

HEARING ON BUREAU OF LAND MANAGEMENT
REALTY AND APPRAISAL ISSUES

HEARING
BEFORE THE
SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC
LANDS

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

MARCH 24, 1998, WASHINGTON, DC

Serial No. 105-86

Printed for the use of the Committee on Resources



U.S. GOVERNMENT PRINTING OFFICE

48-058 CC

WASHINGTON : 1998

COMMITTEE ON RESOURCES

DON YOUNG, Alaska, *Chairman*

W.J. (BILLY) TAUZIN, Louisiana	GEORGE MILLER, California
JAMES V. HANSEN, Utah	EDWARD J. MARKEY, Massachusetts
JIM SEXTON, New Jersey	NICK J. RAHALL II, West Virginia
ELTON GALLEGLY, California	BRUCE F. VENTO, Minnesota
JOHN J. DUNCAN, Jr., Tennessee	DALE E. KILDEE, Michigan
JOEL HEFLEY, Colorado	PETER A. DeFAZIO, Oregon
JOHN T. DOOLITTLE, California	ENI F.H. FALEOMAVAEGA, American Samoa
WAYNE T. GILCHREST, Maryland	NEIL ABERCROMBIE, Hawaii
KEN CALVERT, California	SOLOMON P. ORTIZ, Texas
RICHARD W. POMBO, California	OWEN B. PICKETT, Virginia
BARBARA CUBIN, Wyoming	FRANK PALLONE, Jr., New Jersey
HELEN CHENOWETH, Idaho	CALVIN M. DOOLEY, California
LINDA SMITH, Washington	CARLOS A. ROMERO-BARCELO, Puerto Rico
GEORGE P. RADANOVICH, California	MAURICE D. HINCHEY, New York
WALTER B. JONES, Jr., North Carolina	ROBERT A. UNDERWOOD, Guam
WILLIAM M. (MAC) THORNBERRY, Texas	SAM FARR, California
JOHN SHADEGG, Arizona	PATRICK J. KENNEDY, Rhode Island
JOHN E. ENSIGN, Nevada	ADAM SMITH, Washington
ROBERT F. SMITH, Oregon	WILLIAM D. DELAHUNT, Massachusetts
CHRIS CANNON, Utah	CHRIS JOHN, Louisiana
KEVIN BRADY, Texas	DONNA CHRISTIAN-GREEN, Virgin Islands
JOHN PETERSON, Pennsylvania	RON KIND, Wisconsin
RICK HILL, Montana	LLOYD DOGGETT, Texas
BOB SCHAFER, Colorado	
JIM GIBBONS, Nevada	
MICHAEL D. CRAPO, Idaho	

LLOYD A. JONES, *Chief of Staff*

ELIZABETH MEGGINSON, *Chief Counsel*

CHRISTINE KENNEDY, *Chief Clerk/Administrator*

JOHN LAWRENCE, *Democratic Staff Director*

SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS

JAMES V. HANSEN, Utah, *Chairman*

ELTON, GALLEGLY, California	ENI F.H. FALEOMAVAEGA, American Samoa
JOHN J. DUNCAN, Jr., Tennessee	EDWARD J. MARKEY, Massachusetts
JOEL HEFLEY, Colorado	NICK J. RAHALL II, West Virginia
WAYNE T. GILCHREST, Maryland	BRUCE F. VENTO, Minnesota
RICHARD W. POMBO, California	DALE E. KILDEE, Michigan
HELEN CHENOWETH, Idaho	FRANK PALLONE, Jr., New Jersey
LINDA SMITH, Washington	CARLOS A. ROMERO-BARCELO, Puerto Rico
GEORGE P. RADANOVICH, California	MAURICE D. HINCHEY, New York
WALTER B. JONES, Jr., North Carolina	ROBERT A. UNDERWOOD, Guam
JOHN B. SHADEGG, Arizona	PATRICK J. KENNEDY, Rhode Island
JOHN E. ENSIGN, Nevada	WILLIAM D. DELAHUNT, Massachusetts
ROBERT F. SMITH, Oregon	DONNA CHRISTIAN-GREEN, Virgin Islands
RICK HILL, Montana	RON KIND, Wisconsin
JIM GIBBONS, Nevada	LLOYD DOGGETT, Texas

ALLEN FREEMYER, *Counsel*

TODD HULL, *Professional Staff*

LIZ BIRNBAUM, *Democratic Counsel*

GARY GRIFFITH, *Professional Staff*

CONTENTS

Hearing held March 24, 1998	Page 1
Statements of Members:	
Faleomavaega, Hon. Eni F. H., a Delegate in Congress from the Territory of American Samoa	3
Hansen, Hon. James V., a Representative in Congress from the State of Utah	1
Statements of witnesses:	
Gardner, Alan, County Commissioner, Washington County, Utah	9
Prepared statement of	45
Glass, Thomas R. H., Western Land Group Inc.	12
Prepared statement of	42
Hanson, Woodward S., Hanson Appraisal Company, Inc.	11
Prepared statement of	58
Harja, John, Governor's Office of Planning and Budget, State of Utah	6
Prepared statement of	38
Shea, Pat, Director, Bureau of Land Management; accompanied by Bill Lamb, Director, State of Utah; and David Cavanaugh, Senior Ap- praiser, Bureau of Land Management	3
Prepared statement of	36
Additional material supplied:	
Carrick, David, Shepard & Assoc., Inc., Public Land Exchange, Boulder, Colorado, prepared statement of	75
Johnson, Curt, Commissioner, Office of the Commissioner of School and Public Lands, Pierre, South Dakota, prepared statement of	76

HEARING ON BUREAU OF LAND MANAGEMENT REALTY AND APPRAISAL ISSUES

TUESDAY, MARCH 24, 1998

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS, COMMITTEE ON RESOURCES, *Washington, DC.*

The Subcommittee met, pursuant to notice, at 10 a.m., in room 1324, Rayburn House Office Building, Hon. James V. Hansen (chairman of the Subcommittee) presiding.

Mr. HANSEN. [presiding] The Subcommittee convenes to conduct an oversight hearing on BLM land exchanges and realty appraisals.

STATEMENT OF HON. JAMES V. HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. HANSEN. The land disposition policies of the 1800's gave us an extremely fragmented ownership pattern for western lands. I refer you to the map of Utah over there as an example of this problem. This checkerboard pattern of ownership in the West makes Federal lands difficult to manage and causes numerous problems for state and private landowners.

The Federal Lands Policy and Management Act of 1976 declared land exchanges the preferred method for blocking up the public lands into manageable tracts. It sounded like a great idea. We weren't going to have any net loss of public lands, we were just going to trade parcels around until we ended up with manageable tracts. Unfortunately, things haven't worked out as well as we hoped they would.

I have seen minor land exchanges that have taken 15 years to complete. I don't think people should have to spend a quarter of their lifetime fighting bureaucratic red tape trying to trade out a small inholding. Somehow we've got to figure out a way to speed things up. We've passed several land exchange facilitation bills since FLPMA, and yet the problem persists.

I can personally say that as a city councilman 38 years ago in the little town of Farmington, we spent my whole 12 years on the council trying to trade a piece of land. Always it was going to get done, but the Forest Service and BLM never really got around to it.

Then we turned around and I was on the State legislature for four terms and speaker for a term, and we never got it done. And finally, we had to put it into a land exchange bill here in Congress. I've instructed staff to start putting together another land exchange bill for the 11 western States, because contrary to what

we've heard from all the agencies, it just doesn't happen and I can get horror stories from every State to back that up.

One of the biggest problems, and the one we will spend most of our time talking about is land appraisals. One problem is that government appraisal standards do not take into account the public interest of land. Appraisers refuse to accept the value of a non-economic quote, "highest and best use," such as endangered species habitat conservation or view-shed preservation.

Typically, a property owner with endangered species habitat never gets credit for having maintained his property in such a manner as to constitute valuable habitat. The highest and best use for his land is preserving the species, and as such, the parcel of land should have enormous value. Unfortunately, since the appraisal process is skewed toward economic uses, the appraiser will value the land at next to zero.

Under this scenario, land exchanges are difficult to consummate. The landowner knows his land is much more valuable than the appraisal says it is, and the BLM or whoever refuses to accept public interest value as legitimate criteria on which to base an appraisal. Often, neither side will budge and we go through this same old game we've played around here for my 18 years.

I hope that we can come up with some answers here today. Maybe there are some simple ways of solving these problems, maybe not. Either way, I appreciate the willingness of our witnesses to participate in this dialog.

The gentleman from Puerto Rico, do you have an opening statement?

Mr. ROMERO-BARCELÓ. No, sir, no opening statement.

Mr. HANSEN. Thank you, sir.

As you know, a lot of things are going on right now. Members will dribble in and we will be ready to respond to questions. We only have one panel for today and you are all seated there, so we'll just start with you.

The Director of BLM, Mr. Pat Shea, from the great State of Utah. We are always impressed to have you with us, Pat, and we appreciate you being here. We'll turn to you. And we also have accompanying you Bill Lamb, Director of the BLM for the State of Utah. Is Bill here? He's there as support, is that right? And David Cavanaugh is also here.

Mr. Shea, we'll turn the time to you, sir.

Mr. SHEA. Thank you very much.

Mr. HANSEN. I don't know if I want to limit the Director to 5 minutes. You take whatever time you need but keep it under 20 minutes, will you.

Mr. SHEA. No, no. I will—

Mr. HANSEN. Can I hold you for just a minute. We are honored to see the Ranking Member of the Committee just walked in, Mr. Faleomavaega of American Samoa. And if you wouldn't mind holding just a moment, we'll turn to this gentleman for any opening statement he has and pearls of wisdom, which I'm sure we'll receive.

**STATEMENT OF HON. ENI F. H. FALEOMAVAEGA, A DELEGATE
IN CONGRESS FROM THE TERRITORY OF AMERICAN SAMOA**

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I do have a very short statement, and I do welcome our friends from the Bureau of Land Management for their testimonies this morning.

Mr. Chairman, we all recognize that land exchanges can be a useful management tool that can promote more efficient land management by all concerned. However, land exchanges can also be complicated transactions involving disparate, noncontiguous lands. Adding to this, as we know, appraisals are an art and not a science.

There have always been certain underlying principles to Federal land exchanges. First and foremost, such exchanges should be in the public interest. Second, such exchanges should be done on an equal value basis. And third, may I suggest these exchanges should be willing seller to willing buyer type transactions.

I know there are those who would like to speed up land exchanges by cutting a few corners. We cannot or should not cut corners if it means that we undercut the public interest or the principle of equal value exchanges.

I look forward to the testimony of our witnesses this morning and I am interested in any ideas they may have for the improvement of the exchange process, as long as such ideas are consistent with the principles of public interest and equal value.

Mr. Chairman, thank you.

Mr. HANSEN. Thank you. Mr. Shea.

Mr. SHEA. Thank you, Mr. Chairman. I am sure with the Ranking Minority Member's concurrence, that we will wish the Running Utes well on Saturday as they move on in the NCAA, just by way of a side note.

Mr. HANSEN. Put that closer to you, if you would, please. We want to pick you up on the recorder.

Mr. SHEA. All right.

STATEMENT OF PAT SHEA, DIRECTOR, BUREAU OF LAND MANAGEMENT; ACCOMPANIED BY BILL LAMB, DIRECTOR, STATE OF UTAH; AND DAVID CAVANAUGH, SENIOR APPRAISER, BUREAU OF LAND MANAGEMENT

Mr. SHEA. Thank you for the opportunity to testify on the Bureau of Land Management's exchange and appraisal process. Since becoming the BLM Director, I have come to appreciate both the importance of the exchange program and its complexity. It is vital that the interests of the taxpayers, the true landowner, be protected and that we find means of improving and facilitating the exchange process.

We know that there is room for improvement in our land exchange process. We need to consider how the appraisal process might be revised, whether the BLM is applying consistent criteria in identifying potential land exchanges, how much discretion should be left to local BLM managers, and what guidelines are needed when private developers and nonprofit conservation groups are involved.

By strengthening its land exchange policies and procedures, the BLM can continue to acquire private property for public use while protecting the interests of the American taxpayers.

I have undertaken several measures to improve this program. I have established a procedure for a second level review by the BLM State director or the Washington Headquarters Office. The second level review requires concurrence in decisions involving exchanges greater than \$500,000 in value.

These new procedures also require a feasibility analysis report for all land exchanges and require that concurrence for any dismissal of protests to any land exchange decisions. I should add here that in the two months that this process has been in place, there have been no delays in the exchanges that were presently going through the process.

In addition, I am establishing a bureauwide land exchange team to assist in the review of high priority exchanges, provide additional technical support to BLM field offices, and address policy and procedural issues.

And it's my anticipation, Mr. Chairman, that that exchange team will be located outside of Washington, DC and will have strict timeline guidelines to make sure that it does not cause a delay in the process.

Before discussing the specifics of the program, I'd like to offer some background on the exchange program. The BLM, as you know, has stewardship of more than 264 million acres of land—more than any other Federal agency. It completes 60 to 70 land exchanges every year. On average, these exchanges total roughly 150,000 acres of land exchanged each year at a value of approximately \$50 million.

Land exchanges are an important tool to carry out the BLM land management program. Exchanges allow the BLM to acquire the kind of land that is suited to public ownership; land the public use or for conservation, such as habitat for wildlife, including threatened or endangered species; land that offers recreational opportunities for the public; or land containing sensitive riparian areas that are critical to the health of streams, rivers, and entire watersheds.

Exchanges also allow the BLM to consolidate land ownership patterns where appropriate to increase our efficiencies and reduce cost. The Department strongly supports public ownership of public lands, and is committed to working with other jurisdictions to improve land ownership patterns and the management of those lands. This is consistent with the Federal Land Policy and Management Act of 1976.

Historically, land exchanges are time consuming because of the number of affected parties, user and interest group concerns, and lengthy assessments and analysis procedures. However, the Federal Land Exchange Facilitation Act of 1988 and the joint BLM and Forest Service regulations published in 1993 have provided tools that can improve the land exchange process.

Parties involved in the exchange must reach agreement on a wide variety of issues, including scheduling, sharing of cost, selection of appraisers, number of appraisal reports, and methods of resolving disputes concerning the appraised value. Like other com-

plicated real estate transactions, there can be periodic delays and disagreements between the parties.

And I've given you several examples in the testimony that I submitted for the record, where it gives you a state-by-state breakout. I won't go through those, but will certainly be able to answer questions that the Committee might have about that.

The vast majority of land exchanges are like these examples—so clearly logical and mutually beneficial that they are completed without protest or controversy. Sometimes, however, proposed land exchanges do become contentious. Appraisals can be subject to question and criticism from those involved in the proposed exchange, or from outside parties.

Appraisals are especially difficult and controversial in areas of rapid growth and volatile market prices. This makes the job of appraisers even more challenging. Land exchanges are voluntary transactions. They require mutual agreement by the parties to the transaction on a wide variety of issues, including value. To be successful, the parties to the transaction must have confidence in the appraisal process.

I'd like to describe briefly how real estate appraisals are incorporated into the land exchange process. The appraisal process is essential in reaching agreement on the value of the lands involved in the exchange. Again, it is important that the parties have confidence in the integrity and impartiality of those involved in the process.

Real estate appraisals are obtained to "estimate," the market value of lands involved in proposed land exchanges. Ideally, the appraisal report is an objective, impartial estimate of what property would sell for on the open market as of the date of the appraisal report. The credibility of the appraiser's report is affected by his or her ability to obtain reliable market information, properly analyze the information, develop and test various assumptions, and reach a logical and supported estimate of the value.

The appraisal report is an opinion of value; an appraiser's estimate of what the property would likely sell for. The appraiser does not determine value, but instead estimates market value.

Appraisal reports are prepared in accordance with BLM appraisal standards in 43 CFR 2200, and to the extent appropriate, with the Department of Justice Uniform Appraisal Standards for Federal Land Acquisition. These standards are consistent with the Uniform Standard of Professional Appraisal Practice published by the Appraisal Foundation, Appraisal Standards Board.

We review appraisal reports to assure that they meet professional and BLM appraisal document standards. The reviewer prepares a report approving the appraisal and recommending its use for purposes of reaching an agreement.

If parties to a proposed exchange cannot reach agreement on the approved appraised values, bargaining or other methods may be used to reach an agreement.

If chances for agreement are remote, BLM or the property owner may decide to end further efforts.

We define bargaining as a process other than arbitration by which parties attempt to resolve a dispute concerning the appraised value. Different forms of mediation or dispute resolution

techniques may be used to resolve the disagreement. The process is premised on the theory that reasonable people can reasonably disagree with the appraiser's analysis. Therefore, bargaining is limited to the information, assumptions and conclusions in the appraisal reports.

Any agreement reached by the parties must be in writing and made part of the land exchange administrative record. Any appraisals presented during the bargaining process must be open to review by a qualified appraiser representing the agency with responsibility for appraisal review. The BLM State Director must concur in any agreement reached through bargaining.

Once the parties have agreed, BLM published a notice of decision regarding the proposed land exchange transaction. The NOD informs the public of the BLM's decision to proceed with the land exchange. The public has 45 days to comment or protest BLM's decision. During the 45-day period, the appraisal reports, along with other supporting documentation, is available for review by the public.

I want to add here that the public's review of any exchange is an essential part of my, and I believe, the Bureau's fiduciary duty to the taxpayers. I think a great deal of problems could have been avoided in the past had there been a more complete public review of the proposed transactions.

In conclusion, I hope the information I have shared today has clarified the process and demonstrated my commitment to achieving a better program. Protecting the natural resources, protecting the public's assets, and achieving a fair market return on all land transactions are my primary goals.

I believe that a hearing like this can be an interesting forum to explore means by which we could make adaptations that might meet some additional needs that constituents of yours or other members of the Committee may have brought to your attention.

This concludes my statement, and I will be glad to answer questions you may have.

[The prepared statement of Mr. Shea may be found at end of hearing.]

Mr. HANSEN. Thank you, Mr. Director. We appreciate your statement. Mr. John Harja of the Governor's State of Utah, Office of Planning and Budget, we'll turn the time to you, sir.

STATEMENT OF JOHN HARJA, GOVERNOR'S OFFICE OF PLANNING AND BUDGET, STATE OF UTAH

Mr. HARJA. Thank you, Mr. Chairman. I'd like to say I am here today as vice chair of the board of trustees for the School and Institutional Trust Lands. I'm not sure it is, but it's the second largest landowner in the State of Utah.

The school trust lands, of course, were given for a specific purpose, and that is to generate income for the schools. And as such, and as you mentioned, they are scattered all over the state. When the BLM or the Federal Government decides to engage in protective activities such as national parks, monuments, ESA protection areas and the sort, our lands are inevitably involved. So we have a vested interest in seeing exchanges.

With that in mind, they have to be efficient and they have to have low transaction costs to be attractive to us, and that is basically what we see not happening. With trust lands, there are no two-parties with BLM. There are mineral lease payments in targets. If the target is a mineral acquisition, half of the money comes to the State of Utah, and that has to be recognized in any exchange proposal.

There is also a restriction on what Trust Lands can do in terms of selling its minerals, which is why we're so interested in exchanges. The State and local government is also involved, as I mentioned. The mineral lease payments and local people are always very interested in those and the actual use of the land. So there are no two-party exchanges.

The main issues for us are what we would want to acquire and the valuation issue, which is I think the key target today. Trust Lands is very interested in administrative exchanges and entered into an MOU with the BLM a couple of years ago to try to expedite this process, and instead, has found it seriously slowed down.

I'm going to discuss some of those, but as I do, I would like to mention right now though that we are very appreciative of the help of Mr. Bill Lamb, the State Director, has given us and his process in bringing in outside facilitators as help to unstick some of the deals. We actually, in fact, did complete an exchange recently involving some habitat conservation areas near St. George for some property up near Park City.

As we see it, there are basically a couple of difficulties. Some have to do with the substantive issues and most of them have to do with the process. The substantive issue as we see it has to do with prejudging the issue. As we talk with BLM appraisers, they are full of statements like, your land is worthless and we don't need to do a serious appraisal here because we can complete this in a couple of months.

For example, in 1993, this Congress passed what we call the inholdings bill, Public Law 103-93, a bill designed to help us get our trust lands out of the national parks. As the bill was being signed by the President, we got together and the BLM appraisers said this should take us two months. That didn't give us any great feeling of hope. In fact, it's five and a half years later. The appraisal process itself took two of those years, just to have four people appraise 539 separate tracts of land.

The point of all that is we have to have trust in what the BLM will do. We need to know are they going to be fair, are they going to give us a fair shake. And when we get statements like that put in up front, it's very difficult to believe that either the appraisal or the review will be fair to us. So we get stuck in an impasse.

The procedural issue I think that we see is we don't know exactly how it's going to proceed. Appraisals are done and then what? It was never made very clear to us in either inholdings or some of our other exchanges that are underway what would happen.

The Director mentioned bargaining. That was never made clear to us that this is how we'll bargain. The universe of bargaining or the universe of mediation is never made clear.

In addition, there are a number of outside effects that seem to pop up that give us difficulty and make us think the process in not

fair. They have to a lot with what I call the tail wagging the dog. We look at the person that's been designated to work with and we say, OK, you're the contact person and you're the person that we'll start with.

And as we proceed to try to negotiate a process that will work, to clarify what I just mentioned, other people lower down in the chain will start tossing in extraneous things like ethical complaints against appraisers or complaints that the process itself that we just designed in order to complete this is not fair to the Federal taxpayer.

Now we're not trying to be unfair to the Federal taxpayer, but we are trying, as two sovereigns, to negotiate a process that will lead to a result. And if an appraiser is saying it's unfair to the Federal taxpayer, it gives the Director pause. And one year of a delay in our inholdings process was due to this sort of thing.

The point is we're willing to work with the BLM in whatever process we can negotiate. And the Director mentioned all of their requirements, and most of those are OK as long as we can see that this is the path. But it needs to stick there. And if the appraisers are undermining the process, then nobody knows where we're going and it just leads to a big stuckness, impasse.

The basic problem in terms of valuation is appraisers can, in fact, as the Director mentioned, come out with wildly differing values. We've seen millions of dollars in difference, or hundreds of millions of dollars, in some cases. How do we resolve that?

Mr. Secretary Babbitt has mentioned horse trading, he's mentioned being creative and solving that. That's fine with us; we're willing to be very creative. But we need to understand how the appraisal process gets into that.

The chairman mentioned the natural valuation issue. I don't want to go into that a whole lot, but I would like to mention that it is certainly—maybe Mr. Hansen will talk about it more—the appraisal industry is engaged in a big debate on how that should work out.

I think that from our perspective, the Federal Government is kind of missing the point. The chairman mentioned economics. We don't call it economics, we call it non-monetary uses.

For example, school trust lands recently in the recent year has auctioned off a number of lands and the values have ranged from \$400 to \$600 an acre up to \$4,000 an acre. These are people that just want to own the land. They have no water, no power. All they want to do is own the land and basically leave it be. This is a market, in our view. People are spending money for this kind of thing. This has gotten to be taken into account in the Federal process, and right now, that's very difficult. I think it's sort of like the Federal Government is ignoring the issue.

Congressional action, I think, is necessary for some things. For example, Congress passed something in the St. George area that the appraisers would not consider the effects of Endangered Species Act. I think that was right, and that's the sort of thing that might help unstick some problems. And I would certainly, as those come up, ask the Congress to consider that.

My own belief is becoming that appraisals, the detailed appraisal process is very difficult in large exchanges like we're engaged in.

