor of the Interior Department, BLM's National Land Exchange Team, land program managers, and ultimately the Deputy Director of BLM. If there is a decision to approve the exchange, the parties may sign an exchange agreement committing them to completing the exchange. This agreement is legally binding.

Title transfer is the final phase. It involves reviewing the title evidence and land status, issuing the federal patent, and closing the transaction. It typically takes about 1 to 1½ months.

## Issues

**Concerns.** Recent concerns about exchanges have 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.”<sup>9</sup> Audit reports also have 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 TAF determined that there were political pressures to change or ignore qualified market value opinions to create the appearance that exchanges are conducted at market value. TAF also concluded that inconsistencies among BLM's written guidance and directives result in inconsistent development of market value opinions, improper management of appraisal efforts, and lack of compliance with laws and regulations. Accordingly, TAF recommended a systematic review to determine where changes and clarifications are needed.<sup>10</sup>

**BLM Reforms.** In response to these concerns, BLM states that it has taken 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 familiar with appraisals and exchanges, to advise the agency on changes needed to address problems with appraisals and exchanges raised in audits.<sup>11</sup> BLM chose to implement some three dozen recommendations of the group's several dozen options, including those to strengthen management of the exchange process; build public confidence; develop new

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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> *Appraisal and Exchange Workgroup Final Report*, presented to the Bureau of Land Management, U.S. Dept. of the Interior, May 2003.

authorities; enhance training and skills; facilitate exchanges with states; strengthen the ability to reach agreement on value; define the role of facilitators; and develop policy and guidance for processing legislated exchanges.

A significant change involves the consolidation of real estate appraisal functions from several DOI bureaus into a new DOI Office of Appraisal Services, 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 appraisal office rather than to DOI realty personnel. This office has developed a web-based system for DOI bureaus to submit and track requests for appraisals. The office is developing a consolidated handbook for DOI appraisals, with a draft anticipated in the spring of 2005. In addition, BLM is revising its *Land Exchange Handbook* to reflect recent changes.

**Opposition and Support for Land Exchanges.** Some critics suggest 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 observes 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 restrict transactions to the same state.

Some observers assert that new 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 (Title II, P.L. 106-248; 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 for acquiring 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. For instance, under a June 2004 sale of land under SNPLMA, parcels sold at significantly higher than the appraised prices, calling into question the accuracy of appraisals. Further, BLM contends that the majority of exchanges are not controversial. Exchange advocates also contend that BLM has limited funding for land acquisitions, and thus needs exchange authority to acquire additional valuable land. Finally, exchange proponents assert that recent and ongoing reforms are addressing concerns with exchanges and appraisals.