We have our inholdings of 539 tracts. We have a new national monument; we'll have 337 tracts in there. It simply becomes too large and too unwieldy.

Some way to collect issues or collect tracts into groups is necessary here and it may take the Congress to help us do that. In fact, what we think is better is in 1996, there was an Arkansas Oklahoma Exchange Act passed. Evidence of value was basically presented up here in the Congress and Congress directed that this thing happen. For large exchanges, I am becoming more and more convinced that may be the way to have it proceed.

With that, Mr. Chairman, I will quit.

[The prepared statement of Mr. Harja may be found at end of hearing.]

Mr. HANSEN. Thank you, Mr. Harja. Commissioner Alan Gardner, County Commissioner of Washington County, Utah. If you will you pull that mike up to you, Commissioner, I would appreciate it, and we will turn the time to you, sir.

**STATEMENT OF ALAN GARDNER, COUNTY COMMISSIONER,
WASHINGTON COUNTY, UTAH**

Mr. GARDNER. Thank you. And I would like to echo a lot of John's comments. My name is Alan Gardner and I live in Washington County, Utah, where I presently serve as a County Commissioner. My family owns property in an area designated as habitat for the Desert Tortoise. And for the last 8 years, we've been involved in the process of establishing a habitat conservation plan within Washington County under the Endangered Species Act.

And I do appreciate the opportunity to say a few words about the inappropriate way we have been dealt with property holders in the HCP. We indicated initially to the BLM and the Fish and Wildlife Service that we liked the property that we had, but we would be willing to accommodate the creation of the HCP by trading our property, along with others in the area, for BLM property of like value.

We are one of 35 other different owners of 6,803 acres of private property, and that doesn't include any school trust lands, that was to be included in this Desert Tortoise HCP that encompasses about 65 square miles.

Because of the suggested devaluation of private property by Mr. Jack McDonald of the State BLM office, it took intense negotiations that lasted almost a year between BLM, Fish and Wildlife, the Justice Department, Washington County, and the private landowners to finally come to an agreement as to how value was to be determined.

And there was a preliminary estimate of value established by an accepted appraiser, and this appraiser was to be selected by the private property holders from an approved list of appraisers furnished by the BLM. This estimate was then to be reviewed by Mr. Don Duskin, BLM's chief appraiser for Oregon and Washington, and the preliminary estimate was then to be upgraded to a final appraisal prior to completing an exchange. Neither the State BLM office or any of its contract appraisers were to be involved in any of this process.

Everything was moving along nicely until Mr. McDonald of the State Office of Appraisers did not like the value of the property and, contrary to the agreement, sent down his own appraiser, Mr. Paul Meiling, who determined that since our property was tortoise habitat, it was only of token value and appraised it at less than 15 percent of the preliminary value estimate.

This devaluation of our property is a classic example of green-collar crime. Net gains stolen by the government would have been over \$1.5 million for my family. By this breach of agreement by BLM and the subsequent devaluation, all the HCP property trades came to a screeching halt.

Almost a year later, we once again agreed to proceed under a bargaining agreement with a team appointed by the BLM. We came to a bargain value, and in so doing conceded to give up \$1,000 an acre or \$239,000 which would have been the cost of doing a Section 10 permit on our property if we were to develop it ourselves.

We also had to pacify Fish and Wildlife Service by agreeing to a fencing cost that came to another \$63,360 for a total of \$302,360 in mitigation costs.

BLM agreed that since our value was frozen at the March 20, 1996 date, whatever property we acquired from the BLM would be valued at that same date. Coming up with a value for like property to trade has been just as frustrating as the first part of the trade.

After disposal property by BLM had been identified, we selected an appraiser from the BLM list. His appraisal was reviewed and accepted by Mr. John Widdoss of BLM, but was eventually rejected by Washington. We selected a different appraiser from their approved list and his work was likewise rejected.

So once again, BLM contracted their own appraiser and another appraisal has been completed on the trade property. It seems that they have the ability to keep requesting appraisals until the numbers satisfy them, with no consideration given to the rights of the private property holders.

Another area of concern is that even though the private property holders in the HCP were not anxious to exchange their property, but were willing to do so to accommodate the proposed HCP, they were still required to bear the cost of the appraisals and surveys of the lands they were trading for.

A final concern is the complication and expense that comes about because of the historical and archeological sites. The mitigation costs were allowed to devalue our property, but in the case of the trade properties, they can become almost insurmountable expense that is added to the price. Why should the private property holder get deducted on one side and charged on the other? It appears to be a double whammy.

Those mitigation costs should be subtracted from the value of the property trades.

In the case of the Washington County Water Conservancy District, those costs, including the clearance costs, have come to almost \$800,000. And I might note in two months of working on the archeological clearances, for that money they have found one arrowhead and a bunch of charcoal.

The appraisal of other private property within the HCP has improved since most recent legislation has helped to clarify the value of habitant land in Washington County. Also, the Utah State Director of BLM, Mr. Bill Lamb, has assigned more local BLM personnel to assist in land exchanges. Mr. Cavanaugh from Washington has been to St. George several times to try to expedite this process, which we appreciate very much. But this process is still trying.

I have a few suggestions that I would like to offer. Somehow the decisions need to be made on a more local basis with enough staff in the local office to accommodate it, and reasonable appraisers in the State office to back up. The time to accomplish the trade needs to be greatly reduced. There has to be recognition of fair market value without the presence of an endangered species considered.

Mitigation costs for archeological sites should be deducted from the appraised value if they are going to be paid by the new owner. And there should be a limit to the number of appraisals and reviews that can be done on any one piece of property.

Thank you very much.

[The prepared statement of Mr. Gardner may be found at end of hearing.]

Mr. HANSEN. Thank you, Mr. Gardner. Mr. Hanson from Hanson Appraisal Company, we turn the time to you, sir.

Mr. WOODWARD HANSON. Yes, sir. I'd first like to thank Congressman Goss for providing the introduction and thank you, sir, for giving me an invitation and an opportunity to appear before this Subcommittee.

I also ask that you please include my full written testimony, along with my supplemental summary of today's oral testimony into the record.

Mr. HANSEN. Without objection, all of the full testimony will be included in the record.

Mr. WOODWARD HANSON. Yes, sir. Thank you.

STATEMENT OF WOODWARD S. HANSON, HANSON APPRAISAL COMPANY, INC.

Mr. WOODWARD HANSON. First, what I'd like to do is begin by identifying what the appraisal industry perceives is the problem. As 1998 Vice President of the Appraisal Institute and an MAI member with 20,000 members nationwide, we have dealt with this problem again and again.

We believe that the valuation of public lands, balancing preservation and development, is not an economic issue. It is a social, cultural, political issue, and it requires a political solution. Others agree. Recently, an article was published in the National Resources Law Center Review from the University of Colorado, right on point with this in that regard.

Currently, there is a fundamental disagreement over the elements of value for public and natural lands. The problem has led to wide ranges of value estimates for public lands and increased delays in land transactions.

I know that most of you are familiar with the Dell Webb land transaction involving 4,700 acres of public lands located south of Las Vegas, Nevada. But let me take a few moments to give you

some highlights of this exchange with respect to the appraisal issues.

From our understanding of our land swap, it was well-documented that the case illustrates large deviations in the land value estimates and an extended time period to complete the land transaction process.

Regarding the land value estimates, value estimates ranging from \$9,000 per acre to \$10,600 per acre were first obtained by BLM, whereas third-party intervenors have appraised the property at \$36,000 per acre, representing a difference of almost \$12 million. Shocking as this may be, this is not an isolated incident.

In addition, the complexity of the appraisal problem and the possibility and potential of third-party intervention and lack of an effective public policy to address the valuation involved drags transactions like this on for years without resolutions.

And part of the complexity of these types of appraisal assignments is you're dealing with properties in transitionary locations that have other issues such as comprehensive plan amendments, zoning changes, infrastructural extension, offsite liabilities, et cetera.

The solution: I'm here to offer what I believe is the pathway to a solution. Congress needs to make a real commitment to better define its public policy relating to the valuation of public lands.

Congress also needs to establish clear priorities for the use and development of public lands and natural resources. The appraisal community has already begun working to solve the problem. There is an active debate within the appraisal industry on the issue of the valuation of public lands.

The Appraisal Institute has organized a series of forums and participated in national debates on these issues over the last several years. We have concluded that we cannot solve this problem alone.

This must be a joint effort with Congress and the administration. Because the valuation of public land, balancing preservation and development is not an economic issue, but is a social, cultural, and political issue, we need a political solution. And we appeal to you today to help us find one.

Thank you for your time.

[The prepared statement of Mr. Hanson may be found at end of hearing.]

Mr. HANSEN. Thank you, Mr. Hanson. We appreciate your comments.

We'll now turn the time to Mr. Tom Glass, Western Land Group. Mr. Glass, the time is yours, sir.

STATEMENT OF THOMAS R. H. GLASS, WESTERN LAND GROUP INC.

Mr. GLASS. Thank you, Mr. Chairman, for the opportunity to testify today. My name is Tom Glass and I'm a principal in Western Land Group, a national public lands consulting firm headquartered in Denver.

Thank you again for your sponsorship of FLEFA and your ongoing interests in land exchanges as evidenced by your holding this hearing today. It's very encouraging to us as a small business to

have policymakers such as you striving to improve the land exchange process.

Also, Mr. Chairman, thank you for your sponsorship of the Snow Basin Land Exchange legislation. We are working with Mr. Gray Reynolds and the Snow Basin folks as we work to try to resolve some very thorny appraisal issues flowing from your legislation, and we'll keep you posted in that regard.

Since our formation in 1981, Western Land Group has assisted in the consummation of more than 100 Federal land exchanges, utilizing both legislative and administrative processes. We continue to help clients facilitate dozens of new cases involving lands ranging from tens of thousands of acres to less than one acre.

Working in partnership with BLM and the other public land management agencies throughout the West, Western Land Group achieved fundamental public and private land management objectives. These include, but are certainly not limited to, protecting municipal watersheds; placing key threatened wetlands and wildlife habitat in the public domain; eliminating private inholdings in designated wilderness areas; helping municipalities and counties acquire lands for administrative purposes and open space; facilitating responsible community growth; and improving hunting, fishing, and recreational access to Federal land.

Until recently, current law, regulation, and policy has worked well. The Federal Land Exchange Facilitation Act, which we helped to develop along with you and other members of this Subcommittee, has made some significant improvements to the process.

We are, however, concerned about several recent developments in BLM's land exchange process. First, we're concerned about the newly instituted directive which relinquishes a BLM State Director's authority to approve exchanges if the value of public lands in the exchange is more than \$500,000. The directive requires that Washington, DC staff approve exchanges based upon an additional level of feasibility, analyses, and issues papers.

Second, we are also concerned about the increased popularity of competitive exchanges, or BLM's intent to auction unwanted Federal lands to the highest bidder. As a steward of the land, BLM has a responsibility to get the best deal for the public when disposing of land.

The best deal means more than just money, Mr. Chairman. Exchanges should be driven not only by BLM priorities, but also by community priorities, including development planning, infrastructure needs, open space needs, access needs and the like. To auction a parcel could result in an outsider who has no interest in the community's needs acquiring the parcel simply because he or she was willing to pay the most.

And while we certainly have a lot to agree with with Commissioner Gardner and his very unfortunate situation, with regards to the appraisal process, Western Land Group has generally been pleased with the arbitration provisions.

Prior to FLEFA, there was no arbitration and many exchange valuations were decided entirely by the BLM or the Forest Service. They were both a principal in the transaction, and also the last word in the transaction.

FLEFA' arbitration provision has been a helpful tool to resolving disputes involving value.

We also suggest that the amount allowable under Section 206(h)(1)(A) of FLPMA be increased from \$150,000 to \$500,000 to allow utilization statements of approximate equal value, rather than full appraisals in appropriate situations. This would help reduce the backlog of appraisals and appraisal reviews.

On balance, Western Land Group believes that BLM's exchange process has worked fairly well. However, we do have two recommendations. First, the Federal Land Policy and Management Act requires that land be exchanged for exact equal value. Otherwise, cash equalization payments must be made. FLEFA permits certain waivers of this requirement.

However, the BLM often doesn't have access to the cash equalization dollars without coming back to the Congress to get specific appropriations. We recommend that Section 203 of FLPMA be amended so a portion of the moneys received by the Secretary of Interior from the sale of public lands be placed in a special fund for cash equalization purposes.

And finally, while we're a great supporter of well-crafted and well-managed exchanges, we recognize that exchanges are not a panacea and can't entirely substitute for purchases under the Land and Water Conservation Fund.

Thank you for this opportunity to speak to you today, Mr. Chairman.

[The prepared statement of Mr. Glass may be found at end of hearing.]

Mr. HANSEN. Thank you, Mr. Glass, for your excellent testimony. The gentleman from American Samoa.

Mr. FALEOMAVEGA. Mr. Chairman, thank you. And I want to offer my personal welcome to Mr. Shea, the Director of the Bureau of Land Management for his presence and also our friends from Utah.

I would be remiss, Mr. Chairman, if I do not offer my congratulations to you, and as an alumnus of the University of Utah and the Mighty Utes, and their capacity to be among the top four now in the NCAA competition. I don't know if you're aware, Mr. Chairman, but the Ute tribe from Utah borrowed this word Utah from us, because the word Utah in my language means mountains. And I understand it's exactly the same meaning among the Ute tribe, the word Utah. So you actually borrowed this word from us, so you might want to carry that on to the members of the Ute tribe in the State of Utah.

Mr. Shea, I appreciate your testimony. I do have some questions if you could help us with it. I notice that we have basically two Federal statutes and a series of regulations that were instituted, I think, in 1993: the 1976 law and the 1988 law. And then we've got these regulations that were instituted in 1993.

Do we need to take any steps currently as far as the Congress is concerned to make improvements on these statutes, or maybe we just need to wipe them all out and start with first base again. Or what do you suggest that we ought to do to make improvements in the process?

Mr. SHEA. You can go back to 1785 when Thomas Jefferson and James Madison started the cadastral survey. Because the United States was faced with the prospect of frontier lands and how to manage them, there have been, almost on a decadal basis, different political/economic problems associated with available public lands. And each generation, indeed each Congress, has probably thought of a different way of solving the problem.

At the end of the day, it strikes me, as the Director of the BLM, what I need to do in terms of my stewardship is to facilitate an orderly process that will ensure the taxpayers receive the value for their lands while, at the same time, making the necessary accommodations at the local level.

There's always going to be a give and take on that. You could take an arithmetic approach of two plus two is four and that would solve the problem at the local level. But as you move up the chain of government to county and State and Federal, I think you move rapidly into algebra and into calculus where the variables can have an enormously different impact, depending on which statute or which regulation you're doing.

I have before me the Federal Land Acquisition Act or regulations, Uniform Appraisal Standards, and you can see that it's not terribly thick, but it's very complicated to read. And then I have the private sector's appraisal standards, a little bit thicker, and actually a little bit more complicated.

So I don't think there is a single solution to this. I liked the suggestion that Mr. Glass made that BLM, as other Federal agencies, be empowered to retain some of the proceeds of exchanges for cash equalization purposes under a special fund. I think that has some merit.

But I think to go in and throw everything out and invent whole cloth again is simply going to delay the process further.

Mr. FALCOMA. What is your opinion of Mr. Hanson's thinking that the whole situation that we're involved in here is really not an economic issue, but a political one, and that maybe it requires a political solution?

Mr. SHEA. Well, I do think Congress ultimately has the authority through legislation to do what they will with the property and be held accountable in the election process. That is the ultimate solution. I mentioned in my opening statement that we transact 50 to 60 land exchanges a year involving anywhere from 150,000 to 300,000 acres. Many of those transactions are small, isolated pieces that we need, in my judgment, to expedite so that you don't delay solving problems at the local level.

But once you get into rapidly developing areas—Las Vegas is a good example—and the prices are literally going through the ceiling, I think we have an obligation to make sure that the taxpayers are getting a just return on their property.

Mr. FALCOMA. I noticed in your statement you mentioned that you have only approved about 70 or 80 land exchanges last year. How many do we do on an annual basis? I mean, how many applications are submitted as a whole?

Mr. SHEA. I couldn't tell you how many. There is no submission. What happens, if you'll see on the chart—

Mr. FALCOMA. Some are ongoing, I know that. Right.

Mr. SHEA. There's an exchange proposal and it's usually made to the district manager or the State director. And I can get for you a guesstimate there, because sometimes that might be as informal as somebody walking in the district manager's office and saying you know that 35 acres over in the north quarter, we'd like to see if we couldn't do some exchange.

Mr. FALEOMAVAEGA. Yes, I think it would be helpful for the record if you could submit that for the record, if it's all right, Mr. Chairman.

Mr. SHEA. I will do that.

The BLM completes an average of 60 exchanges annually. We estimate twice that many are proposed each year, but for one reason or another are not pursued. The usual reason for not getting beyond the proposal is one of the parties in the pre-negotiations decides not to pursue the proposal further.

Mr. FALEOMAVAEGA. I saw the chart here. And I am sure the Chairman and I feel sometimes too, whenever we talk about regulations, there is a chilling factor that comes in. And when you say about the complexity, and then when you add the regulations to the laws, it just makes it even more complex. Am I wrong on this? I look at the chart. This is what we go through by doing a land exchange process.

Mr. SHEA. Right. But again, I would point out that where there are two willing parties, that process can move very expeditiously. Where the problem arises is when the public, as is their right, reviews the proposed exchange and raises substantive questions as to value, as to endangered species, the system, as it's presently designed and as I believe has many safeguards to it, does slow the process down. And it does involve oftentimes a negotiation back and forth.

I was interested with Commissioner Gardner's comment that he was unaware that there was a possibility of negotiation because it's clearly laid out in the regulations that I cited in my opening testimony that you can have negotiations to resolve disputes.

Mr. FALEOMAVAEGA. How does a national institute of appraisers or national foundation or association really come out with a very accurate assessment of what an appraised value of a property, because it seems in hearing from our friends here, that's where the problem lies. It's such a subjective—

Mr. SHEA. I think you put it quite well in your opening statement when you said that the appraisal is an art form, not a science. And just as in science, we could verify and duplicate something. I think I could take two appraisers out on the same parcel of land and in some instances, come up with widely disparate values. And that's where I think the chairman's observation that, in many ways, it's a political question then as to what would be a fair exchange for the taxpayers to accept in some instances.

Mr. FALEOMAVAEGA. And I think that's where the problem is. You don't think that we ought to do any changes in the current law to make it more effective?

Mr. SHEA. Well, like I said, I like the idea of having some funds set aside so that we could do equalizations more expeditiously than having to wait for a Congressional cycle for approval of additional funds to have those equalizations.

The chairman and I have discussed the concept of a land bank, but again, that is a question for Congress to address. We certainly will be working with different national institutes and different Members of Congress to see if there aren't some things we could do. I'm not saying we have a completely defensible system. But I'm just saying that if we were to remove it in its entirety, we would be, I think, in a very difficult position.

Mr. FALCOMA. And it's just as difficult even to establish a national standard for even an appraisal process.

Mr. SHEA. Well, again, I think we have a very good establishment in the Uniform Appraisal Standards for Federal Land Acquisitions. Again, it's not something that my 6th grade son could sit down and read and understand, but it is, with the people who practice quite often, a very good guidance about what they need to do to facilitate these exchanges.

Mr. FALCOMA. Thank you, Mr. Chairman.

Mr. HANSEN. Mr. Hanson, did you want to comment on some of this statement?

Mr. WOODWARD HANSEN. Yes, sir, I would. With almost 20 years of field experience as an appraiser who focuses on eminent domain litigation valuation, I am often asked on the witness stand, Mr. Hanson, isn't it true that appraising is somewhat more of an art than it is a science. And my answer has always been, well, I guess that all depends on who you hire.

I would strongly suggest that the competency provision of USPAP takes care of that at the Federal level, and segueing into the comments made earlier by the Director, I looked closely at the BLM 43 CFR 2200, and their standards exceed industry standards. I can give you examples, but I won't do that unless I'm asked to.

You have the Uniform Standards of Professional Appraisal Practice—we call it USPAP—which is created by the Appraisal Standards Board of the Appraisal Foundation as a result of the S&L crises of the 80's. Then you have the Uniform Land Acquisition Policy of the Interagency Office of 1992, and then you have CFR 2200. So you have layers and layers of standards and supplemental standards.

But what I really think I can bring to this discussion as a result of my background in eminent domain and the case law that deals directly with these topics are some examples. And before I begin, I would remind you that the BLM land transaction process is not an eminent domain model; it's a voluntary transaction model.

But what I hear are people complaining about scope of project influences. That's a Federal rule, State rule. For example, if the government designates a property as a protected ecological habitat and then goes in and buys it and alleges that its value has diminished as a result of its own policy, then that by law is something that you should disregard. The scope of project rule says as an expert, as an appraiser, you should disregard any decrease or increase in value caused by the project, solely by the project after its announcement.

I keep hearing issues that relate to, at least, Mr. Gardner's concern of condemnation blight. Their property was affected by issues of blight caused by public policy, and therefore, they couldn't achieve just compensation from their viewpoint.

I hear earlier testimony about why can't sales of small tracts of land be used to value large tracts of land. Well, folks, that was the S&L crisis. We've been through that once. Five-acre, 10-acre comps are not relevant data points to be used in the valuation of 600, 1200 acre tracts without doing a discounted cash-flow model, which includes a lot of variables like absorption and retail pricing, et cetera.

Otherwise, you are going to get a number that's called gross retail sales potential, not market value, and we've already fought that battle in the 80's down there in Texas. So I would caution you, don't go in that direction because that's not where you want to do.

And I would comment finally that the land valuation process, particularly in relation to the transaction or swap, requires a tremendous amount of due diligence on both parties. And particularly with regards to the issue of the noneconomic components of property.

The Federal agencies have clearly opined that they will not compensate for noneconomic elements in property valuation. And until Congress can take a strong initiative on this particular issue, we are going to continue to face this stumbling block.

Mr. HANSEN. Thank you very much. Probably one of the most complicated issues that we ever face around here is this one. We've talked about it; every year for 18 years, we've had a hearing on this, and it becomes very frustrating. I could write volumes about the frustrations that people have, with the BLM, especially the Forest Service, Reclamation, you name it, Park Service.

General principles, I would like to get a lot of inholdings out of parks. I'd like to get some inholdings out of BLM ground. It just makes good public policy to do that. I always worry whether the Democrats are in control down on Pennsylvania Avenue or the Republicans are in control. It comes into a fudge factory, in a way. And people become very defensive. Basically, these laws come from us and I have to say that sometimes the interpretation of the laws leave me a little cold, but still that does happen from time to time.

So I would hope that people wouldn't become defensive.

But you know, I look at things like Commissioner Gardner brought up, and I've represented in my 18 years in Congress, 16 years I've represented Washington County, and I cannot believe the problems that have been created down there on this thing of the 1973 Endangered Species Act.

Mr. Doyle was in to see me the other day. I could name 20 people from that area that are super-frustrated, and I share some of those things. Somewhere—that's what I said earlier, and this is the cop-out argument, is fine, as Mr. Glass pointed out, when we get to a certain point we say fine, we'll just put it in legislation.

He was talking about a land exchange on Snow Basin. What that was about is Jack Ward Thomas, the head of the Forest Service at the time, came in and sat in my room and said, "Mr. Chairman, there is no way on earth I can make this land exchange and jump through all those hoops in time for the 2002 Winter Games and Utah is going to look like a bunch of dummies. Therefore, would you do it by legislation." And we did.

Even at that, it was a frustrating experience. So my first question to him was, was there any opposition to this. He said, oh, none

whatsoever. Boy, was he naive. There was even a great movie star lobbying in front of my one office saying how bad it was even though he had his own. But I won't go into that.

Anyway, carrying that on, I would have to respectfully disagree with the Director, and I'm not sure I am disagreeing with you at all, but I think there are some places we can streamline this. Just look over at that chart over there. It's fraught with problems, in a way. Every time there's another person involved, then we get personalities involved and they have their own feelings in it.

Mr. Gardner points out, and I think of half the people in Washington County and Iron County. I remember when our mutual friend, Mr. Babbitt went into Iron County and said because we have found the prairie dog in there, your ground is now worth \$600 an acre. Well, that didn't sit too well with the Governor of the State or myself as Congressman from that area. This is ground some of those people have owned for many years.

So I'm sure that Alan Gardner sits there, he and family, taking him out of his role as County Commissioner, but put him in his role as a landowner. And all of a sudden—they've owned that ground for generations. Now, all of a sudden in 1973, Congress comes along and says wow, we just found this little thing called the Desert Tortoise.

Of course, some of us debate where it's very healthy in Washington County, but very sick in the Mojave area, why we try to keep both sides. But I won't get into a Fish and Wildlife debate here. But why is it now that Mr. Gardner's ground is worth less money than that? He didn't do this. It had nothing to do with him.

And Director Shea, in my humble opinion, that constitutes a taking. They took the man's ground that was worth x amount of dollars, whether it be Mr. Gardner, Mr. Doyle, a hundred of them down there, who fall in that category.

Another thing that always bothers me is every time somebody calls, they find an archeological site on it. I personally have gone down, and I go down there about every other month, and tried to find some of these archeological sites. I wish whoever finds those would go with me one of these days and point it out to me. Or somebody prayed there at one time. Oh, I don't know who it was, whether it was those early Mormon pioneers or whether it was an Indian tribe or something. Then we constitute a religious issue.

Now someone's got to cut through this stuff. Now I don't mean to take anybody on here, but I really think we've created ourselves just a ton of problems on how to handle some of these issues that we have.

And then, of course, the folks who work for you, Mr. Shea, we always like to criticize them. That's part of the fun of this job, you know, is taking on those areas, because we get it every day from the public who feels it's our fault. But somehow I honestly think we should come up with some recommendations to do that.

Did you want to go again? I've got a few more things to say, but I'll turn to you and you can take the second round, if you like.

Mr. FALEOMAVEGA. Just one a half questions, Mr. Chairman, if it's all right. I wanted to get back to Mr. Shea again, if it's all right.

And I guess in a roundabout way in your statement, Mr. Shea, you've given us what steps, as the chart also indicates, are taken to do the land exchange process. Does the Bureau have some kind of a division of categorizations and say that this is from a small landowner that wants to do a land exchange to a corporate, to a State, and to a county so that the process doesn't get clogged up?

I hear from Mr. Harja even the small landowners get bogged up with this whole process, and I'm just curious why couldn't it be expedited for the situation of an individual landowner as compared, I suppose, to a State-owned land.

Mr. SHEA. On December 23, 1997, we issued a memorandum which allowed for a second review by a State director or by the national office. The purpose of issuing that was to try to do exactly what you are asking about, and that is separate out those small noncontroversial exchanges.

Let me give you an example. In central Utah, there was an 80-acre parcel that had a particular plant that was found nowhere else in the world. So if we had allowed an expedited exchange, it would have been entirely possible for that parcel to have been exchanged without anybody making an assessment of the scientific value under the Endangered Species Act of that plant.

So what we are encouraging our people to do at the local level is to come up with those exchanges that can be done as expeditiously as possible. And as I said, on this chart, it flows very quickly if there is no controversy. Now, unfortunately, we live in a time of great contentiousness, particularly when it comes to land questions. And that's where it has bogged down.

Now, Congress may well come along, either with specific legislation authorizing exchanges or with a streamlining of the process. That's your authority. I would probably be here as the Director arguing against making it too efficient because I think some of the abuses that were mentioned in the 80's would arise again very quickly. And one of the things that this process, I believe, has done is avoided the taxpayers' losing on the exchanges.

Mr. FALCOMA. Boy, that really—you say that this one parcel of land had one plant in there that is the most rarest in the world.

Mr. SHEA. Well, there was no other place. The reason I'm familiar with it was the Nature Conservancy eventually worked out an exchange and preserved it through an exchange process that I think took about two and a half years.

Mr. FALCOMA. So in every procedure whether it be through individual, corporate, county, State, we've got the Endangered Species, you have the scientific community that has to go in there and make a thorough check of the—

Mr. SHEA. They have to make that assessment, yes.

Mr. FALCOMA. And how long does it take?

Mr. SHEA. Again, it can take a very long time, or it can be done quickly. That's one of the areas where our inventorying the flora and fauna on public lands would be of assistance. We are creating an Automated Land Mineral Records System, ALMRS, which will allow us to retain in digital form information such as that. So I think in the future that process can be done more expeditiously.

But right now we don't have those assessments in many areas and therefore, they have to be done as the proposal was done.

The average is 18 months to complete a land exchange. The inventory and clearance work required by regulation is the most time consuming portion of the process. The negotiations and agreement on land value can also add to the length of the transaction.

Mr. FALEOMAVAEGA. I suppose this adds to my sense of frustration right now. I've been following this issue for the past 7 years in trying to get a better process of giving Federal recognition to some 100 Indian tribes that are still not federally recognized. And some of these tribes now, over 100 years, they are still not considered Indians, which in my mind is an insult and I resent it very much the current procedure, the way it's done.

And I looked at the Indian tribes almost like Mr. Gardner here and the others, going to such a tremendous amount of money and then all to no avail. I mean, just without any real sense of success in going through the process.

I am trying to get in my mind, Mr. Shea, what in your proposed procedure with these regulations, what do you see now as the average time factor that will take really for a land exchange to take place?

Mr. SHEA. I'd have to, if I may, give you an answer on the record written for that, because it would have to be just a guesstimate. But there have been some exchanges that have been accomplished in less than a year, but most of them take around 18 months or more.

Mr. FALEOMAVAEGA. There was discussion also about the public interest value. I am a little confused on that. Can you shed some light on this, the public interest value of the land exchange, I suppose.

Mr. SHEA. I haven't used the term public interest value. What I have been using as a term is the fiduciary duty I feel to the taxpayers, make sure that land that they've, in a sense, acquired over the years is not turned around and then an exchange value of x is given to it at the exchange date, and then four days later, it becomes four times x .

Mr. FALEOMAVAEGA. I suppose in layman's terms, what I would look at the public interest value meaning is that making sure that the public's property is protected by the government, that you don't get shortchanged. And I wondered, maybe Mr. Hanson can help me out if there is, if we could properly use the term.

Mr. WOODWARD HANSON. Sure, yes, sir. The term public interest value has not been well-defined in appraisal literature. It's generally recognized as the increment over market value that a property may command, as a result of special and unique cultural, ecological features.

Mr. FALEOMAVAEGA. Mr. Webb, you cited the Dell Webb land exchange as an example in Las Vegas. Would you say that public interest value comes into play with that.

Mr. WOODWARD HANSON. I am not familiar with public interest value having any context to the Dell Webb exchange, sir. It was more an issue of a property—I think you were on to something that I think is brilliant, is there needs to be a recategorization of these lands.

One obvious set are BLM lands that are located in urban fringe areas need much different due diligence than do lands that are in remote rural areas. If I have a piece of property that's on the edge of Las Vegas that's growing at 8 percent a year—I was just there working on the CalNev Pipeline, and I see Henderson, Nevada busting at the seams and I got 4,700 acres next to it, I'm going to take a real darn close look at what the value of that is.

I know my institutional clients would make me do that, and I would certainly expect the government to do the same thing on behalf of the American people.

Mr. FALCOMA. Well, if I knew that a Federal highway was going to come there 10 years from now, that you want to purchase all the land there that belongs to BLM, knowing that something very good is going to come through there. So public interest value becomes less valued in the public interest. I mean, the public's interest in terms of the property owned by the public just was not taken very fairly, I guess.

Well, now that I'm more confused than ever, Mr. Chairman, I just wanted to ask in terms of the examples you cited, Mr. Chairman, I can appreciate the problems that sometimes we have. And I think, Mr. Shea, I don't want to put the onus in saying that it's the bureaucratic mess that is causing this whole problem. But I guess it comes right back to us here in the Congress. And if it's us, we want to fix it. But we don't want to continue spinning our wheels and continuing having hearings like this and not solve the problem for the next 10 years.

Mr. SHEA. One of the things I would suggest is that there is no single solution. However, your comments and questions have led me to a concept that I would posit for the Committee's consideration. When we do move forward to form this national exchange team, it would be entirely possible for them to prepare an annual report which we would give to you so that there would be an approximate source of data about exchanges that the Congress could review, and then in its wisdom decide whether or not something legislatively needed to be done.

Mr. FALCOMA. I certainly have no objection to that, Mr. Chairman, and I hope that maybe that can be done. But at the same time, we want to encourage input from our friends at the State and local levels so that if they're frustrated, we want to hear about it. And I think our good friends from Utah are very, very frustrated with the current process. At least, that's what I gather. Mr. Harja.

Mr. HARJA. Yes, if I could, to further your confusion about public interest value, if I could. We were discussing, the Director and Mr. Hanson were discussing the changing face of the urban areas and difficulties there.

What I was trying to suggest is that this is also occurring in the rural areas, in the areas that are the parks and the scenery and all the pretty stuff that we all want to preserve, and the Endangered Species Act animals.

Mr. Hanson mentioned a second ago that he called it the increment above market value. I think the debate from our view is, is in fact that market value or not. And in fact, what I was trying

to say with my examples of value is people are buying these lands for that purpose, and we call that economics, supply and demand.

That is the debate. And I agree with Mr. Hanson that if the Congress could assist us with that debate, help the appraisers out and help us understand, that would be of great value.

Mr. FALEOMAVEGA. Thank you, Mr. Chairman.

Mr. HANSEN. Thank you. Mr. Harja, I hope everyone realizes, his responsibility is to do some land exchanges for the State of Utah for the children as far as trust lands. Some of our other States in the West do a much better job than we do. I think we dropped the ball maybe 20 years ago when New Mexico and others got on the ball and did something.

We have an awful lot of children there and it costs an awful lot of money to take care of their education. And Congress wisely put some of that in trust lands, but we don't have the best lands.

How is your exchange coming that we have talked about ad nauseam for the last 10 years?

Mr. HARJA. With great anticipation, we came to Congress in 1992 and 1993 asking for a process that would help us exchange those lands out of the National Parks, Forests, and Indian Reservations and acquire some properties that were about to be developed, and we could generate the money to put in the permanent fund to spend on education.

The Congress at that time was not willing to look at our estimations of value, our sense that it is approximately equivalent. And it chose instead to choose a process of appraisal. And Mr. Ventos sat here and said we would like every nickel to be accounted for.

Well, it made some sense to us. Maybe in my naive atmosphere at the time, I said we can do this and appraisals shouldn't take too long. Instead, as I mentioned, as we started into it, it was a sense of prejudice, a sense of these lands are out there only to hold the earth together, as I recall was the statement. And we started to feel uncomfortable.

We negotiated a process where the appraisal industry, four highly qualified people that we jointly chose, would work on this problem. And I have to say, I think those four felt overwhelmed by 500-and-some-odd tracts scattered all over the State, and these are 640's, these are not 10-acre things. They are rural, they are remote, they have minerals.

They had to examine 20 different minerals: coal, alabaster, ad nauseam. We had to hire not only four appraisers and a research assistant to go out and look at all the comparables. We had to hire a mineral appraiser because we had 175 tracts where we only owned the minerals. And he had to hire 15 different experts on minerals. That process alone cost us about \$1.5 million.

And we're nowhere near completing it because, despite our efforts, this question of what is the market for rural areas came up and the—I believe the USPAP allows for these sort of things to be considered, that Mr. Shea mentioned. The Federal book here, this yellow book, does not allow that. And to us, that's simply ignoring a common issue.

So we're stuck right now. We had to finally—the State had to sue and we're now in negotiations with the Department of Justice to

try to conclude this. And right now, assuming all goes well for us in courts, we're looking at probably 10 years from start to finish to get an exchange of 500-and-some-odd parcels done. I am hopeful we can simply mediate that and be done soon.

Mr. HANSEN. Mediate that and be done soon.

Mr. HARJA. Mediate the dispute.

Mr. HANSEN. Soon? How long do you say you've been on it?

Mr. HARJA. I used to estimate days and months. Now I don't do that anymore. I just say soon.

Mr. HANSEN. If Roll Call was here, they'd put that in as the Joke of the Day. But thank you for your good work, though. I know Mr. Harja works very diligently on that.

Mr. HARJA. We intend to conclude this. We intend to get this done. It's in our best interest. It is just frustrating that the process turned out to be so large—

Mr. HANSEN. Well, you've got the monument in there. Of course, the monument is almost nothing to a lot of us, even though the delegation takes the point that it's reduced the WSAs down to 2.8, rather than 3.2. That doesn't really matter much either way. But I'd sure like to see some of that resolved, and I think most of the citizens in the State of Utah would.

Every time they pick up their property tax notice and see how much their mill levy goes to education when we should have taken the vision of a very great Governor by the name of Scott Matheson and gone ahead and done that some time ago. I wish we had blocked that out. We'd have most of this out of our hair when he came up with that Project BOLD which should have been done years before.

Mr. Glass, you had a comment.

Mr. GLASS. Thank you, Mr. Chairman. Just to clarify a couple of things. I'm not an apologist for the exchange process at all. I know that there are certainly some subjective elements to appraisals, but because of FLEFA, the agencies are no longer arbitrary, and that's because of the arbitration provision.

We've been through one arbitration. Out of over 100 land exchanges, we've taken one case to arbitration. In that case, the government lost big. They were accused of being arbitrary and capricious and the arbitrator determined such.

One of the main problems with completing exchanges, Mr. Chairman, is that the staff reviewers often lack the self-confidence to review people's work, like Mr. Hanson here, and approve it without a lot of squirming and teeth gnashing and fingernail biting.

However, I want to compliment Mr. Dave Cavanaugh, the Chief Review Appraiser here in Washington, DC, for some very competent work that he did on behalf of the City of St. George in Washington County. He was instrumental in resolving some very difficult questions concerning tortoise habitat that was owned by the City of St. George.

Without Mr. Cavanaugh's intervention, I don't think we could have possibly resolved this issue, with all due respect to the State staff in Utah. I want to point out that a lot of it is self-confidence on the part of these review appraisers. Particularly, when they get into high growth areas. They are used to going out and appraising farms, then all of a sudden, they are on the edge of a real estate

boom like the one case we talked about in Las Vegas, and they are somewhat out of their bailiwick.

And if there is ever an appropriate role for Washington, short of arbitration, it is getting competent people like Mr. Cavanaugh out there to try to address some of these issues before the entire transaction falls apart.

Mr. HANSEN. Mr. Hanson, in regard to Mr. Glass's comment, as we try to somewhat streamline this and make it more efficient, one of the frustrations we find in Washington, DC is we can never find somebody who can make a decision. We are always trying—somebody is going to cover himself, and I'd better check further up. I spend most of my time working on military issues. I finally have to get to the Secretary or his Deputy or a Secretary of the Army, Navy, Air Force, Marines to get a decision. And it's a frustrating experience. And you find that all over the Federal Government.

I noticed you have MAI behind your name. Would you, for the record, tell us what that is.

Mr. WOODWARD HANSON. MAI is a professional designation that is owned by the Appraisal Institute and it stands for Member, the Appraisal Institute. What it means is as a professionally designated appraiser, we have stringent educational requirements, stringent ethics and review requirements. We have a disciplinary process. We have a comprehensive exam. We have demonstration and report writing criteria.

It means that the standards that we have set for membership into our organization greatly exceed those minimum standards that were defined by Title 11 of FIRREA during the creation of the State-certified appraiser.

Mr. HANSEN. Are you of the opinion that the Federal Government and those who handle public lands have the qualifications to do it?

Mr. WOODWARD HANSON. Sir, to be sure that I understand your question correctly, do you mean those who are currently doing the appraisals on behalf of BLM, et cetera?

Mr. HANSEN. Realizing they have a lot more going than—I mean, they are not private business people and they have a lot of considerations, do you think that they appraise the ground in the way that you would or someone from the private sector would?

Mr. WOODWARD HANSON. In my review and investigation in preparing for this hearing, I learned that BLM has a policy or history of outsourcing appraisals. And I've learned that oftentimes they use members of my organization, so to speak. So I think the policy is a good policy in that they are going to the people with the greatest experience and educational backgrounds to solve these problems.

But what I hear today are not appraisal problems that are unique. These are appraisal problems that I face every day in my business. I have institutional clients that are involved in land on the east coast of Florida next to agricultural preserves and fringe areas that need plan amendments and infrastructure extensions. And we are trained, we have the tools necessary to lead to accurate conclusions in these settings.

Mr. HANSEN. Well, what I'm getting at, and I guess this is also for the Director, is a lot of situations we have is somebody in Flor-

ida, Utah, wherever it may be, an appraiser with your qualifications does something and it's all thrown out in Washington. Case after case, this is thrown out, the other one is thrown out. Why? What criteria are they using at this level that didn't fit at that level?

Maybe the Director would rather respond to that.

Mr. SHEA. Again, I agree with Mr. Hanson. Many of the more complicated land transactions that we do we outsource to the professional who we find to be the most highly qualified. And quite frankly, it's a tension between trying to push the decisionmaking authority to the local level to allow them to make expeditious and yet just decisions, while at the same time having the opportunity in appropriate settings, to bring in the truly professional.

So I know that parties can disagree. Having been a lawyer for 23 years, I was often hired to create disputes perhaps where there were none. And we live in a society where we have that happen all too often.

But that's why I was saying in my opening comments, this is a complicated process that requires an ability to give local authority the right to make the decision, and yet, because it involves a trust obligation to the people of the United States, we need to have the most competent people like Mr. Hanson and other MAIs available to do it.

Mr. HANSEN. Is it BLM policy that the public always has access to the final approved appraisal before an exchange is completed?

Mr. SHEA. It has to have a 45-day comment or the exchange can't go forward.

Mr. HANSEN. I see. When some organization that comes in has an obvious built-in agenda which is particular to their group, but not really along with the will of the masses of people, is that taken into consideration?

Take for example, somebody who is really uptight, who has a save-the-slimy-slug type of thing. Therefore, they foul up a land exchange to save a slimy slug. The slimy slug is going to be saved over the direction of maybe 10,000 people, because of two people. Does that come into consideration?

Mr. SHEA. I guess we don't check the Fifth Amendment as to whether it's applicable to the slimy slug advocate or the ordinary citizen. That's part of the due process provisions of our Constitution.

Mr. HANSEN. But somewhere, someone has to adjudicate this and determine where is the value.

Mr. SHEA. Oh, I agree.

Mr. HANSEN. I mean, here we've got a community like Iron County, which is growing by leaps and bounds and they find two prairie dogs down there and it stops a huge amount of growth, even though people figured out how to move it safely to another spot. And yet it cost us millions of dollars to do it. Somebody's got to cut through some of this sometimes.

Mr. SHEA. Again, I think Congress, in terms of legislating standing in jurisdictional questions involving the Article 3 Powers of Adjudication, has that ability. There is an individual up in Idaho, Mr. Marvel, who has on our permit questions—this is not a land exchange question, but on permits has quite regularly been suing the

BLM and the Forest Service and we are obligated to go to court and defend the actions, which take a great deal of time and for the private permit holder, the livestock rancher or agriculturist, it's an enormous cost.

But I didn't write the Constitution and I wouldn't want somebody to say, well, if you have curly hair you get one right and if you have straight hair, you get a different right.

Mr. HANSEN. Specifically to the Spillsbury exchange, a letter was sent to the BLM by the Western Land Exchange Project, an environmental watchdog organization which initiated the fourth appraisal of this property and resulted in another delay just days before it was to be completed.

Now we've read the letter here and find nothing in it overwhelming evidence that would compel the BLM to conduct yet another appraisal. And I just wonder why it was such a big deal that the BLM responded to the Western Land Exchange Project. Does anybody want to respond to that, or am I getting too specific on something?

Mr. SHEA. I'd be happy to get something for the record. I am not familiar with that.

The BLM responds to every citizen or group that protests or comments regarding one of our decisions. We do not arbitrarily single out any comment we receive for a response. The reason we responded to the Western Land Exchange Project is they commented on the decision. We did not hold up the land exchange because of the Western Land Exchange inquiry. We needed to have an administrative record that conformed with lands being exchanged. Generally we will delay an exchange until the administrative record supports the management decision to complete the land exchange.

Mr. HANSEN. I'd appreciate it very much if you would do that.

Mr. GLASS. I had a question I wanted to ask you. You have told us that you oppose the development of a national exchange team, is that right?

Mr. GLASS. No, I did not. What I said, Mr. Chairman, was that I am concerned about the new directives of the BLM which relinquishes a State BLM Director's authority to approve exchanges where the value of the public lands to be exchanged is more than \$500,000.

Mr. HANSEN. But you mentioned response time, if my ears heard me correct.

Mr. GLASS. And one of my major concerns about this directive is its removing authority or taking authority back to Washington instead of out into the states.

Mr. HANSEN. But you think there should be a time limit, Mr. Glass.

Mr. GLASS. I would love there to be a time limit.

Mr. HANSEN. And what would you propose? Is it fair to ask that?

Mr. GLASS. The thing that causes the greatest number of delays in most exchanges is public opposition, local public opposition, similar to some of the controversy that surrounded the Snow Basin Land Exchange. And it's that public process, when the public gets actively involved, that the process does slow down.

Occasionally, there are technical issues that slow the process down. For example, surveys. If an exchange is in an unsurveyed township or there are difficult survey problems, that can really

delay an exchange, up to a year or two, given the small budgets these agencies have to go out and perform surveys.

And appraisals, for the most part, do not slow down the process unless they become contentious. And that is why the arbitration provision that you sponsored in FLEFA is so important.

If we could have some timeframes for review, I would welcome them, but I haven't called for anything specifically today.

Mr. HANSEN. Mr. Gardner, you commented in your statement about your land being appraised and appraised and appraised. How many times has it been appraised?

Mr. GARDNER. I think altogether the lands we've been involved with, we've had five different appraisals on ours and—

Mr. HANSEN. Five different appraisals?

Mr. GARDNER. Two on our private and three or four on BLM that we are trying to acquire.

Mr. HANSEN. Over what period of time?

Mr. GARDNER. Oh, probably started 4 or 5 years ago now, I don't know. I lose track, it's been so long. But from the initial prevalue estimate, that would have been in 90—we've been 2 years since we arbitrated or bargained for the agreement on our property, and so it's been at least 2 years before that when we started this process.

Mr. HANSEN. What was wrong with the five appraisals, that you had to have five appraisals?

Mr. GARDNER. Well, the first was the preliminary value estimate, and then that was supposed to be just upgraded to a regular appraisal, and BLM sent down another appraiser to do a complete new appraisal.

And that's where we ran into the problem, because he discounted the tortoise and gave us a low value. And we bargained there when we selected the BLM land to exchange for. We selected an appraiser off of their approved list who was MAI-certified—all of the appraisers have been MAI-certified. He was extremely slow getting his appraisal completed. Both us and BLM were very frustrated with the time that he took. But he worked that process through. It was accepted by Mr. Widdoss, the review appraiser for BLM out of South Dakota, and then rejected at Washington. I think Mr. Cavanaugh rejected it because of—I'm not sure the total reasons there.

Mr. HANSEN. If there's ever an illustration of a fudge factory, it's Washington County. I would do anything to get that done if I have to stick it in an appropriations bill somewhere just to get the dang thing over with. Can't we get these things squared away somehow?

I'd like somebody to send me a list of what's holding things up in Washington County. Every time I turn around, there's another hang-up on that thing. It's just gone on and on.

Do you want to comment on that, Mr. Hanson?

Mr. WOODWARD HANSON. Yes, sir. You know, what I keep hearing over and over again is a private property owner who feels as though—who feels frustrations resulting from the process largely due to the amount of time and also the conclusions. And the value estimates are affected by the legislation or local policies that affect highest and best use and ultimately value.

And it gets back, once again, to scope of project influence. What I hear this gentleman saying, as a private property rights sort of

perspective, is you can't downzone my property, and then value it on that basis before you buy it from me. And his frustrations are certainly fair.

So that's where I want to remind you, that's an example of where the Federal Government and its rules and regulations and legislation affect value. You can't have it both ways. You can't downzone or limit the use of somebody's property through an Endangered Species Act, for example, and then come in and tell them it's worth nothing. That doesn't get to just compensation, which is once again, an eminent domain paradigm, not a voluntary transaction paradigm.

But I would like to say one thing. One instance where the BLM system goes way in the direction of the benefit of the property owner is where it allows the property owner to select the appraiser. That is in direct conflict with Title 11 FIRREA where earlier legislators concluded that one of the causes of the S&L crises was the developer, the borrower, got to pick the appraiser. The fox was guarding the henhouse.

So that is an example of where the BLM system, I think, is in conflict with other existing Federal legislation, but goes in the direction of the landowner's interests.

Mr. HANSEN. Mr. Gardner, do you want to comment?

Mr. GARDNER. We were agreed to select the appraiser, but it was from a list of stipulated appraisers given us by BLM. And prior to their selection, we knew neither one of these appraisers, so you know, there wasn't anything there.

And that's the whole reason, I guess, this process came about, because the State Office of Appraisal initially right up front had problems with the value of the property because it was impacted by the tortoise, and we went around and around with that for over a year because we knew there was no point in even starting if we were going to be faced with Mr. McDonald's recommendations from the State level.

So that's why Mr. Duskin was used out of Oregon and Mr. Widdoss out of South Dakota because of the attitude that was in the State appraiser's office. And ideally, it should be just addressed there if we had someone that was reasonable to work with. We would prefer that. But with the attitude that was there, why that could not be accomplished.

Mr. HANSEN. Mr. Director?

Mr. SHEA. Yes, Mr. Gardner's right. We submitted a list and they chose from the list, so they don't have a unilateral right to name the appraiser in that process. Second, I do have a prepared response on the public interest value that I'll submit for the record.

And then, Mr. Chairman, there was a letter that was sent to you on March 10 in response to your inquiry about the land exchange and the appraiser. So I'll have copies of that, as well.

Let me make one suggestion on the endangered species question. It would be entirely possible to do a computation of what the purchaser of the property paid for the property with some return on that property if, by happenstance, it was found after the purchase to have an endangered species on it, so that you didn't get into this esoterica as to what impact the endangered species presence on

that land had and would give some just return based on a calculation to the property owner.

But again, that would be a congressional type of activity that would perhaps expedite the process.

Mr. HANSEN. Mr. Hanson, in your opinion, if a property owner owns property for many, many years, and Congress passes a law like the Endangered Species Act, or the Section 404 of the Wetlands Act, and then the person cannot use the property for what he intended it for or proposed to sell it sometime.

In your opinion, does that constitute a taking?

Mr. WOODWARD HANSON. I wish I was a Federal judge and could answer that question frequently. That question gets back to this very complex issues of investment-backed expectations, which you cited, and which I would refer you to, the first English decision out of California and the Lucas Decision out of South Carolina. It gets to other issues related to reasonable economic use.

But there are too many more facts that I would need to know whether or not it constituted a taking. But it's definitely an intrusion into constitutionally protected private property rights. It, in my experience, definitely affects value and there becomes a point—and I have specialized in inverse condemnation actions over the years where the cumulative impact of the regulation is a de facto taking, yes.

Mr. HANSEN. Mr. Gardner, you tell me if this is true. I had somebody call me from Washington County who did not have the Desert Tortoise on their property and said the Fish and Wildlife physically put one on their property. Is that just one of the better rumors going around or is there any truth to that? Or do you know?

Mr. GARDNER. Are you talking to me?

Mr. HANSEN. Yes, sir.

Mr. GARDNER. I've heard a lot of rumors to that effect. I don't know that we can physically prove that.

Mr. HANSEN. You can't give us names or an admission from somebody or dates or anything like that.

Mr. GARDNER. No, I know that I'm very firmly convinced that all of the tortoises to the north of town where by coincidence, the HCP is located, are all transplanted tortoises from down on the slope.

I have a signed letter from one individual who ran sheep in the City Crick area, which is the highest concentration of tortoises in the area now, and they lambed their sheep there every spring. And when they're lambing sheep, they live with them out there and they never did see a tortoise in all that time. And so it's just been in the last few years that they've been there. So it's something we've done to ourselves as we've brought pets home from over the mountain.

Mr. HANSEN. Mr. Hanson, would you comment?

Mr. WOODWARD HANSON. I just would comment in Florida we have what is called portable Indian mounds, you know, where the Indian mounds are transported to your property and like the tortoise, being hypothetically placed. It's one of the many things that have been brought up in eminent domain cases I've been in. Somebody says if you're not careful, you know, we'll put an Indian mound on your property. And I happen to own a property with an Indian mound, so I'm very proud of that.

Mr. HANSEN. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. I just have one followup question, Mr. Chairman. I am asking Mr. Shea if he could help me out. What exactly is BLM's procedure, let's say that Mr. Gardner is a willing donor, or wanted to do this land exchange with BLM. I get the impression from Mr. Gardner that these appraisals are given to him without any say on his part. And I was under the impression that the process is totally voluntary on both sides.

Could you help us? Is there a pool of appraisers that BLM just dips into and says this is what you get? Or do you go through a process with Mr. Gardner going through the list of potential appraisers that will be involved in the process? How does the BLM go about selecting appraisers in the process? Or does the BLM have their own appraisers?

Mr. SHEA. BLM does have its own appraisers, but given the volume of work and given the complexity, as Mr. Hanson pointed out, we do have a list of qualified appraisers that are available on a contract basis. And in Mr. Gardner's instance, a list was prepared of available ones that would be acceptable to BLM, and he was given the opportunity, as I understand his testimony, to select one that would then be used.

Now, there was, as he pointed out, a dispute with the State appraiser as to how calculation would be made. So once the initial exchange proposal has been put forward, you then move to, all right, how are we going to appraise this process, and at any given juncture on that chart you can have a dispute.

And quite frankly, to go back to a comment the chairman was making, that chart inoculates the BLM against a court deciding that somebody's property was improperly taken, and that's one of the reasons we have so many safeguards built into it.

Mr. FALEOMAVAEGA. And then the dispute would end up with four or five appraisers and Mr. Gardner's—

Mr. SHEA. But let me just get clear in my own mind, I understood him to say that there were two appraisals on his property and three appraisals on the BLM property that was going to be exchanged, for a total of five, but not five on any one single piece of property.

Mr. FALEOMAVAEGA. And the procedure sometimes, let's say that if it takes place in Utah, you get appraisers from Florida or from other states to conduct the survey?

Mr. SHEA. In the instance of Washington County, there was an appraiser from North Dakota or South Dakota. And then I also believe there was an appraiser who came in from California.

Mr. FALEOMAVAEGA. Now I would be very leery of getting an appraiser from Hawaii. You talk about inflated real estate business going on over there. I would question whether that appraiser is going to give me a fair bargain as far as the negotiations taking place.

And these appraisers, are they all members of MAI or are they different associations? Is there competition among appraisers in the different associations, just like the AMA and others?

Mr. SHEA. There's definitely—and I'll let Mr. Hanson discuss the competition within his own trade, but there are definitely.

Mr. FALEOMAVAEGA. Mr. Hanson, can you help us on that?

Mr. WOODWARD HANSON. Yes, sir. Thank you.

Mr. FALEOMAVAEGA. Sure, absolutely. There is definitely competition among organizations that designate professionally trained appraisers, so the answer is yes to that.

The other comment I wanted to tell you is the notion of an approved appraiser list is not unique and peculiar to BLM. Every regional bank that I know of has an approved appraiser list, and what it is is like a prequalifying effort to ensure that the best and most qualified people are on this list.

Now, when I work for regional banks in the Southeast, I'm on various lists, I'm not allowed to talk to the borrower before I'm engaged by the lender or I have violated Federal law. So my corollary is still accurate. It is still an advantageous element of the BLM policy to the property owner to be able to pick from a list of prequalified skilled appraisers to represent them in the appraisal process.

And I would say one more thing. USPAP—because I know you are sensitive to bringing in an appraiser from Hawaii to do something in Utah—the Uniform Standards of Professional Appraisal Practice has a competency provision, and the competency provision deals with not only having adequate education and experience background, but geographic competency. So there are protections within existing appraisal standards to mitigate or avoid those sorts of problems and punish those who don't comply.

Mr. FALEOMAVAEGA. Maybe my using the word competition is not proper, Mr. Shea. But besides the MAI, how many other institutions or associations that make up the appraisers in the country?

Mr. WOODWARD HANSON. There's numerous. There's, I would dare to guess, an excess of probably 25 to 30, and out of that number, the critical mass is really associated with what I would estimate are one to three organizations.

Mr. FALEOMAVAEGA. And you don't have a national association like the AMA then? I mean, you have three big associations or groupings.

Mr. WOODWARD HANSON. Well, the Appraisal Institute is the largest of them all. We are the 900-pound gorilla, so to speak. And with 20,000 members, we are widely recognized as the leading authority on real estate appraisal. We are currently involved in a process now where we are working with allied organizations like the Farm Managers and Rural Appraisers and the American Society of Appraisers, trying to help discuss and create contribution to this emerging public policy initiative.

Mr. FALEOMAVAEGA. Mr. Shea, I don't sympathize with the problem you are faced with. So with all these 20,000 appraisers and the 900-pound gorillas and two 200-pound gorillas, how do you go about in putting in such a way that you have competency and fairness among the appraisers that will be involved in the process?

Mr. SHEA. At the end of the day, a Federal judge unfortunately will, if it's pushed to that extent, say whether or not we were fair in the process. But let me try to illustrate what I think Mr. Hanson is getting to, and it's a personal problem. I call it Pat's basement problem.

We have a house that we designed in Salt Lake. Because we can get a 1.5 point difference in our mortgage, we are going through

the process of having it appraised for refinancing purposes. Now, the ground floor of this house is in the side of a hill; we built on a hill.

One appraiser comes in and says that that's a basement, and therefor, any of the floor on that basement level is one-half the value per square foot as it is on the second floor. But if the appraiser comes in and says well, that's just an entry level, that's the first floor, then the appraisal goes up.

Now I've had three different appraisals, and we're still having discussions back and forth. Now what's one person's basement is another person's first floor, and that's the inherent problem we have here.

And that's why I come back to the theme I introduced in my opening comment. If we try to streamline this process too quickly, there may be some people who are satisfied because they will get greater value for their property. But at the end of the day, the taxpayers will not have gotten full value for the property that they've been holding, or we've been holding in their trust for, in many instances, hundreds or more years.

Mr. FALCOMA: Mr. Glass.

Mr. GLASS. I know that fairness is the goal here, and it's not an easy road to tow. But let me give you a couple of examples.

Mr. Chairman, you mentioned wetlands. Wetlands have been designated for at least a decade or two. On a regular basis Western Land Group goes out into the market and purchases wetlands. There has been a market for existing wetlands. We have been able to find fair market value wetlands all over the United States to put into the land exchanges.

In other words, the situation has stabilized after 10 or 15 years of property values being dislocated and disrupted. Where the real problems are—and you're seeing it here—I have nothing but empathy for Commissioner Gardner and what he is going through with the Desert Tortoise. We do a great deal of work up in the Pacific Northwest, and as you know, Mr. Chairman, first it was the Spotted Owl and then it was the Marbled Murrelet. All of a sudden, it's various species of salmon. And each one of these new additions, new species that's considered under the Endangered Species Act has had a profound impact on the value of both the public land and the private land that's out there.

And I will also tell you that the agency, the BLM, treats these species differently in different parts of the country. And I will tell you that there are few exchanges in the Pacific Northwest where they have run into the same problem that Commissioner Gardner has run into, because they've made an administrative decision to not consider the impact of endangered species on the two sides of the transaction.

And typically, what occurs is that the private landowner who has an HCP or who has spotted owl on his land trades that spotted owl land to the United States, ignoring the fact that there may be an appraisal issue associated with it. The landowner acquires land that doesn't have owls or salmon or whatever, that has harvestable timber on it. That's an administrative decision that has been helpful, I think, to some degree in the Northwest. But it was handled, apparently with the opposite outcome with Commissioner Gardner.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

Mr. HANSEN. I don't mean to pick on anybody here, but Mr. Gardner, why did you go to South Dakota to get an appraiser. We keep hearing there's problems in the office up there. Now I don't want to spit on the flag, but why did you go to South Dakota? What was wrong with the one in Utah?

Mr. GARDNER. Well, initially, in our agreement that we had in determining the prevalue estimate, it was to be appraisers outside of the State of Utah or outside of the involvement of the Utah Appraisal Office, at least. And so that—

Mr. HANSEN. The BLM Appraisal Office in Utah is what you're referring to.

Mr. GARDNER. BLM Appraisal Office in Utah, yes. And the BLM is the one that selected Mr. Widdoss as a review appraiser for them to help with the land exchanges in Washington County.

Mr. HANSEN. Was there quite a difference between what you got out of the one from Utah and the one from South Dakota?

Mr. GARDNER. Well, Utah we knew we had the value of \$1,000 gift and that was their appraisal they did on our property. And I might add that they tried to incorporate them again here just a few months ago, and they sent down the same appraiser even after the legislation that you put through Congress specifying that the Endangered Species was not to have an effect on property. And he appraised some adjoining land to our land and came up with the same value.

Mr. HANSEN. Maybe I'd have to ask Mr. Lamb this question. Maybe Mr. Shea wouldn't be aware of it. Do you ever use anybody outside of the Utah State Appraiser at BLM to do Utah work?

Mr. SHEA. Do we ever use outside of Utah?

Mr. HANSEN. Yes.

Mr. SHEA. Yes, we do.

Mr. HANSEN. Have you done that on a regular basis or is that an uncommon basis? I see the one example here, but are there any others?

Mr. SHEA. I'd have to ask Bill.

Mr. HANSEN. In other words, how many times have you used somebody outside of the Utah Appraisal of Mr. McDonald?

Can you step up to the mike there, Mr. Lamb, so the recorder can pick you up? And identify yourself first, if you would please.

Mr. LAMB. I'm Bill Lamb, the Acting State Director for Utah.

I guess this is a complicated question. When Mr. Gardner, Commissioner Gardner, had the first appraisal on there, and this was some time ago, your legislation provided that to all lands in Washington County the existence of endangered species would not be considered when making a valuation.

The valuation of Mr. Gardner's land happened prior to that legislation enacted. So one appraiser that went into the area appraised it at \$1,000 an acre; the other appraised it somewhere around \$7,000 an acre. We had a review appraiser who was outside of the State for the reason that these gentlemen have stated, that they felt that they were biased and so we went outside of Utah to find some review appraiser.

During this process, we felt that it was necessary that we go through some kind of a bargaining. So we established a small

team. They looked at the situation and came up with a valuation of, I think it was, \$7,440 for the property, and Mr. Gardner and his family accepted that value.

It was a long, drawn-out process because of the various things that happened during the course of the time that we were involved.

Mr. HANSEN. Thank you for your answer. Mr. Faleomavaega, do you have any more questions? I've got one final question for the Director and I'm ready to—

Mr. FALEOMAVAEGA. No questions, Mr. Chairman, but only to thank our Director, Mr. Shea, of the BLM, and our friends from Utah and Mr. Glass for their fine testimony. I sincerely hope, Mr. Chairman, that we will do our part and hopefully make some constructive amendments, if necessary, to the current law to be helpful not only to Mr. Shea, but to our friends also from Utah.

Mr. HANSEN. Mr. Shea, we have a rumor up here which I hope is not true that one of the men from South Dakota and one from New Mexico was told not to come and testify, that were supposed to be here to testify, that they would have trouble with their land exchange with the BLM. Any truth in that?

Mr. SHEA. Oh, absolutely not. We met with them two weeks ago and I was the one that suggested that they come. And Mr. Powell wrote you a letter, I believe, and Mr. Johnson did, as well. And we have formed a very effective working relationship. We are having all of our State Directors here in April to meet jointly with them to see if there aren't ways we can expedite exchanges.

So I have encouraged that partnership and both of them are outstanding public servants in their respective states that we support.

Mr. HANSEN. We're not trying to create any problem for you. We just wouldn't want to have anyone told they couldn't come, especially if we asked them to.

Let me thank you, Mr. Shea, and the members of the panel. It's been very informative. I don't know what will come out of this, but I do think that there is some very necessary parts of streamlining. If not, we are probably going to go back to the old saw of just putting it in legislation. I don't think that's the right way to do things. I think it really should come through the agencies.

Thanks so much, and this hearing is now adjourned.

[Whereupon, at 11:51 a.m., the Subcommittee adjourned subject to the call of the Chair.]

[Additional material submitted for the record follows.]

STATEMENT OF PAT SHEA, DIRECTOR, BUREAU OF LAND MANAGEMENT, REALTY
APPRAISAL PROCESS ON BLM LAND EXCHANGES

Thank you for the opportunity to testify on the Bureau of Land Management's (BLM) exchange and appraisal process. Since becoming BLM Director, I have come to appreciate both the importance of the exchange program and its complexity. It is vital that the interest of the taxpayers—the true landowner—be protected and that we find a means of improving and facilitating the exchange process.

We know that there is room for improvement in our land exchange process. We need to consider how the appraisal process might be revised, whether the BLM is applying consistent criteria in identifying potential land exchanges, how much discretion should be left to local BLM land managers, and what guidelines are needed when private developers and nonprofit conservation groups are involved. By strengthening its land exchange policies and procedures, the BLM can continue to acquire private property for public use while protecting the interests of American taxpayers.

I have undertaken several measures to improve this program. I have established procedures for a second level review by the BLM State Director or the Washington Headquarters Office. The second level review requires concurrence in decisions involving exchanges greater than \$500,000 in value. These new procedures also require a feasibility analysis report for all land exchanges and require the concurrence for any dismissal of protests to any land exchange decisions. In addition, I am establishing a bureauwide land exchange team to assist in the review of high priority exchanges, provide additional technical support to BLM field offices, and address policy and procedural issues.

BACKGROUND

Before discussing the specifics of our program, I would like to offer some background on the exchange program.

The BLM, with stewardship of more than 264 million acres of land—more than any other Federal agency—completes 60 to 70 land exchanges every year. On average, these exchanges total roughly 150 000 acres of land exchanged each year at a value of about \$50 million.

Land exchanges are an important tool to carry out BLM's land management program. Exchanges allow the BLM to acquire the kind of land that is suited to public ownership: land, the public use of which is conservation, such as habitat for wildlife including threatened or endangered species; land that offers recreational opportunities for the public; or land containing sensitive riparian areas that are critical to the health of streams, rivers and entire watersheds. Exchanges also allow the BLM to consolidate land ownership patterns where appropriate, to increase our efficiency and reduce cost. The Department strongly supports public ownership of public lands and is committed to working with other jurisdictions to improve land ownership patterns and the management of those lands. This is consistent with the Federal Land Policy and Management Act of 1976 which provides that "the public lands [will] be retained in Federal ownership, unless . . . , it is determined that disposal of a particular parcel will serve the national interest"

Historically, land exchanges are time consuming because of the number of affected parties, user and interest group concerns, and lengthy assessment and analysis procedures. However, the Federal Land Exchange Facilitation Act of 1988 (FLEFA) and joint BLM and Forest Service land exchange regulations published in 1993 have provided tools that can improve the land exchange process. Parties involved in the exchange must reach agreement on a wide variety of issues including scheduling, sharing of costs, selection of appraisers, number of appraisal reports, and methods for resolving disputes concerning the appraised value. Like other complicated real estate transactions, there can be periodic delays and disagreements between the parties.

LAND EXCHANGES

Examples of recent successful exchanges include the following:

California: BLM completed an important exchange last year with the Merced Irrigation District in California to consolidate some lands along the Merced Wild and Scenic River. The Irrigation District acquired title to 180 acres of inaccessible public lands which were key parcels in its water operations to serve its customers, while BLM acquired 160 acres of land with river frontage that provides the public better access to this nationally rated Wild and Scenic River, known for its whitewater thrills. It was a win-win for the public on both sides. The BLM and the Irrigation District both received fair market value for their constituents.

The positive benefits of such small, but locally important exchanges cannot be overstated, but these benefits can also be accomplished on a larger scale for even greater returns. Also, in California, the BLM and the State Land Commission have already exchanged 70,000 acres within the California Desert with plans underway for another 200,000 acres to be exchanged over the next few years. These exchanges will result in BLM acquiring State inholdings in the National Park Service managed Mojave preserve and in Wilderness Areas managed by BLM for excess Federal lands with development potential in other parts of the State. Appraisals were done cooperatively by BLM and the State Land Commission to ensure that both public entities received fair market value for these public assets.

Colorado: Last summer, the BLM's Canon City District acquired through an exchange the 1,272-acre VVN Ranch in Park County, Colorado. The BLM did so with the help of the Rocky Mountain Elk Foundation, which purchased the property and held it until the land exchange could be completed. The ranch contains a year-round elk habitat; significant scenic, recreation, and wildlife resources; and three miles of wetland-riparian (streamside) areas that were not previously available for public use. In return, 840 acres of land within 13 scattered parcels were transferred into private ownership. The majority of these lands were grazed lands with some potential for recreation home sites.

Utah: In January, the Dixie Field Office completed an innovative, three-way exchange that added critical desert tortoise habitat to the Red Cliffs Desert Reserve located in Utah's Washington County. In the trade, the Federal Government acquired 614 acres of desert tortoise habitat from the State's School Trust Administration in exchange for a 250 acre gravel pit. Through the exchange, the BLM transferred the gravel pit to Western Rock Products, which in turn provided \$1,950,000 for the habitat lands that the State transferred to the Federal Government. Creativity and flexibility, along with cooperation between public and private partners were the keys to success in this win-win transaction. This is but one example of four recently completed exchanges in southern Utah that has added nearly 1,200 acres of habitat to the Red Cliffs Reserve in return for lands and resources that can be privately developed in booming Washington County.

The vast majority of land exchanges are like these examples—so clearly logical and mutually beneficial that they are completed without protest or controversy. Sometimes, however, proposed land exchanges do become contentious. Appraisals can be subject to question and criticism from those involved in the proposed exchange or from outside parties. Appraisals are especially difficult and controversial in areas of rapid growth and volatile market prices. This makes the job of appraisers even more challenging. Land exchanges are voluntary transactions. They require mutual agreement by parties to the transaction on a wide variety of issues including value. To be successful, parties to the transaction must have confidence in the appraisal process.

APPRAISALS

I would like to describe briefly how real estate appraisals are incorporated into the land exchange process. The appraisal process is essential in reaching agreement on the value of the lands involved in the exchange. Again, it is important that the parties have confidence in the integrity and impartiality of those involved in the process.

Real estate appraisals are obtained to "estimate" the market value of lands involved in a proposed land exchange. Ideally the appraisal report is an objective, impartial estimate of what the property would sell for on the open market as of the date of the appraisal report. The credibility of the appraiser's report is affected by his or her ability to obtain reliable market information, properly analyze the information, develop and test various assumptions, and reach a logical and supported estimate of value. The appraisal report is an opinion of value; an appraiser's estimate of what the property would likely sell for. The appraiser does not determine value, but instead estimates market value.

Appraisal reports are prepared in accordance with BLM appraisal standards in 43 CFR 2200 and, to the extent appropriate, with the Department of Justice "Uniform Appraisal Standards for Federal Land Acquisitions." These standards are consistent with the "Uniform Standards of Professional Appraisal Practice" published by the Appraisal Foundation, Appraisal Standards Board.

We review appraisal reports to assure they meet professional and BLM appraisal documentation standards. The reviewer prepares a report approving the appraisal and recommending its use for purposes of reaching an agreement.

If parties to a proposed exchange cannot reach agreement on the approved appraised values, bargaining or another method may be used to reach agreement. If

chances for agreement are remote, BLM or the property owner may decide to end further efforts.

We define bargaining as a process, other than arbitration, by which parties attempt to resolve a dispute concerning the appraised value. Different forms of mediation or dispute resolution techniques may be used to resolve the disagreement. The process is premised on the theory that reasonable people can reasonably disagree with the appraiser's analysis. Therefore, bargaining is limited to the information, assumptions, and conclusions in the appraisal reports.

Any agreement reached by the parties must be in writing and made part of the land exchanges' administrative record. Any appraisals presented during the bargaining process must be open to review by a qualified appraiser representing the agency with responsibility for appraisal review. The BLM State Director must concur in any agreement reached through bargaining.

Once parties have agreed, BLM publishes a Notice of Decision (NOD) regarding the proposed land exchange transaction. The NOD informs the public of the BLM decision to proceed with the land exchange. The public has 45 days to comment or protest BLM's decision. During the 45 day period, the appraisal reports, along with other supporting documentation, is available for review by the public.

CONCLUSION

I hope the information I have shared today has clarified the process and demonstrated my commitment to achieving a better program. Protecting the natural resources, protecting the public assets, and achieving a fair market return on all land transactions are my primary goals.

This concludes my statement. I will be glad to answer any questions you may have.

STATEMENT OF JOHN A. HARJA, VICE-CHAIR, BOARD OF TRUSTEES, UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION

My name is John A. Harja, and I represent the Utah School and Institutional Trust Lands Administration (the "Trust Lands Administration"), an independent state agency that manages more than 3.7 million acres of land within Utah dedicated to the financial support of public education. I serve as Vice-Chair of the Board of Trustees that guides and supervises the Trust Lands Administration's activities.

Thank you, Mr. Chairman, and members of the Committee, for the opportunity to testify today concerning Bureau of Land Management ("BLM") land exchanges. It is no secret that BLM land exchanges in Utah in the last several years have been both controversial and difficult for all participants. From the standpoint of the Trust Lands Administration, the BLM has recently made substantial progress in some areas, and there is reason for optimism that future exchanges, whether administrative or legislative, need not be so difficult. Our testimony today is meant to:

- Encourage the BLM to continue some positive activities with respect to administrative exchanges;
- Suggest a few changes in the BLM's statutory and regulatory procedures for administrative exchanges; and
- Inform the Committee of some situations where Congressional involvement may clearly be in the public interest.

Many members of the Committee are familiar with the situation of Utah's school trust lands. Of the 3.7 million acres managed by the Trust Lands Administration, over a million acres are located inside national parks and forests, proposed wilderness, critical habitat for endangered species, and of course the new Grand Staircase-Escalante National Monument. Although the lands were granted to Utah with the express purpose of generating revenue for Utah's schools and other public institutions, Federal land management restrictions have in many cases made economic use of the state's trust lands impossible.

The natural solution to the problem of state trust inholdings within Federal reservations is to exchange the state lands for more developable, less sensitive Federal lands elsewhere in Utah. Unfortunately, this solution has been difficult to implement except in a few limited circumstances, with the result that state inholdings continue to exist within most Federal reservations in Utah. This is not a desirable situation for anyone. Federal managers have to contend with potential development of state enclaves within otherwise undisturbed Federal lands, while the State faces substantial controversy when its legal duty to maximize revenue for the schools conflicts with the purposes for which the particular park or other reserve was created.

1. Recent History of BLM-State Administrative Exchanges in Utah.

As the Committee is aware, the BLM has an existing process for administrative exchanges under the Federal Lands Policy & Management Act ("FLPMA") and the Federal Lands Exchange Facilitation Act ("FLEFA"). The Trust Lands Administration believes that this process can work in some circumstances, although, as we will discuss later, its utility in large scale exchanges is doubtful. Our experience with administrative exchanges has been difficult in recent years, but we have also seen great improvement within the last year with respect to the BLM's commitment of good personnel and adequate resources dedicated to making these exchanges work. We commend the BLM for these commitments, and are optimistic that this positive trend will continue.

The best example of the BLM administrative exchange process in Utah in recent years has been that involving the Desert Tortoise Habitat Conservation Plan area near St. George. When the U.S. Fish and Wildlife Service designated thousands of acres within and just outside the city limits of St. George—one of Utah's fastest growing cities—as critical habitat for the threatened tortoise in 1991, it effectively shut down development of almost ten thousand acres of prime residential and commercial land owned by the State, in addition to thousands of acres of private lands.

In 1994, the BLM and the Trust Lands Administration signed a Memorandum of Understanding creating an assembled land exchange process to facilitate exchange of state desert tortoise lands and other state lands desired by BLM for BLM lands elsewhere in the State. Although the MOU was ostensibly meant to speed BLM-State exchanges along, and although the tortoise exchange was ostensibly a BLM priority, no exchanges were completed for several years after the MOU was signed.

What were the problems that delayed desert tortoise exchanges for so long?

- Appraisals conducted by the BLM's State Office penalized landowners for the misfortune of owning valuable habitat. BLM's state level in-house appraisers told landowners that the Fish and Wildlife Service, another Department of Interior ("DOI") agency, would never let them develop their land because of the critical habitat designation. Therefore, the land was deemed virtually worthless by BLM. Not surprisingly, landowners offered 10 cents on the dollar for their lands were not willing participants in the exchange program, and no exchanges were completed until after Congress resolved this issue in 1996.
- Certain state level BLM appraisal staff appear to have engaged in a campaign of intimidation of appraisers who differed on how to appraise tortoise lands. Acting as a private individual, at least one BLM appraiser filed complaints—ultimately dismissed as meritless—with state appraisal licensing authorities claiming violations of state appraisal standards, and seeking disciplinary action against a private appraiser. The private appraiser's work was then rejected by BLM because of the disciplinary filing. These actions were hardly conducive to efforts to reach mutually acceptable valuations.
- There has been no clarity as to how legitimate differences between the parties over valuation can be resolved. Even the best appraisers often differ wildly in their opinion of the value of particular tracts. Where this occurs, fair, arms-length negotiation is the only solution that will reach a mutually acceptable result. Yet many parties have felt that the BLM has at times used its regulations and appraisal guidelines as justification for refusing to negotiate, resulting in a "take it or leave it" situation. Again, landowners, whether private or state, who feel that there is no room for bargaining over legitimate differences in valuation are unlikely to be willing participants in the exchange process.
- BLM District offices elsewhere in Utah have been unable for staffing and budgetary reasons to perform work necessary to amend Resource Management Plans, perform NEPA analysis, and conduct cultural resources reviews for land targeted by the State for acquisition. At least one 12,000 acre tract sought by the State has been placed "off limits" for exchange indefinitely, not because of public interest or environmental reasons, but rather because of lack of BLM resources. The larger the exchange, the more profound this problem becomes; past experience would suggest that any administrative exchange of 100,000 acres or more would take decades to complete if it could be done at all.

Happily, the BLM has made substantial progress during the last year in correcting some of these problems. Their efforts have resulted in the completion of an exchange of several hundred acres of state tortoise habitat for BLM lands near Park City, Utah; an innovative three way exchange of an additional 614 acres of state tortoise habitat that involved the Trust Lands Administration, the BLM and a private party; and the anticipated completion in the next few months of a multi-tract exchange that will protect habitat for the endangered dwarf bearclaw poppy. BLM employees have worked hard to complete these projects, and the Trust Lands Ad-

ministration appreciates their efforts. We are optimistic that ongoing administrative exchanges with BLM will continue on this successful path over the next year.

What has made the difference between recent successes and past failures?

- The BLM has made a strong commitment to bring in experienced out-of-state BLM personnel to expedite in-process exchanges. This has soothed some of the disputes that arose early in the process over appraisal methodology, and has increased the State's confidence in the process. Although we recognize that some private parties have criticized the involvement of Washington-level BLM appraisers in local exchanges, the Trust Lands Administration has welcomed the specific attention and problem-solving focus that the BLM has exhibited in this regard.
- The BLM has been willing to engage in a more open dialogue concerning reasonable differences in valuation.
- The BLM State Office has committed more staff to moving BLM-State exchanges forward, and has worked to identify problem areas in advance, so that resources can either be devoted to solving the problem in a timely manner or diverted to more productive uses.
- In the case of the desert tortoise, Congress resolved the major valuation issue: the impact of Endangered Species Act ("ESA") on land values. As noted above, DOI had previously taken the view that the ESA drastically limited landowners' development options, making previously valuable development land virtually worthless. Not surprisingly, landowners felt that they should not be penalized for protecting endangered species. In Public Law 104-333, Congress directed the Secretary of Interior to value lands in Washington County, Utah without regard to the presence of endangered species or the designation of critical habitat. This legislation was the crucial factor in achieving landowner willingness to exchange; no private tortoise exchanges were completed in the years before the legislation, while a number have been completed in the 16 months since Public Law 104-333 was enacted.

Again, the Trust Lands Administration is pleased at the progress of recent months, and will look forward to the continuation of that progress as the exchange process continues.

2. *Suggestions for Improving the Exchange Process.*

There are certain steps that could expedite state-BLM exchanges throughout the west. The Committee should consider the following concepts:

- a. Expand the concept implemented in Public Law 104-333 that Federal environmental limitations (in that case threatened and endangered species) not be used to devalue the property to be acquired, where the purpose of the Federal acquisition is to protect that specific environmental value.
- b. Where state law or agreement provides protections for cultural and historic resources analogous to those provided by the National Historic Preservation Act ("NHPA"), do not require NHPA surveys prior to transfer of lands to states by BLM.
- c. Increase the current \$150,000 threshold for expedited exchanges without formal appraisals.

In addition to these points, the Trust Lands Administration would encourage meaningful Federal-state dialogue concerning valuation issues, notwithstanding the current legal dispute in Utah concerning the valuation of natural lands. As the Committee is aware, there has been controversy in recent months concerning whether past BLM exchange appraisals have adequately recognized the great increase in land values in rapidly urbanizing areas such as Las Vegas. The Trust Lands Administration would point out that there has been an equally stunning rise in land prices in rural areas of the West recognized as having natural values such as gorgeous scenery, proximity to wilderness, ancient Anasazi ruins, and recreational opportunities. Simply put, there are tens of thousands of people today who want to own a part of those natural values, and who have the money to pay handsomely to do so. Too often, when state natural lands are being acquired by BLM, the focus of Federal appraisers on prices paid in the past for traditional uses neglects this fact of the New West.

Just as the BLM is rightly concerned about not receiving full value for its urban lands state land management agencies (with their fiduciary duty to achieve full value for their beneficiary institutions) cannot disregard prices paid in the market for lands having outstanding natural characteristics. When the Federal Government seeks to acquire these lands for public purposes, there must be a mechanism for addressing this issue.

3. The Need for Congressional Involvement in Some Circumstances.

As BLM Director Shea has discussed in recent newspaper commentaries, the BLM's land exchange program serves the important Federal goal of consolidating Federal ownership of lands with specific values: wildlife and endangered species habitat, land that offers important recreational opportunities for the public, and ecologically sensitive lands such as riparian areas. This is a worthy goal. The checkerboard pattern of state and Federal land ownership now existing throughout much of the west is unworkable in light of the differing management mandates of the various landowners, and often leads to unnecessary conflicts between the Federal Government and the states. The suggestions for legislative and regulatory changes described above would go far to further the BLM's objectives and reduce state-Federal disputes.

At the same time, there are inherent limitations to the BLM's administrative exchange process. Where such limitations exist, Congressional involvement may serve the public interest by facilitating desirable exchanges and eliminating unnecessary obstacles. A small but telling example is the language in Public Law 104-333, discussed above, requiring that exchange valuations in Washington County not penalize landowners by devaluing land on account of its status as critical endangered species habitat. Before this statute was enacted, desert tortoise habitat acquisition was at a virtual standstill; afterwards, the program has moved forward with increasing success.

A second example of a situation where administrative exchanges fail and Congressional involvement may be useful occurs in the case of multi-tract exchanges involving large areas. There are well over a thousand tracts of state trust lands scattered within proposed BLM wilderness in Utah, while the Grand Staircase-Escalante National Monument contains 337 school trust parcels encompassing over 175,000 acres. The existing administrative process would typically require appraisals of each such parcel, together with appraisals, RMP amendments, NEPA review, and cultural resources surveys of all BLM tracts to be acquired. When lower value rural lands are the subject of the exchange, transactional costs can swallow any exchange benefits. More importantly, BLM often cannot devote the resources to complete the necessary work while performing its other responsibilities as well.

In the early 1980s, former Utah Governor Scott Matheson recognized the untenable nature of the checkerboard pattern of state land ownership in Utah, and launched an effort—Project BOLD—to consolidate the thousands of scattered state sections into several dozen large consolidated state land blocks. Significantly, both the BLM and the State then recognized that this effort was too large to be completed administratively, for the same reasons we have discussed today, and turned to Congress for implementing legislation.

Although Project BOLD ultimately was not finalized, its lessons are still useful. There are inherent limitations in the use of appraisals in exchanges involving hundreds of tracts, both in terms of accuracy and transaction costs. Current statutory limitations on the BLM with respect to land use planning, NEPA compliance, and cultural resources surveys, when combined with limited agency resources, can make large administrative exchanges impractical. Conversely, consensus between the parties to the exchange and affected third parties on specific lands to be exchanged, with Congressional implementation of that consensus, can achieve exchanges having great environmental and public benefits where the administrative process cannot.

Congress has followed this path in recent years with the 1996 Arkansas-Oklahoma land exchange. Similarly, although in a slightly different format, the state land exchange provisions contained in recent California desert protection legislation are also of note. Although legislation of these types will not always be necessary with large exchanges, it is clearly merited where resource limitations, special environmental or valuation concerns, or other factors jeopardize the success of the administrative exchange process.

Conclusion

In conclusion, the Trust Lands Administration believes that recent efforts by the BLM to expedite administrative exchanges in Utah are bearing fruit. We encourage BLM to continue these efforts, and to consider additional steps to expedite state-Federal exchanges. At the same time, the Trust Lands Administration urges the Committee and your colleagues in Congress as a whole to consider legislation implementing or expediting high priority state-Federal exchanges.

Thank you for the opportunity to testify before the Committee.

STATEMENT OF THOMAS R. H. GLASS, WESTERN LAND GROUP, INC.

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify today. My name is Tom Glass, and I am a principal in Western Land Group, Inc., a national public lands consulting firm headquartered in Denver.

Western Land Group, Inc.

Since our formation in 1981, Western Land Group has assisted in the consummation of more than 100 Federal exchanges, utilizing both legislative and administrative processes. We continue to help clients to facilitate dozens of new cases, involving lands ranging from tens of thousands of acres to less than one acre.

Benefits of Land Exchanges

Working in partnership with BLM and other public land management agencies throughout the West, Western Land Group achieved fundamental public and private land objectives. These include, but are certainly not limited to:

- protecting municipal watersheds;
- placing key threatened wetlands and wildlife habitat in the public domain;
- eliminating private inholdings in designated wilderness areas;
- helping municipalities and counties acquire lands for administrative purposes and open space;
- facilitating responsible community growth; and
- improving hunting, fishing, and recreational access to Federal land.

Western Land Group helps agencies to accomplish their goals, despite limited agency staff and resources. Together, we have created more coherent and logical ownership patterns, resulting in win-win situations for both the public and private sectors.

Adequacy of Current Land Exchange Law, Regulation, and Policy

Until recently, current law, regulation, and policy governing land exchanges has worked fairly well. The Federal Land Exchange Facilitation Act (FLEFA), which Western Land Group helped develop, has streamlined the process somewhat. The *Final BLM Land Exchange Manual* integrates the essence of FLEFA, and is another good tool which all BLM lands staff should review carefully.

Western Land Group is, however, concerned about several recent developments in BLM's land exchange policies.

1. Western Land Group is concerned about the newly instituted directive which relinquishes a BLM State Director's authority to approve exchanges where the value of public lands to be exchanged is more than \$500,000. The directive requires that Washington, DC staff approve exchanges based upon an additional level of feasibility analyses and issues papers.

In most states, BLM has talented field staff who should be supported, not reprimanded. FLEFA encourages the consideration of local issues and local politics in all exchanges. Grassroots involvement, including the dissemination of accurate, ethical information early-on, is critical to creating successful exchanges. In general, local personnel (including State directors) are better acquainted with local concerns than are Washington, DC personnel whose expertise may lie elsewhere. The emphasis should be on increasing the capacity and sophistication of BLM's lands staff at the state and local levels, not on developing a National Exchange Team.

BLM's new directive could slow down the process considerably. By transferring approval authority to Washington, the directive requires that an additional level of feasibility analyses and issue papers be completed for the Washington staff at three stages of the exchange process. Western Land Group maintains that the previous level of analysis, when combined with community involvement, is adequate for most exchanges, and is largely redundant. The biggest problem with the added level of analysis is that Washington, DC staff has no mandated response time. The lack of guaranteed response times would most certainly cause delay. The most serious consequence of delay is a reduced ability for the United States to acquire premium private lands. Exchange proponents must purchase private lands, usually within strict timeframes. If required feasibility analyses and issue papers are sent to Washington without specific guaranteed response times, it will be impossible for exchange proponents to set closing dates. Without closing dates, private landowners interested in conveying lands to the United States cannot enter into secure purchase contracts with the United States. Additional steps in the process could also lead to expiration of appraisals, which are valid for a maximum of one year.

1. Western Land Group is also concerned about the increased popularity of Competitive Exchanges, or BLM's intent to auction unwanted Federal lands to the highest bidder.

As a steward of the land, BLM has a responsibility to get the best deal for the public when disposing of land. The best deal means more than just the most money. Exchanges should be driven not only by BLM priorities, but also by community priorities including development planning, infrastructure needs, open space needs, access needs, and the like. To auction a parcel could result in an outsider, who has no interest in a community's needs, acquiring the parcel simply because he or she was willing to pay the most.

The Crystal River Ranch land exchange, which Western Land Group closed in 1995, is an example of why competitive exchanges should be approached with caution. The Crystal River Ranch exchange involved the acquisition of 1,439 acres of Federal lands located in the Roaring Fork Valley near Aspen, Colorado (a hot real estate market). The Federal lands were situated within the ranch, accessible by public road, and managed by BLM. Following the exchange, Crystal River Ranch donated a conservation easement on the acquired lands to the Colorado State Division of Wildlife. The conservation easement provides for public hunting on the acquired lands, as well as the protection of wildlife habitat values and continued ranching activities in perpetuity. If the public lands in this exchange had been auctioned to the highest bidder, such as a real estate speculator, the unique negotiated benefits of the transaction would never have occurred. Instead, the United States received full fair market value for the property and protection of open space and wildlife values in perpetuity.

As an alternative to competitive exchanges, Western Land Group recommends the following approach, once Federal lands have been clearly identified for disposal. First, work with the community to identify acquisition priorities and generate creative options. Second, identify and obtain high priority offered lands with significant public value. Third, work with proponents who have a vested interest in the lands. Fourth, work with exchange facilitators who share the agency's goals. Fifth, complete exchanges based on appraisal rather than speculation. The appraisal process has many checks to ensure fair market value.

With regards to the appraisal process, Western Land Group has been pleased with FLEFA's arbitration provision. We believe it has been a helpful tool to resolving disputes involving value. In addition, Western Land Group commends Dave Cavanaugh, BLM's Chief Appraiser here in the District of Columbia, for his recent efforts on the City of St. George land exchange in Washington County, Utah. Mr. Cavanaugh stepped in at the right time to resolve a difficult situation involving appraisals. Serving as the review appraiser, Mr. Cavanaugh was able to insure that the local private appraiser adequately appraised the involved BLM lands while giving the City of St. George proper credit for its lands within the Mojave Desert Tortoise Preserve. His involvement is a perfect example of how knowledgeable headquarters staff can be effective in trouble-shooting and overseeing difficult exchanges.

We also suggest that the amount allowable under Sec. 206(h) (1) (A) of FLPMA be increased from \$150,000 to \$500,000 to allow utilization of statements of approximate equal value rather than full appraisals in appropriate situations. This would help reduce the backlog of appraisals and appraisal reviews.

On balance, Western Land Group believes that BLM's exchange program has worked fairly well. We do have two more recommendations, however, for the Subcommittee to consider. The first relates to cash equalization moneys.

Cash Equalization Moneys

The Federal Land Policy and Management Act requires that land be exchanged for exact equal value. Otherwise, cash equalization payments must be made. FLEFA permits certain waivers of this requirement. The biggest remaining problem, however, is that BLM in particular sometimes does not have money on hand to make equalization payments. As a result, exchanges sometimes have to be delayed to await Congressional cash equalization appropriations. In our opinion, Congress does not need to micro-manage cash equalization moneys in this matter.

We recommend that Section 203 of FLPMA be amended so a portion of the moneys received by the Secretary of the Interior from the sale of public lands be placed in a special fund. This fund would be earmarked and available to the Secretary, without need of appropriation, to provide moneys for cash equalization in land exchanges. The Forest Service already has a similar fund under the Sisk Act, and it has served them well. In that regard, we recommend that the current requirement for appropriation of all cash equalization dollars be eliminated and that the BLM

be authorized to manage a fund similar to the Forest Service's. Spending from this fund could be limited to cash equalization purposes or other purposes, as Congress deems appropriate.

Land and Water Conservation Fund

As a final thought, Mr. Chairman, while Western Land Group is obviously a great supporter of well-crafted and well-managed exchanges, Western Land Group recognizes that exchanges are not a panacea. Land exchanges cannot substitute for Federal purchases using the Land and Water Conservation Fund. We recommend that Congress fully fund the LWCF, as was done in 1998, in order to reduce the estimated \$2–\$3 billion backlog of land that willing sellers would like to sell Uncle Sam for various reasons.

Mr. Chairman, that concludes my testimony. I would be happy to answer any questions that you may have. Thank you again for your sponsorship of FLEFA and your ongoing interest in land exchanges as evidenced by your holding this hearing today. It is very encouraging to us, as a small business, to have policymakers such as yourselves striving to improve the land exchange process.

**TESTIMONY OF WASHINGTON COUNTY, UTAH COMMISSIONER
ALAN D. GARDNER
BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS
TUESDAY, MARCH 24, 1998**

The first portion of this paper deals with the history of the appraisal negotiations for the Washington County Habitat Conservation Plan. It was taken from work done by Dallin Gardner, (no relation) a consultant for another property owner.

In late 1993 and early 1994, much time and effort was spent by members of the Habitat Conservation Plan Steering Committee and Federal Officials (Bureau of Land Management - U.S. Fish and Wildlife Service - Justice Department and others) to find an equitable means of valuing the private lands within the proposed HCP preserve. Agreement was not reached until a major public "summit" meeting was held in St. George, Utah sometime in March or April of 1994.

Prior to this meeting and because of serious conflicts which arose concerning the use of Utah based BLM appraisers, BLM management offered a list of approved appraisers from outside Utah from which James Doyle, representing the private landowners involved with the HCP process could make a selection. BLM also selected Mr. Don Duskin (Chief, Branch of ATROW and Appraisal, Oregon/Washington) to be the review appraiser for the appraisal work to be done on the Washington County HCP private lands.

The public meeting was attended by BLM, FWS, Washington County, HCP Steering Committee and Utah Congressional Delegation representative. Private landowners also attended, **ALONG WITH (3) OF THE BLM RECOMMENDED APPRAISERS**, Mr. Duskin, Jerry Kinghorn, legal counsel for Mr. Doyle and numerous other people. Representatives of the Justice Department were standing by in Denver to respond to any questions or problems which might arise out of the meeting. The meeting was chaired by Russell Gallian, representing the Washington County Commission.

The valuation issue was paramount at this meeting. Agreement seemed difficult with regard to the latest of several "Draft Appraisal Guidelines" issued by the Justice Department. The morning session of the meeting failed to produce any tangible results. Following an early lunch recess, the meeting reconvened and upon explanation being made by Mr. Donald Duskin about how the appraisal process might proceed, agreement was reached and the process labeled "PRELIMINARY VALUE ESTIMATE" was launched.

An "AGREEMENT TO OBTAIN PRELIMINARY VALUE ESTIMATE" (PVE) was entered into between BLM and James Doyle, representing the Washington County private landowners, recognizing that landowners (both under and not under contract to participate in a proposed Interstate Land Exchange) would be universally impacted by this process. The PVE was a joint venture between BLM and Doyle with each obligated to pay ½ of the \$42,500.00 bid price.

Testimony of Alan D. Gardner (continued)

Note: It is important to consider here, a quotation from the "AGREEMENT TO OBTAIN PRELIMINARY VALUE ESTIMATE":

"...The Preliminary value estimate to be performed by the appraiser will be a preliminary value estimate in accordance with the provisions of this Agreement, and will not be a final appraisal; rather it is contemplated that if a transaction is later negotiated between the parties, the preliminary value estimate will be updated to a final appraisal at that time.

(Underlining added).

Over a month was spent by BLM, Mr. Kinghorn, and Dallin Gardner preparing and reviewing the "Preliminary Valuation Solicitation" for mailing to the BLM recommended appraisers (and others) on May 25, 1994.

Subsequently, bids were received and reviewed. Sell-Huish and Associates, Inc., represented by Jan Sell was selected to do the work in accordance with the agreements already in place.

On July 11, 1994, a pre-appraisal review meeting was held in the BLM offices in Salt Lake City. This meeting was attended by Mr. Kinghorn; Ted Stephenson (BLM); Don Duskin, Review Appraiser; Jan Sell, selected appraiser; and Dallin Gardner, representing the interests of certain landowners whose property was proposed to be involved in the Interstate Land Exchange. The purpose of the meeting was to answer questions and review the "PRELIMINARY VALUATION SOLICITATION", including the "DRAFT APPRAISAL GUIDELINES". Open discussion was welcomed on any and all points of clarification and concern prior to Sell-Huish beginning the appraisal process.

The contract with the landowners and the Purchase Order from BLM were then issued, authorizing Sell-Huish to perform the appraisal. Work was started on July 14, 1994.

During the following (3+) months, the appraisers completed their work, which consists of a "COMMON DATA BOOK" and a separate "SELF CONTAINED APPRAISAL REPORT" for each of the (35) parcels included in their contract.

In addition to the work done by Sell-Huish, Mr. Duskin, the Review Appraiser, made site visits to inspect the (35) parcels and all of the comparable properties identified and used by Sell-Huish.

On October 20, 1994, nearly (5) months after the "Solicitation" for bids had been released, Sell-Huish completed their work and sent final information to Mr. Duskin, Mr. Doyle and landowner representatives.

Testimony of Alan D. Gardner (continued)

Mr. Duskin completed his review over an additional period of (5 ½) months from the completion of work by Sell-Huish. During this time he performed independent verification of information and recommended technical and analytical corrections to Sell-Huish and, in cooperation with Sell-Huish, made some value adjustments.

On April 5, 1995 (10 ½) months after the "Solicitation" for bids was issued, Mr. Duskin released his own final review comments in the form of a Memorandum to the Utah State Director of BLM. This memorandum explained that "...The appraisers have corrected all of the technical and analytical deficiencies, previously noted." Mr. Duskin then presented his own independent list of "approved market values" by Property Owner, Size and market Value for each of the subject (35) parcels. There was a total of 6,803.83 acres involved with a total "approved market value" of \$83,820,000.00.

Any appraisal is intimately related to the history, background and special conditions or circumstances affecting the property, its ownership or other special situations. It would be impossible for a new entrant into the appraisal environment of the PVE properties to understand and/or duplicate all of the discussions, instructions and interpretations which had already been jointly agreed to by the parties with respect to obtaining estimates of value for these lands.

When the time came to have a final appraisal, property that was homesteaded by my grandfather, Erastus Gardner, about 60 years ago (still in possession of the Gardner family), and in the center of the HCP Reserve, was selected by the BLM as one of the first pieces to be exchanged.

Instead of upgrading the previous appraiser's PVE as was called for in the agreement, a new appraiser, who had no background on any of the previous discussions, was brought in without any input from us. I showed the appraiser, Paul Meiling, our property and reminded him that the tortoise was not to be considered in the appraisal process, as was agreed to. To this he replied that he had no knowledge of any agreement to delete the tortoise in his evaluation, and that his work would reflect the tortoise presence on the land. In his appraisal, (see Exhibit One) Mr. Meiling states that he didn't get comparables for our property, because of the "heavy and severe impact" of the tortoise. He placed a value on our property of less than 15% of the PVE on the same land. As it turned out, Mr. Meiling was sent out under contract from the Utah State office of the BLM, who by prior agreement was to have no involvement. Because of this low ball appraisal, all exchanges came to a complete stop. Ten months later our family agreed to bargain for a price on our property with the BLM. The BLM team consisted of Jerry Meredith; District Manager for BLM, Dave McNay; Chief of the Lands Branch in the BLM California State Office, and Dick Young; Chief of Land Resources for the National Parks Service Intermountain Field Area. My brother, Larry Gardner, and I represented our family. After discussions over several days, and inspecting the subject property and comparable sales; we agreed upon a price that included a mitigation deduction of \$239,000. (\$1,000. per acre). This was the estimated cost for a Section 10 Permit if we were to develop the land ourselves.

Testimony of Alan D. Gardner (continued)

An inflation factor was added back on because of the age of the appraisals. Then Fish and Wildlife Service mandated additional mitigation of fencing costs, because if we were to develop the property it would have to be fenced (15,800 feet). Fish and Wildlife wanted the price of a block wall, but we agreed on wire fencing, similar to some around St. George at \$4.00 a foot. That was an additional deduction of \$63,360., or \$260. an acre for a total of \$302,360.; in mitigation costs (Exhibit Two). BLM also agreed that the appraised value of any BLM land would be tied to the date the agreement was signed, March 20, 1996. Our family had looked extensively at lands to exchange for. We selected an appraiser, Eric Johnson, from the approved list supplied to us by BLM. He was extremely slow (six and ½ months) in completing his appraisal. After it was turned in and corrections made, we were told his work had been accepted by John Widdoss, the selected BLM Review Appraiser (Exhibit Three). A month or more later we were told it had been rejected by Dave Cavanaugh, BLM's Chief Appraiser in Washington, DC because it had too many problems (an appraisal he did for St. George City was also rejected). At this point, we made a selection of an additional parcel, because mining claims and archeological sites had restricted available acreage in the first parcels selected (Exhibit Four). We selected a different appraiser from the BLM's approved list. He is reappraising the original acreage, plus he has appraised the added parcel. We were then informed that this second appraisal was rejected because the land was of a higher value today (than our agreed upon date of March 20, 1996), and had possibilities of higher value in the future. We realize BLM has had problems in the Las Vegas Exchange, but we feel they are going overboard the other direction in Washington County, Utah. It is as if the deal, on the surface, has to appear like the BLM got the best end of the bargain, rather than making it fair to both parties.

I would like to address two other issues I think are unjust. The majority of the acreage inside the Reserve was not for sale. Property owners, forced to give up land have accommodated the BLM by exchanging for other property outside the Reserve, yet they have had to bear the cost of the appraisals on something they were forced into. If surveys are required they have to pay for government surveys also, even though they could be done cheaper by private companies. Not only have we had mitigation costs to pay we have also suffered severe opportunity costs because BLM has not been able to perform on a timely basis.

Many families have been forced to bear an inordinate burden for the broader public interest declared by Congress under federal law reflected in efforts to preserve the desert tortoise. Not only were we forced to sell our private property, we were also forced to assume the costs of an elaborate federal process and pay for tortoise impacts which should be borne by the public as a whole.

Another problem has been conflicts with archeological sites. Every exchange so far has been impacted by archeological sites. These are very expensive to mitigate. As a result, most exchanges have had the sites carved out, sometimes leaving pockets of BLM land or peninsulas into private land (Exhibit Five). In some cases mitigation is required including some sites on one of our exchange parcels. The Washington County Water Conservancy District, in negotiations with Zion National Park and BLM agreed to exchange a reservoir site on private land above the

Testimony of Alan D. Gardner (continued)

Park, for a location below Zion that would not impact the flow of the Virgin River through the Park. The new location had archeological sites that had to be mitigated. It cost the District around \$150,000. in archeological surveys and clearance and an additional \$700,000. in mitigation. Of this amount, \$65,000. was paid by BLM because some sites overlapped on BLM ground. These mitigation costs should be deducted from the appraised value like BLM deducted mitigation for a Section 10 permit and fencing in our agreement. Instead they add significant costs to the exchanged property above the appraised value.

Appraisals of other private property within the HCP have improved since Public Law 104-333/110 Statute 4093 has passed, which deals with the exchanges in Washington County, Utah. Also, Bill Lamb, Utah State BLM Director, has assigned more local BLM personnel to assist in land exchanges. Mr. Cavanaugh has been to St. George many times assisting. More emphasis needs to be continued at the local level and compensation needs to be timely and at fair market value. With these changes, things have gone smoother and several exchanges have occurred. But, questions of fairness, such as those presented in this testimony, still exist. I am concerned that many other private property owners will be forced into unfavorable compromises when faced with the burdens created by the process involved in these land exchanges.

EXHIBIT ONE

PROPERTY VALUATION (Cont'd)

The Sales Comparison Approach (Cont'd)

Conclusion of Value, Federal Lands, Parcel "B"

A full and complete comparative narrative analysis is not presented for the Non-Federal lands under appraisal. This is so, because the impact of the tortoise influence on the property is so heavy and severe that all of the other factors of comparison become meaningless, compared to this one dominant factor. The Unit Adjustment Grid on the preceding page quickly conveys what the appraiser believes the market's attitude and reaction is to lands so encumbered by the endangered species, and the consequence and effects of its presence.

To date, there are no known sales within Washington County which demonstrate the value of land within the area delineated as tortoise habitat. Heavy judgment is required of the appraiser in the absence of such revealing market data. Arguably, land so encumbered by the endangered species has no use, in the terms we usually consider. "Maximum productivity," taken from the "highest and best use" definition, has no application here, since the land is incapable of producing any income.

Any individual's attempt to value this property under the current conditions must render judgment as to what the future might have in store for this property. If it can be reasoned that legislation will change the Endangered Species Act in the foreseeable future, prospective buyers might be inclined to be more aggressive in acquiring this property. The ultimate test of value, from the definition of market value, is the price one is willing to pay for the property with full knowledge of its potential uses. In this appraiser's judgment, that price is nominal in today's market, compared to a price a buyer might otherwise pay for the land if not affected. Buyers anticipation and perceptions are of paramount importance in rendering value judgment. At the present, these perceptions suggest such a purchase of this property to be extremely speculative. Any bonifide offer to buy the property would prudently be made accordingly.

From the array of market data collected, the appraiser concludes a value of \$1,000 per acre for the Non-Federal Lands appraised as Parcel "B", thus the tract is appraised at:

$$239.00 \text{ acres @ } \$1,000/\text{acre} = \$239,000$$

The agency has requested that the appraiser make *pro rata* allocations of value for the subject parcel, based on a division of the larger parcel into two tracts, (1) the easterly 100 acres and (2), the westerly 139 acres.

The allocations are:	The easterly 100 acres	\$100,000
	The westerly 139 acres	\$139,000
	Total	\$239,000

EXHIBIT TWO

June 7, 1996

Mr. Jerry Meredith
District Manager, BLM
Cedar City, Utah

Dear Mr. Meredith:

We accept the BLM's offer of \$7440.00 per acre for our property to be exchanged for BLM lands to be selected by us.

We however do not agree with the reduced value placed on it for mitigation; such as \$1,000 an acre in lieu of doing our own section 7 permit or section 10 permit, and \$260 an acre for fencing (\$4 per foot for the 3 mile perimeter).

Washington County's Section 7 permit should have been sufficient. We feel that Fish and Wildlife is out to take any private property they can with as little compensation as possible going to the owner.

We have agreed to the HCP process and would like to move forward. Please draw up the exchange contract and we will proceed with the exchange.

Sincerely,

W. Gardner
Wish Gardner
De-Har LC

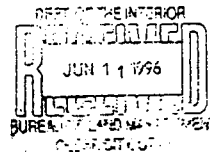


EXHIBIT TWO

Iron County

Commission received an estimate from a private consulting firm of just over \$100,000 for an HCP covering a little over 2,000 acres. That equates to a cost of a little over \$50 per acre.

We recognize that in addition to the HCP costs, there will be mitigation costs. The Washington County HCP estimates these at about \$16 million or nearly \$300 per acre. The Iron County plan is not completed, but at the present time small single site HCPs are requiring \$50 per animal removed to cover capture and relocation to a public land site, and a \$200 per acre mitigation fee.

The subject property is on the north edge of the HCP's proposed reserve and adjacent to property that is outside the HCP. The subject property is not in priority A habitat, but is listed as priority B. The property owners believe that much of the upper elevations of the property have few if any tortoises. Further biological studies (HCP studies) would be needed to substantiate this belief.

Given the above considerations we believe the value we recommended should be adjusted downward by \$1000 per acre to allow for the cost a developer would have to consider if they were to approach the FWS with a request for an individual HCP. The federal team believes that this process recognizes the presence of a listed species without assuming that the property simply can not be developed. We believe this is more in accord with the appraisal instructions than either appraisal report.

This would place the adjusted value recommendation at \$6,000 per acre.

Recognizing, as did both appraisers that property in this area is appreciating at an accelerated rate we also agreed that the comps should be adjusted for appreciation. Both appraisers made this adjustment in their reports, but since the reports have aged further we felt this consideration should be carried forward to the date of the bargaining. Using the rate from the Meiling report (1.6% per month) because it was the most recent, the final recommendation becomes \$7,700 per acre. This factor will negate the need to update the appraisals that are both beyond the normal life expectancy.

SECOND BARGAINING SESSION

This recommendation was presented to the Gardners when they returned at 3 p.m. on Tuesday March 19. After going over our logic and the recommendation in detail, the Gardners asked for some time to discuss our recommendation and to make a few phone calls.

EXHIBIT TWO

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Cedar City District Office
176 East D.L. Sargent Dr.
Cedar City, Utah 84720

UT-040
2200

May 28, 1996

Memorandum

To: State Director, Utah

From: District Manager

Subject: Negotiating/Bargaining, DeMar LTD

As requested in your memorandum of April 18, 1996, "Negotiating/Bargaining Instructions DeMar LTD (Supplement 1)", I reviewed the teams process for estimating mitigation expenses with Bob Williams and Reed Harris of the Fish and Wildlife Service.

Mr. Williams responded for the Service and indicated that he felt the process the team used was as accurate as possible at this point, with one exception. The estimates used in developing mitigation costs by the team did not include fencing that would keep people within the developed area and tortoises out of that area.

It should be noted that it is very difficult to identify specific mitigation or estimate mitigation costs accurately without knowing exactly what is proposed for a particular parcel of land, and without having first completed a biological assessment. The development plan and the biological assessment provide the key information needed to determine what mitigation might be necessary.

However, fencing has become a routine requirement in this area, but was not included in cost estimates contained in the Washington County HCP. The most recent examples are the Hurricane Golf Course development, the Tlacahn Center, the City of St. George property, and the temporary holding facility for translocated tortoises.

Mr. Williams indicated the Service prefers one of two types of fence depending on the circumstances. Either a block wall with footings into the ground, or a range fence with partially buried tortoise proof mesh at the bottom.

I next contacted Bill Mader, Washington County HCP administrator about the type and cost of fencing they are currently using within the HCP area. He indicated that while Hurricane Golf Course is using a block wall, the closer and more comparable development would be Tlacahn. They are using a range fence with partially buried tortoise proof mesh at the bottom. This is also very similar to what the City of St. George is using and what the HCP is using for their temporary enclosure where tortoises are held prior to relocation.

He has priced the type of fencing needed within the HCP Reserve at a number of locations. The price has ranged from \$3 to \$5 a running foot. The range is based on the height and type of fence and the amount bid. Based on the information he has collected, he felt like a fence similar

EXHIBIT THREE



Sunday, March 2, 1997

8:49 AM

From:	To:
Name: John Widdoss	Name: Mr. Eric N. Johnson, MSA
Company: Hall-Widdoss & Co., Inc.	Company:
Phone: (605) 348-6626	Phone: (801) 586-5106
Fax: (605) 348-0356	Fax: (801) 586-0254

Total number of pages, including cover: 1

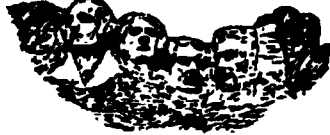
Message:

Eric --

I have recommended approval of the appraisal of the DeMar federal parcels at \$1,137,000. Please send your corrected copies of the appraisal to Ted Stephenson with the State Office of the BLM.

I have some of the same final recommendations which relate to style only. In your final analysis, a little less averaging, weighting, etc., would increase the reader's confidence that you placed the final value conclusion on the "best" sale or best sales (1-3 properties if your data is good). In this case, there are no real comparables, but stressing the best sale gives a stronger confidence in your conclusions.

EXHIBIT THREE



Saturday, March 1, 1997

5:16 PM

From:	To:
Name: John Widdoss	Name: Mr. Eric N. Johnson, MSA
Company: Hall-Widdoss & Co., Inc.	Company:
Phone: (605) 348-6626	Phone: (801) 586-5106
Fax: (605) 348-0356	Fax: (801) 586-0254

Total number of pages, including cover: 1

Message:

Eric --

I have reviewed the updated material on the Zion View Ranch you submitted last week. I will be recommending approval of the appraisal and value estimate at \$1,644,000. As a matter of style, there is substantial improvement in the new material. I would, however, select the "best sale" in the final analysis and rely a little less on the "ranging and bracketing". While that assists, one sale should be better than all the rest, i.e., it becomes a benchmark for your final comments.

Please send the final reports with revisions to Ted Stevenson.

Thanks

This parcel DeMar is acquiring, but in a three-way exchange.

EXHIBIT FOUR

AMENDMENT
UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
AGREEMENT TO INITIATE AN EXCHANGE

UTU-75157

The Agreement to Initiate an Exchange entered into on August 22, 1996, between DeMar L.C. and the BLM is amended as follows:

Because of conflicts with mining claims, it is necessary to identify additional public lands which may be exchanged in order to equalize values. Exhibit A, SELECTED FEDERAL LAND is amended to include the following described land:

Salt Lake Meridian

T. 42 S., R. 13 W.,
sec. 1, lot 1, SE $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$;
sec. 11, E $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$;
sec. 14, NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$;

containing 505.08 acres more or less.

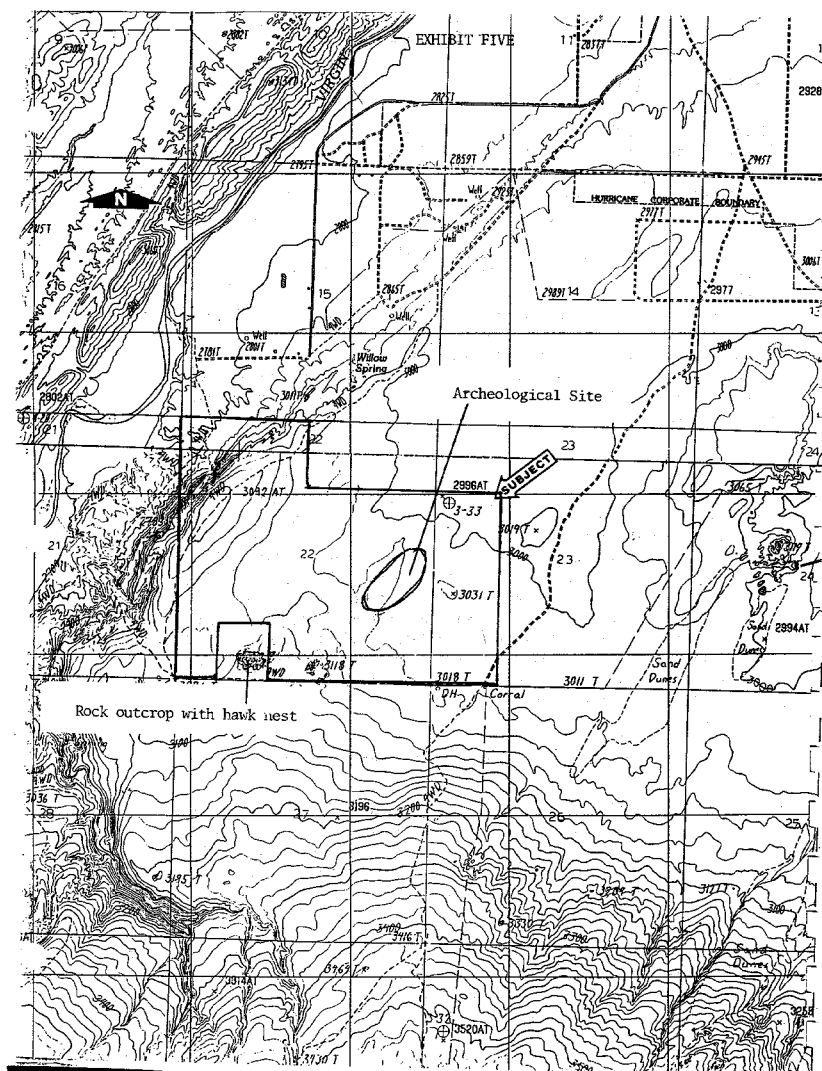
All other provisions of the original agreement will remain in effect.

PROPOSER

By: *Arthur DeMar*
Title: *Arthur DeMar*
Date: *3-26-97*

BUREAU OF LAND MANAGEMENT

By: *James D. Cragg*
Title: *Area Manager*
Date: *3/26/97*



Woodward S. Hanson, MAI

INTRODUCTION:

Chairman Hansen and members of the Subcommittee, I am Woodward S. Hanson, 1998 Vice President of the Appraisal Institute. I would like to begin by thanking you for giving me an opportunity to provide input to what the Appraisal Institute sees as an exciting and dynamic period in the further development of our nation's *"Federal Lands Public Policy Initiative"*.

I am a 5th generation resident of Fort Myers, Florida, and grew up one block from Senator Connie Mack and recently had Congressman Porter Goss' grandson on my little league baseball team. Although I have five sons, I am neither a Mormon or am I kin to Chairman Hansen. I live near and use the Everglades National Park, the Big Cypress and the 10,000 Islands for recreational purposes, and my grandfather was known as the "White Medicine Man" by the Seminole Indians of Florida. I am in business with my father, an 83 year old Navy veteran. I have a personal and professional interest in our national resources and am an advocate for *multiple use development of natural resources on public lands*.

I am an honors graduate of the University of Florida with degrees in Business Administration-Real Estate and Urban Land Studies; and, Bachelor of Design Architecture. I have qualified as an expert in the field of real estate appraisal on numerous occasions in Federal Court, Federal Tax Court, the Chancery Court of Delaware, and various Circuit Courts throughout Florida. I am currently on the faculty of the American Law Institute of the American Bar Association (ALI-ABA) which provides an eminent domain CLE curriculum. I am also a member of the University of Florida's Graduate School of Business Administrations' Real Estate Advisory Board. I have represented both public and private clients in the valuation of lands acquired for preservation and/or public recreational uses, including the Florida Department of Environmental Protection's recent acquisition of Top-Sail Hill in Destin, Florida, for \$85 mm, the largest public acquisition in the history of the State of Florida. I also authored the Appraisal Institute's position paper on "Public Interest Value and Non-Economic Highest and Best Use".

OUTLINE OF SIGNIFICANT TOPICS AND ISSUES

According to your 06 March 1998 letter, the Subcommittee *"will hold and oversight hearing on Bureau of Land Management realty and appraisal issues."* In response to the Subcommittee's "focal point", I have carefully reviewed *43 CFR Part 2200* which is that portion of the Department of Interiors' Public Lands Policy which identifies the *Bureau of Land Management's* (BLM) objectives, definitions, responsibilities and policies.

Based upon this review, as well as a review of the 1998 edition of the Uniform Standards of Professional Appraisal Practice (USPAP) of the Appraisal Foundation, the Uniform Appraisal Standards for Federal Land Acquisitions, of the Interagency Land Acquisition Conference 1992, and my independent research, I have selected the following issues and

questions and being best targeted at what I presume to be the Subcommittee's main focus. These are identified as follows:

- *Does the BLM federal land exchange policy, require an inordinate amount of time, and, if so why?*
- *Are there rational explanations for large differences of opinion in the valuation of public lands?*
- *Is the BLM policy consistent with current industry standards?*
- *Contributory valuation of view amenities and non-economic resources.*
- *The need for legislative direction on issues related to the valuation of public or natural lands.*

Expecting that these issues are of greatest interest and concern to the Subcommittee, I have prepared the following response for your review and entry into the Official Record.

Question No. 1: Does the BLM federal land exchange policy, require an inordinate amount of time, and if so, why?

The Bureau of Land Management (BLM), within the Department of Interior, is the largest federal landowner, controlling over 270 million acres. It swaps tens of millions of dollars worth of land with developers and others each year. It is not widely known, but just about every week, some agency of the federal government trades public land for property owned by private interests.

Most recently, the "*Dell Webb exchange*", involving 4,700 Acres of federally owned public lands, received criticism in an article titled "*Inside Tract*" published in the 16 January 1998 edition of The Wall Street Journal (See Exhibit A). The article is more concerned with the *equitability and fairness* of the land exchange process, than the amount of time involved in completing the project.

If an extensive or inordinate amount of time is associated with this process, it would seem as though the seller, or in these cases, the vendor (public), would be the benefiting party as additional time for due diligence, data verification, review of opposing party appraisals, and other transactional related activities would be available.

It also appears that there is great "interest" in BLM assets which are transitional in nature and are capable of supporting an "*urban use*" due to their "*fringe locations*" adjacent to growing metropolitan statistical areas (MSA), such as Las Vegas, Nevada and Phoenix, Arizona. These are "*complex properties*" which involve many valuation issues, including, probability of comprehensive plan amendments or zoning changes, adequacy and availability of infrastructure, off site liabilities, mitigation requirements, and others. In addition, the exchange process involves "*multiple properties*", whereas,

the eminent domain process involves only one. Furthermore, the amount of time to complete the exchange process is dependent upon the disparity between the value estimates related to the exchange parcels.

In conclusion, the BLM process does not appear to take an inordinate amount of time given the complexity of the properties involved and the increasing public sensitivity to and awareness of public lands and resources. Extended transaction terms seem directly related to differences in value opinions.

Question No. 2: Are there rational explanations for large differences in opinion in the valuation of public lands?

In the Del Webb exchange, the BLM obtained value estimates from appraisers which ranged from \$10,000 Per Acre to \$10,900 Per Acre, whereas, plaintiffs suing to stop the swap have put it at \$36,000 Per Acre. Can a range in value of this magnitude be explained?

Often times, such a magnitude of dispersion in market value estimates, is attributable to either "*special assumptions*" or "*hypothetical conditions*" relied upon by one of the appraisers, but not the other. Examples include legal instructions to assume that there exists a reasonable probability of annexation, infrastructure extension, or zoning change. Each of these issues affect the "*highest and best use*" of the property and the resulting value estimate.

The Conduct Section of the Ethics Provision of the 1998 Uniform Standards of Professional Appraisal Practice states that:

"The development of an appraisal, review, or consulting service based on a hypothetical condition is unethical unless: 1) the use of the hypothesis is clearly disclosed; 2) the assumption of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison and would not be misleading; and 3) the report clearly describes the rationale for this assumption, the nature of the hypothetical condition, and its effect of the result of the appraisal, review or consulting service."

Therefore, the appraiser has specific ethical obligations in these instances.

The 1998 USPAP also contains by a "*Jurisdictional Exception*" and "*Competency Provision*". The "*Jurisdictional Exception*" states "If any part of these standards is contrary to the law or public policy of any jurisdiction, only that part shall be void and no force or effect in that jurisdiction". The "*competency provision*" states that "an appraiser must have the knowledge and experience to complete the assignment competently; or alternatively disclose the lack of knowledge before accepting the assignment, take all steps necessary to complete the assignment competently, and

describe the lack of knowledge and the steps taken to complete the assignment competently in the report.

Another "*real-time*" explanation of value dispersion pertains to the contributory valuation of special property features which when valued in context to their "public" or "social value" results in value estimates which allegedly exceed their "market value" under traditional, economic valuation processes.

Question No. 3: Is the BLM policy consistent with current industry standards?

The BLM exchange process is governed by 43 CFR 2200. The objective of this policy is identified as:

"to encourage and expedite the exchange of Federal lands for non-Federal lands, found to be in the public interest, in accordance with applicable statutory policies, standards and requirements."

The Director of BLM has the responsibility of carrying out the functions of the Secretary of the Interior under these regulations. The Secretary is not required to exchange any Federal lands. Land exchanges "*are discretionary, voluntary real estate transactions between the Federal and non-Federal parties*". The exchange may only take place after a determination is made that the public interest will be served.

Lands or interests in land to be exchanged shall be of equal value or equalized in accordance with the methods set forth in Section 2201.6. An exchange of lands or interests shall be based upon "*market value*" as determined by the Secretary through appraisal(s), through bargaining based on appraisal(s), or through arbitration. The policy includes "*Appraiser Qualifications*" which comport to the intent of Title XI of FIRREA (12 U.S.C. 3331). The minimum level of required competency is that of a "certified appraiser", as opposed to the "professionally designated" appraiser. However, the BLM often uses "professionally designated" appraisers for the complex property appraisal.

Finally, under the Market Value Section 2201.3-2 (3), the value estimate shall include:

"historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities that are reflected in prices paid for similar properties in the competitive market".

The appraiser is also required by BLM to provide the reader with a 5-year sales and marketing history of the subject property, whereas, USPAP requires only a 3-year sales and marketing history overview. Also, the appraiser is required to inspect the subject property and the comparable sale properties. This too, exceeds the requirements of USPAP. A *review appraisal* is also required.

In conclusion, the BLM federal land exchange policies, reflected in 43 CFR 2200 appear to meet or exceed current standard in the industry, particularly those required by USPAP, which is the published standard for federally regulated financial transactions involving financial institutions.

Question No. 4: Contributory value of view amenities and non-economic resources?

Utah with 84,916 square miles is the 13th largest state in the nation. In terms of "*economic geography*" Utah has 67% of its lands under federal ownership (e.g., BLM, Forest Service, Department of Defense, and the National Park Service), 4% in Indian holdings, 22% in private ownership and 7% under state ownership. Utah also contains six national parks: Arches N.P., Bryce Canyon N.P., Canyon Lands N.P., Capital Reef N.P., Great Basin N.P. and Zion N.P. The Arches National Park contains 73,000 Acres with over 1,500 "arches". Utah also contains numerous "school holdings" or "SITLA" lands, typically Sections 16 and 36. Thus, the "*contributory value*" of these natural amenities is important not only to the State of Utah, but its individual citizens as well.

As indicated above, Section 2201.3.2-2 (3) requires the appraiser to include value contribution from "scenic, cultural or other resource values or amenities that are reflected for prices paid for similar properties in the competitive market".

The problem occurs when there are no *sales of similar properties*, due to the uniqueness of the properties being appraised. Or, where sales data or transactional evidence that is relied upon occurs in "*a non-competitive market*". Examples include government transactions, or transactions involving parties who are motivated by a "non-economic" incentive (i.e., preservation, or conservation).

Other unique complexities exist when special legislation is passed which governs the appraisal process, such as recent legislation related to the Endangered Species Act and the "desert tortoise" of Utah. If an appraiser is required to disregard such property influences, a significant impact may occur to the "highest and best use" of the property and the resulting market value estimate. However, Federal and State jurisdictions have long histories of law relating to "*Scope of Project influence*", whereby the appraiser is required to disregard any increase or decrease in value caused solely by the project and occurring after project announcement.

The use of the "*fair market value*" concept, as opposed to the current "*market value*" standard may be applied when there are other factors involved in the appraisal assignment. The FMV standard applies to emergency status or issues of fairness and equity. The FMV model is an alternative available to BLM and other federal agencies to "*close the gap*" on valuation ranges associated with the appraisal of natural lands, view amenities or other resource values.

However, there exists a need for a uniform process which is applied consistently and provides the public with a reasonable level of accountability. This provides the "rational nexus" to the final portion of this statement.

Question No. 5: The need for legislative direction on issues related to the valuation of public or natural lands.

Within contemporary appraisal community there is an active debate on the issues relating to public interest value (PIV), non-economic highest and best use, and the related family of concepts. The Appraisal Institute has opined that a property must have an economic highest and best use for it to have a market value, and that preservation and conservation are not proper predicates to an economic highest and best use. This position has been affirmed by the American Society of Farm Managers and Rural Appraisers as well.

These position statements, however, are not intended to be the "final word" on these matters, but rather provide a "point of origin" for the debate and dialogue. In my opinion, it is time for Congress to debate "Public Interest Value" and consider a public policy initiative which clearly provides and articulates a standard or direction to follow in regard to this matter. As more and more of our federal and non-federal public lands are the subject of exchanges, sales or other uses (i.e., rental concessions in national parks), this issue will continue to be a "stumbling block." Failure to resolve this issue will serve to contribute to the wide disparity in value estimates and delays in property transactions due to necessary conflict resolution processes.

Therefore, I urge the Subcommittee to recognize this as a "political issue", rather than simply an "appraisal issue". I would ask Congress to consider the magnitude of this issue in relation to our continuing public policy initiatives on federal lands. In my view, Congress should convene a forum of specialists from outside and from within the government to address this issue head on.

The Appraisal Institute is ready, willing and able to assist you in the development of this public policy initiative. With nearly 20,000 members, associates and affiliates nationwide, the Appraisal Institute has the knowledge, skill, and brain trust necessary to provide constructive input into this process.

In closing, I would like to again thank you for the invitation to appear before the Subcommittee. Good luck with your deliberations and I pray that you will find solutions. I am available to respond to any questions you may have. Thank you.

Appraisal Institute: The World's Leading Organization of Professional Real Estate Appraisers

The Appraisal Institute is the world's premier association of professional real estate appraisers and an acknowledged leader in the fields of real estate appraisal education and publishing. With a heritage extending over more than 60 years, the Appraisal Institute is built on the foundation of promoting professionalism among real estate appraisers through knowledge, training, and experience along with adherence to high ethical standards. Today the Appraisal Institute has more than 24,000 members in the United States, Canada and abroad.

The Appraisal Institute's designation programs, which recognize ability and competence in residential and commercial real estate appraisal and analysis, are a cornerstone of the organization. Designated members of the Appraisal Institute hold the MAI, SRPA, or SREA general membership designation and/or SRA or RM residential designation. These appraisers are able to provide a wide variety of services pertaining to real estate decision making involving commercial as well as residential real estate. Members can guide and support decisions to invest in, buy, or sell property as well as answer questions about a property's value, quality, suitability, and feasibility for various uses. Appraisers holding these designations have long been respected by the courts, government agencies, lenders, corporations and others seeking professional appraisal services.

The Appraisal Institute offers introductory and advanced courses, specialized seminars, and training programs designed to address the needs of all appraisers, ranging from those just entering the profession to seasoned practitioners who wish to keep abreast of the latest techniques and developments. Designated members participate in a continuing education program to enhance and expand their knowledge of current practices.

The Appraisal Institute also offers an associate membership category, designed for those working toward designation, as well as an affiliate membership category for individuals who are not necessarily appraisers. As the largest publisher of real estate appraisal literature, the Appraisal Institute provides its members and the public with comprehensive and timely information on real estate appraisal related subjects, including its classic reference work, *The Appraisal of Real Estate*, now in its eleventh edition, plus periodicals such as *The Appraisal Journal* and *Valuation Insights & Perspectives*.

The Appraisal Institute is headquartered in Chicago, Illinois, and maintains a public affairs office in Washington, D.C. It also has 121 chapters across the country. For further information contact the organization at 312/335-4100 or at www.appraisalinstitute.org.



Public Interest Value and Noneconomic Highest & Best Use: The Appraisal Institute's Position

by Woodward S. Hanson, MAI
Chair, Appraisal Standards Council

The Appraisal Institute has been made aware by its members and other responsible parties outside the Appraisal Institute that controversy has arisen over the meanings of "market value," "highest and best use," and other foundational appraisal terms and concepts. At issue is the use, or attempted use, of noneconomic land ownership concepts as the basis for highest and best use estimates in market value appraisals. The Appraisal Institute and the appraisal profession large have been brought into the conflict because those who apply the noneconomic highest and best use concepts do so certifying that their work comports to the Uniform Standards of Professional Appraisal Practice (USPAP) and the standards and ethics requirements of the Appraisal Institute.

For purposes of this article, public interest value (PIV) will be referred to as a generic concept covering the family of noneconomic highest and best use concepts frequently encountered in conservation and preservation issues. In this context, those who espouse or apply PIV and noneconomic highest and best use concepts cannot be correct in their USPAP and Appraisal Institute certifications if they are in fact incorrect in applying their concepts and definitions in market value situations. The issues are beyond simple debate: They are now deeply involved

in litigation, governmental transactions, and the public's perception of appraising as a profession.

At issue are key concepts and definitions of the appraisal discipline, our courts, and the market at large (i.e., market value, highest and best use, and just compensation), and the public need for the Appraisal Institute to take a leadership position to provide direction and clarification to our members and the appraisal profession. This article will clearly identify the Appraisal Institute's current position on PIV and its variant family of concepts.

Background

The PIV issue (and its family of concepts) concerns highest and best use and whether a property with a "noneconomic highest and best use" (i.e., preservation, conservation, etc.) can be the subject of a "market value" analysis given the current professional and legal definitions. PIV proponents suggest the following terms to describe the "special value": PIV, public use value, natural value, intrinsic value, natural resources value, existence value, aesthetic value, scenic value, option value, non-use value, and contingency value. Often these concepts are moved to the level of highest and best use (i.e., natural land highest and best use, conservation highest and best use, preservation highest and best use, etc.) with the resulting value called "market value."

The origin of the current controversy seems to be rooted in federal legislation adopted in the 1970s which allowed for the public-private exchange of federal lands if such

The issues are beyond simple debate: They are now deeply involved in litigation, governmental transactions, and the public's perception of appraising as a profession.

exchange was found to be in the "public interest" (later amendments provided for unequal value exchanges). This concept was apparently recognized by the 1984 edition of *The Dictionary of Real Estate Appraisal* which amended the highest and best use definition to include the following sentence:

"Hence, in certain situations the highest and best use of land may be for parks, greenbelts, preservation, conservation, wildlife habitats, and the like."

This language was also substantially inspired by developments in federal income tax laws that permitted income tax deductions for certain types of private land donations or dedications for public purposes. Some argued that such land had no market value because it could not be marketed. Others argued that if adjacent land had a highest and best use for residen-

Itter's Note: Public Interest Value (PIV) and its variant family of concepts relates to the use or attempted use of measures of value other than market value in appraising properties being acquired by public agencies for acquisitions, preservation, conservation, and other purposes. In many instances these concepts are used by professional appraisers or others to support income tax deductions, provide a basis for land exchanges involving governments, or other applications. This article presents the Appraisal Institute's position regarding these issues.

continued on page 28

PIV continued from page 27

tial subdivision purposes (for example), the residential land unit values should also be applied to the donated or dedicated land. An attempt was made to reach a more reasonable basis by saying that in a subdivision context, a developer could promote the value of developed areas by creating open space, greenbelts, or the like. Thus, there was a value to such lands which could be measured by looking at the subdivision as a whole, recognizing the economic viability of these nondevelopment highest and best use categories, and valuing the land accordingly. Importantly, the sum of the parts could not exceed the value of the whole; similarly, all components of land value should be recognized rather than overlooked. My research has not indicated any situation in which the 1984 definition was applied in other than an economic context.

The second edition of the dictionary, published in 1989, eliminated any reference to community development goals and "not for profit" uses for the highest and best use definition. This was also true for the third edition, published in 1993.

The evolution of the highest and best use definition in *The Appraisal of Real Estate* is equally dynamic. The seventh edition indicated: "Most profitable likely use cannot always be interpreted strictly in terms of money"; the eighth edition stated: "highest and best use takes into account the contribution of a specific use to the community and community development goals, as well as the benefits of that use to the individual property owners"; the ninth edition asserted: "The benefit that an amenity may contribute to the development of a community is not considered in the appraisers' analysis of highest and best use"; and finally, the tenth edition maintains: "The benefit a real estate development produces for a community or the amenity contribution pro-

vided by a planned project (i.e., the public space in a park-like area) are not to be considered in the appraiser's analysis of highest and best use."

The Appraisal Institute's Appraisal Standards Council Subcommittee (1993-95) concluded: "It is not appropriate to apply highest and best use to an interest in real estate which is to be held out of economic production into perpetuity, even though the amenity benefits to the community or the public at large are substantial."

This chronology leads to the development of the Appraisal Institute's current position on PIV.

Common Threads of the PIV Appraisal
In order to better understand the controversy, one must also consider the common threads which appear to run through the PIV appraisal fabric. These are:

- A particular public (or noneconomic) interest is selected as the highest and best use.
- The principal, and often the only, comparables used are public transactions, usually without adjustments.
- A governmental agency is frequently the principal, or potentially the only, likely purchaser.
- Intent of the purchaser is prima facie evidence of highest and best use and the comparability of transactions used for comparisons.
- Government transactions associated with the land are treated as though the entire compensation were paid for land, even if other considerations exist.
- Location is rarely, if ever, a major consideration in making adjustments.
- Because highest and best use is "similar" among the transactions considered, their indications may be "averaged" to develop a unit of comparison.

PIV proponents state that traditional valuation methods based on economic analysis are generally not

applicable to the valuation of natural lands. The attributes cause the public to severely constrain or effectively stop an economic use. Furthermore, it is advocated that the unique property features make comparable properties hard to find and the traditional valuation tools have led to under-valuation of natural lands. Alternative valuation models being suggested and applied include: 1) travel cost method: based on stream of user fees; 2) contingent valuation: surveys to determine what people would be willing to pay to preserve a natural resource; 3) component benefits approach: valuing the amenity or resource components separately; and 4) option value approach: value based on gaining the option to preserve the resource in its present state or to develop it later.

In "re-engineering" the appraisal process, the PIV proponents suggest that the appraisal profession: 1) re-examine the definition of highest and best use and market value; 2) expand the notion of the market to include public agencies, conservation groups, not-for-profits, etc.; and 3) recognize conservation and/or preservation as an alternative to be considered in the highest and best use analysis.

Opponents to the PIV platform generally conclude that preservation use is not an economic activity shaped by market forces, so it can neither have a market value nor be determined to have a highest and best use. A paramount argument is that the application of PIV concepts invariably results in value estimates that are demonstrably far beyond those that are derived from economic highest and best use analyses. Thus, they exceed the normal requirements of "just compensation" or public and private protections afforded by longstanding requirements that the marketplace be the standard where public-private interests are involved.

It is also suggested that government is a different type of player and

Chronology of the Appraisal Institute's Review

- **October 1993:** The Executive Committee approves a motion requesting that the Appraisal Standards Council (ASC) study PITV.
- **February 1994:** An ASC subcommittee is appointed to study this issue.
- **August 1994:** The subcommittee prepares a written preliminary report which is distributed to the ASC. A motion is passed to

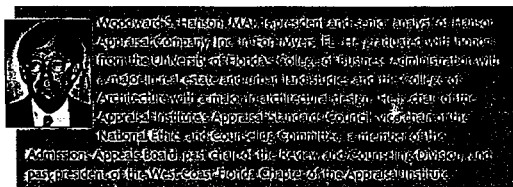
- April 1995: The subcommittee chair reports at an open forum titled "Appraising and for Government Acquisition Preservation." It indicates that the issue is more broad-based than originally anticipated and that further study must address the issues of market value, highest and best use, conditions of sale, intangible value, and competency. A motion is passed to withdraw the draft report of the subcommittee and return it to the ASC. A second motion is passed requesting that the Appraisal Standards Board (ASB) of The Appraisal Foundation appoint a task force to study the PIV issue.

"The Appraisal Institute has studied the issue of appraising unique or environmentally sensitive properties and has concluded that these properties can be appraised under the existing standards of practice of the Appraisal Institute

"That the following policy statement be adopted: The Appraisal Institute has studied the issue of appraising unique or environmentally sensitive properties and has concluded that these properties can be appraised under the existing Standards of Professional Appraisal Practice of the Appraisal Institute, which includes USPAP, and within the provisions of its Code of Ethics, and that highest and best use must be an economic use if the purpose of the appraisal is to estimate market value."

"That the following policy statement be adopted: The Appraisal Institute has studied the issue of appraising preservation and/or conservation properties and has concluded that these properties can be appraised under the exist-

continued on page 48



What Clients Want *cont. from page 8*

tioning from writing reports to consulting," says Iadarola. "There's a growing need for factual, well-thought-out opinions that allow us to free up our underwriters to make underwriting decisions instead of spending time in the field collecting data."

Finally, clients want appraisers to remember that the way they handle the review is as important as the appraisal report itself. "Our better appraisers are smarter than to try to give us the runaround," says Barone. "The people we use on a regular basis work with us to correct mistakes rather than try to cover them up with non-answers."

"The profession is undergoing a lot of changes," Ryan says. "It's the time for appraisers to do their very best work. It'll pay off in the long run." ■



Grace Hayek is an independent writer and editor based in Chicago. A former managing editor for the Appraisal Institute, she is the

author of *Getting the Word Out: High-Profile, Low-Cost Marketing for Appraisers* (1995, Appraisal Institute). Hayek may be contacted at (312) 244-0394 or via e-mail at ghayek@ix.netcom.com.

INCREASE YOUR PROFITS!

Subscribe to Ann O'Rourke's Monthly Newsletter for Appraisers.

FREE SAMPLE ISSUE
1-800-839-0227
ASK FOR OFFER #187

AR | *Valuation Insights & Perspectives*

PIV *cont. from page 29*

ing Standards of Professional Appraisal Practice of the Appraisal Institute, which includes USPAP, and within the provision of its Code of Ethics, and that highest and best use must be an economic use if the purpose of the appraisal is to estimate market value."

The Appraisal Institute's Position on PIV

As a result of considerable discussion and debate, the Appraisal Institute's position on PIV and the related family of concepts is summarized as follows:

- If the purpose of an appraisal assignment is to estimate market value, then the highest and best use of the property to be appraised must be an economic use.
- Preservation and conservation are

not recognized as economic alternatives to be considered in the highest and best use analysis.

- Transactions involving purchasers whose intent is to preserve/conservate privately owned natural lands should not be considered as reliable evidence in support of the market value estimate.

Until such time as the definitions of market value and highest and best use are changed, and until new systems are introduced to replace the current legal and market systems of our country, the above policy will clearly govern the members of the Appraisal Institute. It should also serve as a guide to the profession, governments, other users of appraisal services, and the public at large. ■

Classified Advertising

To spotlight your product or service for the decision-makers of the appraisal industry, contact Chuck Browne, Advertising Manager, Appraisal Institute, (312) 335-4476; fax (312) 335-4474.

Reach more than
30,000
decision-makers in
the appraisal industry
by placing your
classified ad in *Valuation
Insights & Perspectives*!

BUILD YOUR BUSINESS

and polish your image with the

VALUATION REPORT

Keep your name in front of clients and prospects with a personalized quarterly newsletter on industry news and trends. This effective marketing tool is available now on a market exclusive basis for as little as \$99 plus postage. It can't miss.

Fax your name and address to Loftus Appraisers & Consultants (513) 241-7641 or call (513) 241-7660 for sample copy.

**NEW LOWER PRICES!!****ENVIRONMENTALLY CORRECT**

FOTA 100	100+ ROLLS	500+ ROLLS
135-8	\$1.89	\$1.89
135-12	\$1.98	\$1.94
135-12+3	\$1.08	\$1.07
135-24	\$1.33	\$1.29
135-24+3	\$1.45	\$1.39
135-36	\$1.57	\$1.50

FOTA 200		
135-12	\$1.19	\$1.17
135-12+3	\$1.25	\$1.19
135-24	\$1.52	\$1.49
135-36	\$1.79	\$1.72

FOTA 400		
135-12	\$1.40	\$1.35
135-12+3	\$1.49	\$1.35
135-24	\$1.59	\$1.53
135-36	\$1.99	\$1.89

Manufactured, Spooled & Packed in the USA by one of the top five film manufacturers in the world.
C-41 process color print film.
Millions of rolls sold!! 50 ROLL PRO PACK

LIBERTY SUPPLIES
(800) 854-3456
CA (213) 587-1333
24 HR. FAX (213) 587-4981

The Wall Street Journal Friday, January 16, 1998

Inside Tract**How Builder Del Webb
Maneuvered to Win
Prime Las Vegas Parcel****Its Lobbyist, a Pal of Babbitt,
Used a Federal Program
That Swaps Land for Land****Nevada Senator Lends a Hand**

By JEFFREY TATUM
Staff Reporter of The Wall Street Journal
LAS VEGAS — Gary Ryan was the federal government's top land manager here back in 1984 when he was summoned to a meeting with Sen. Harry Reid of Nevada. The senator wanted to talk about a deal involving 4,000 acres of prime federal land.

Arlann's Del Webb Corp., which wanted to acquire and develop the acreage, had filed an application under a program in which the government swaps chunks of public land for privately held parcels that it deems environmentally sensitive.

When he showed up for his meeting with Sen. Reid, Mr. Ryan also found a lobbyist for Del Webb waiting for him. Over the next couple of years, Mr. Ryan would get to know the lobbyist, a burly man named Donald Alann, very well. To consummate the proposed land swap, Mr. Ryan says, Mr. Alann "fled to post the envelope at every opportunity," frequently invoking the name of Sen. Reid and another of his friends, Interior Secretary Bruce Babbitt.

Sen. Reid, too, minced few words in arguing for the deal. The Del Webb land exchange, the senator told Mr. Ryan, was "to be put on the top of the pile and not have to go to the end of the line."

It isn't widely known, but just about every week, on average, some agency of the federal government trades public land for property owned by private interests. The Bureau of Land Management, an agency of the Interior Department, is the biggest federal landowner, controlling about 270 million acres. With little fanfare, it swaps tens of millions of dollars worth of land with developers each year.

But a growing number of critics say the BLM's land-swap program is too susceptible to political meddling and too generous to developers, especially here in Las Vegas, where land values are high and the parcels scarce. "If they're coming to a politician, it makes it almost impossible to say no," Mr. Ryan says. In a 1996 audit, the Interior Department's inspector general rebuked the BLM for its handling of four Nevada land swaps, saying the agency gave up land worth millions of dollars more than what it got in return.

The Del Webb exchange has identified the criticism. Three lawsuits have been filed in Las Vegas federal court seeking to block it, and the Interior Department's inspector general has begun a formal investigation, looking into complaints from current and former BLM officials who say the deal was irregular in a number of ways. A close look at the case reveals the complex maneuvering, both political and corporate, that these land-swap deals can involve.

However, the Del Webb matter raises uncomfortable new questions for Mr. Babbitt, at a time when he faces Justice Department scrutiny of unrecalled allegations that he let Democratic political contributors influence his department's rejection of an Indian casino project. Mr. Babbitt himself once represented Del Webb in its efforts to acquire land from the BLM.

And throughout the period that the land swap was being negotiated with an agency of his department, Mr. Babbitt was in business with Mr. Alann, the Del Webb lobbyist, in a separate land venture.

Mr. Babbitt recused himself in writing from the Del Webb transaction, and his spokesman, Michael Gamble, says the secretary played no role in his department's consideration of it. Mr. Babbitt's property reported his business relationship with the lobbyist to the department's ethics officer and others, Mr. Gamble says.

But Interior Department records show that Mr. Babbitt did become involved at one delicate juncture: Just before the department's inspector general released its critical 1996 audit, Mr. Babbitt endorsed a plan under which the Del Webb exchange and five other proposed Las Vegas-area swaps would be placed on a "priority" list, ensuring that they would continue to move forward at a time when other exchange applications were being put on hold.

Del Webb eventually obtained rights to the land for the equivalent of about 110,000 an acre, a price other developers dismiss as too low.

The stakes for federal land exchanges are especially high in the Las Vegas area, partly because so much land here is controlled by a company headed by Howard Hughes. He bought 25,000 acres in the 1950s, and his Howard Hughes Corp.

Please Turn to Page A6, Column 1



Donald Alann



Bruce Babbitt

AB THE WALL STREET JOURNAL, FRIDAY, JANUARY 16, 1998

How Del Webb Got U.S. Tract in Nevada

Continued from First Page
now owned by Maryland-based Home Co., remains the largest nongovernment landowner in the Las Vegas Valley.

The warm climate, lack of a state income tax and glittering casinos have made this a top retirement destination and an irresistible market for developers such as Del Webb. The publicly held Phoenix company is known for its Sun City age-restricted communities, in which attractive middle-market houses are nestled around golf courses and lavish recreational facilities.

Del Webb's effort to obtain land from the BLM began in the early 1960s. It had a Sun City in Las Vegas, built on land acquired from Hughes, and wanted to expand. Although Hughes was willing to sell desert land, it would be in small, partly developed parcels. Del Webb wanted a big tract of raw land. "To remain in that market, we had to do a land exchange," says Scott Hightower, a Del Webb vice president.

Mr. Babbitt represented Del Webb in this effort and other matters — visiting the BLM's Las Vegas office and phoning BLM employees — until shortly before January 1983, when he became interior secretary and thus the BLM's boss.

In late 1983, Del Webb hired Mr. Moon to work on the land exchange. It wasn't because of his Babbitt ties, says Del Webb Chairman Philip Dixon. "I hired a guy who'd believed had experience with land exchanges," he says. "We didn't hire him to be an influence-peddler between us and Bruce Babbitt." (Eventually, he says, he took Mr. Moon off the case, worrying that his methods were too aggressive.)

Partners With Babbitt

Mr. Moon says he met Mr. Babbitt in the mid-1960s, when Mr. Babbitt was Arizona governor and Mr. Moon was a county prosecutor. They became friends a few years later when Mr. Babbitt, having lost a bid for the Democratic presidential nomination, went into private practice as a lawyer. Mr. Moon says he referred clients to the ex-governor. And in 1980 they jointly invested in 144 acres of land in Prescott, Ariz., where Mr. Moon lives, hoping to sell lots to wealthy Californians pouring into the picturesque mountain town. Sales are on hold pending clearance to shut off a right-of-way through the land, but Mr. Babbitt retains about a 12% interest in the project. There are four partners in all.

Mr. Moon lives in a discreetly concealed mountain retreat, expressing disdain for neighbors who let their houses show above the tree line. Profane and outspoken, fond of beer and cigars, he remarks that "the missionaries need not call here."

Blocked at Red Rock

In Las Vegas, Mr. Moon says, Del Webb was having trouble getting the land it sought from the BLM. It had its eye on 4,000 acres west of the city near the Red Rock National Conservation Area. But there was a bill in Congress to expand the Red Rock, and at one point this bill was amended to include the 4,000 acres the company wanted. Del Webb's Mr. Dixon contends that landowner Howard Hughes Corp. had a lot to do with this move. "Trying to stoke the furnace and screw us up," A. Hughes executive, Mark Brown, denies this, saying "our only interest was to make sure that the process was followed and the land was appraised at fair value."



Harry Reid

Mr. Moon managed to stall the legislation. As an Arizona company, Del Webb had close ties with home-state Republican Sen. John McCain, who used his Senate prerogative to hold up the measure. A McCain spokesman says the senator was concerned that it treated Del Webb unfairly. But Nevada's legislators all wanted a conservation bill passed, and Mr. Moon couldn't get the 4,000 acres reserved from it. "When you're local, you're local," he says.

It was time for Plan B. That involved an alternative land exchange, in which Del Webb would go after a 4,100-acre federal parcel south of Las Vegas.

Mr. Moon says he used Sen. McCain's hold on the conservation bill to arrange a meeting in Sen. Reid's office with Robert Armstrong, the assistant interior secretary in charge of the BLM. There, Mr. Moon asked Mr. Armstrong to write a letter stating the BLM's commitment to move the alternative land swap swiftly through the bureaucracy.

Sen. Reid "was saying, 'These guys [Del Webb] can kill this bill and they give me some hell here, huh,'" Mr. Moon says. Mr. Armstrong "sympathized," he adds, but declined to provide the letter.

Sen. Reid doesn't dispute this account but says he was only seeking BLM assistance within the regulations. "We didn't tell them to approve it," the senator says. "We just didn't want [Del Webb] to lose their place in the pecking order."

Mr. Moon acted instead for a letter signed by the entire Nevada congressional delegation expressing support for the alternative swap. Sen. McCain lifted his hold, and the conservation bill passed. Mr. Moon says. The biologists then proceeded to use the letter like a cudgel, driving BLM officials hard to honor the deal he had made with the Nevada delegation.

He interpreted the delegation's letter liberally. For instance, Del Webb had spent millions of dollars processing the first, unsuccessful land swap. Mr. Moon told BLM employees in Las Vegas that the letter's recommendation "that Del Webb be given credit to the extent possible for its previous investments" meant the BLM should credit the earlier payout toward the company's costs in processing the second proposed exchange.

Name Dropping

Mr. Moon wasn't bashful about using Mr. Babbitt's and Sen. Reid's names with BLM employees. "He'd say, 'Both of them support this exchange,'" the agency's Mr. Ryan says. "I don't want to have to give them the bad news that you've missed this deadline." Mr. Moon says he did use their names but didn't threaten to pull strings to get lower-level people overruled.

Sen. Reid acknowledges that Del Webb held a land-master for him at its Phoenix headquarters in late 1984, raising \$5,000 from Del Webb employees and \$5,000 from Mr. Moon. "I frankly raise a lot of money in Arizona," Sen. Reid says, but he says the contributions had no effect on his stance toward the land exchange. He says he supported the Del Webb exchange because the developer is a good corporate citizen that builds attractive homes for the elderly and employs thousands of Nevadans.

During his three years on the project, Mr. Moon says, he dined several times with his friend Mr. Babbitt. He kept the interior secretary abreast of developments on the Del Webb deal, Mr. Moon says, but didn't ask for his help. He acknowledges that "I might have said, 'I'm working on this land exchange, and your people are being real a—.'" Or, "BLM's got serious trouble" — "I might have said that."

Mr. Babbitt's spokeswoman says the interior secretary never discussed the Del Webb land swap with Mr. Moon, and didn't

Priority List

In January 1996, as the Interior Department's inspector general prepared its audit of Las Vegas-area land exchanges, BLM staffers in Nevada reviewed their procedures for handling applications for such swaps. Then they put together a list of sites to be designated priorities, including Del Webb's. In Washington, Secretary Babbitt reviewed the list. "I believe we have now reached consensus and closure on Nevada land exchanges," he wrote in a approving it. "The overall organization and priority setting... looks OK to me."

In the same memo, Mr. Babbitt reiterated his "policy of not being involved in decisions on specific proposals involving Del Webb in Nevada." His spokeswoman, Mr. Gaskin, contends that approving the priority list didn't amount to an official action on the Del Webb exchange.

Mr. Moon says citing Messrs. Babbitt's and Reid's names ultimately didn't help Del Webb's cause. In fact, he says, his relationship with Mr. Babbitt was a hindrance, provoking suspicious bureaucrats and others to subject the exchange to especially close scrutiny. "No land exchange," Mr. Moon says, "ever jumped through the hoops this one did." With that, the company's Mr. Dixon heavily agreed.

But one hurdle was of its own making. When Del Webb first wrote to the BLM proposing a land swap, it had no environmentally sensitive land to offer in exchange. In most successful swaps, developers don't write to the agency until they have options on land the BLM might want, says Larry Sip, a retired BLM employee.

"When Del Webb initially came in," he says, "they had no land to offer." So Mr. Moon says he checked with the BLM about which Nevada lands it might be interested in. One thing it wanted to do was expand central Nevada's Stillwater National Wildlife Refuge. Del Webb began buying ranches near the refuge and looking into other property.

What's It Worth?

Another way this deal was different: The developer insisted on choosing its own appraiser for the federal land it wanted. Del Webb's Mr. Hightower concedes this was unusual but says the appraiser — from Del Webb's home city of Phoenix — knew the Las Vegas market well.

The amount of the appraisal would, of course, establish how much land Del Webb had to supply in return. The Interior Department's inspector general now is investigating the process that led to the initial appraisal, which placed the Las Vegas land's value at just \$9,000 an acre. A second appraisal that was eventually ordered valued it at \$10,000 an acre, while one commissioned by plaintiffs suing to stop the deal put it at \$26,000 an acre.

To some critics, such disparities show an inherent problem with land swaps: the difficulty of valuing raw land. Charles Hightower, a retired BLM employee and critic of the land-exchange process, says appraisers, like expert witnesses, tend to shade their findings in favor of whoever pays their bills. The BLM could get far more for its land by auctioning it, he says, and then could buy any sensitive land it wanted. Mr. Gaskin says the Interior Department has opposed to such a process, but in most cases the law won't allow it. Department spokeswoman Stephanie Hanna notes that BLM land exchanges have become an increasingly important component of the Interior Department's ability to acquire land that needs protection.



In any case, the Del Webb deal soon hit another snag. Churchill County, near the Stillwater refuge, complained that expanding the refuge would endanger the county's drinking water supply. To address the concern, Mr. Moon was soon shepherding through the office of Churchill County Manager B.J. Selinder an odd cast of characters, Mr. Selinder says. "The first guy looked the part of a rancher - cowboy hat, handlebar moustache, jeans, boots," he says. "Later, he brought in a Harvard professor."

Mr. Moon also did some more name-dropping. "He said he was doing the same job Babbitt used to do for Del Webb before he became interior secretary," Mr. Selinder says. He "intimated that he had a direct line to the secretary." Mr. Moon's account is a little different: He says he had had dinner with Mr. Babbitt not long before meeting Mr. Selinder and merely told the county official that "the Stillwater conservation area is very important to Babbitt."

Second Appraisal

In October 1996, the BLM released a long-awaited notice of decision to grant the Del Webb swap. Five opponents, including Mr. Hiseach, the Sierra Club and the Churchill County Commission, filed protests, raising various concerns. Utah Republican Rep. James Hansen, chairman of a key subcommittee, also objected. After two days of meetings in early 1997, BLM officials decided to require a second appraisal of the land near Las Vegas.

(The value of the land to be traded for it wasn't a particular issue.) Mr. Moon says he advised Del Webb not to cooperate in getting a second appraisal.

At this point, Del Webb chairman Mr. Dion says, he decided to remove Mr. Moon from the project, fearing that "his tactics didn't reflect well on our company" and that "his style wasn't going to get it done."

Mr. Moon's version is that he himself told Del Webb he didn't want to continue with the somewhat bizarre process, that "I didn't want to sign up for another trip to Disneyland."

The second appraisal, commissioned by the BLM, came in at \$10,000 an acre, and the exchange got a second go-round at that price. Del Webb will take the parcel in two phases. It is starting work on the first 1,500 acres now.

Mr. Gaudin, Mr. Babbitt's spokesman, sees the end result as a defense of the interior secretary. "If you review it and jack up the price," he says, "it hardly sounds like doing a favor for the person seeking the land."

Mr. Moon says he is through trying to arrange big land swaps with Washington. Leaning back in an Adirondack chair and surveying the dun-colored mountains outside his Prescott home, he says he yearns for a quieter life. "I'm thinking," he says, "of becoming a teacher."



Office of the Commissioner of School and Public Lands

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
(605) 773-3303
FAX: (605) 773-5520

Curt Johnson
Commissioner

Bryce Healy
Deputy Commissioner

March 19, 1998

Committee on Resources
Subcommittee on National Parks and Public Lands
U.S. House of Representatives
814 O'Neill House Office Building
Washington, D.C. 20515

Dear Subcommittee on National Parks and Public Lands,

Here is some information for the oversight hearing on Bureau of Land Management realty and appraisal issued that is scheduled for Tuesday, March 24, 1998.

Why are land exchanges important to South Dakota?

The creation of state trust land holdings in the Western United States resulted in patterns of intermingled or "checkerboard" federal and state land ownership. This pattern creates a certain amount of management inefficiency for both parties. Further, when the federal government creates a special, or limited, use area (e.g., military reservation, wilderness) where state land is caught within, the inefficiency evolves into conflict. Either continued state leasing will prevent the federal special use, or the federal special use will prevent the state from obtaining any revenue from the land.

For decades, federal and state agencies have conducted land exchanges to consolidate ownership and avoid management conflicts. The results have been positive but there remains a great need for further exchanges. In recent decades, land exchanges have become more difficult. Federal agencies now must comply with significant environmental and other statutes before taking action. Urbanization and economic development have greatly increased some western land values and make valuations more contentious. Public concern with the impacts of changing ownership and use has increased.

South Dakota currently has one land exchange in progress with the Bureau of Land Management. We are about half way through the exchange process. With good luck and no major impediments this exchange will be completed in a time frame of about 3 years.

Using our most recent exchange, although not yet finished, as an example of problem areas encountered I will outline the problems and later give suggestions, as to addressing these problems.

The first problem we encountered is the pilt payment problem. As I understand pilt, payments will continue to be made on property exchanged to the state, but not on new property acquired from the state.

A second problem is with cultural clearances. These clearances are costly and B.L.M. often does not have the finances to complete these clearances. Clearances are time consuming and in a state like South Dakota they can only be completed when there is no snow on the ground.

The third major problem is the appraisal process. Addressing these in reverse order, what's wrong with the appraisal process? Often time the state or federal properties will fall into some of the following listed categories.

- ✓ Riparian
- ✓ Critical Wildlife Habitat
- ✓ T&E Species
- ✓ Winter Range
- ✓ State properties trapped inside a federal entity (visa - versa)
- ✓ Access
- ✓ Fishing Sites
- ✓ Historical Properties
- ✓ View Shed

The market for these properties may not exist or would only have value for some non profit agency such as the Nature Conservancy. Trapped properties only have value to the agency or individual who owns or controls the surrounding property.

In the current South Dakota exchange most of the B.L.M. property is small isolated tracts surrounded by private property. When we acquire these properties the appraisal has to be low enough so that it can be sold or traded to the surrounding land owner. At this point several tracts or appraised beyond what

the surrounding owners will pay. One portion of the state property adjoins a B.L.M. historical park (Fort Meade) and I have had an offer from a private individual which is \$200 an acre higher than appraised by the B.L.M. appraiser.

If the appraiser is allowed some flexibility I believe we can agree on the appraised values.

The problem of cultural clearance in South Dakota is primarily weather related. After the first snowfall the clearances stopped, to be taken up again later this spring when everything is dry. I believe this process would be less time consuming and less costly if random clearances were done on low probability areas and more complete investigations on high priority or probability areas. A second option would be, in a state exchange, to receive additional property from B.L.M., to compensate for the cost and have the state assume cultural clearances when, or if the property is sold.

On the pilt payment problem in South Dakota full property taxes are paid by the lessee of state property. If an exchange takes place the county may loose property tax revenues. This is especially true if the trade crosses county lines. Perhaps there should be more than one way to figure pilt payments.

Even with the problems outlined in this testimony the B.L.M. individuals I deal with are professional, competent individuals. If given the freedom and flexibility to negate some of these stumbling blocks can be solved.

As a land commissioner I feel that progress on these issues is being made and that positive changes will come about if decision makers at the top allow this to happen.

Sincerely,

A handwritten signature in dark ink, appearing to read "Curt Johnson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Curt Johnson
Commissioner

SHEPARD & ASSOC., LLC**Public Land Exchange 1406 Pearl St., Suite 200, P.O. Box 1576, Boulder, CO 80306 (303) 444-0601 FAX (303) 447-0859**

Date: March 18, 1998

Hon. James Hansen, Chairman
HOB WDC
814 O'Neill
Washington, DC 20515

Re: Testimony for Oversight Committee Hearing

Dear Mr. Hansen:

My name is David A. Carrick, broker and manager of Shepard & Associates, LLC, Public Land Exchange. The U.S. House of Representatives' subcommittee hearing on federal land exchanges was brought to my attention by personnel within the Bureau of Land Management in Colorado. I subsequently called your assistant Todd Hull, who suggested that I submit written testimony which might be of interest and use to the committee. According to Mr. Hull, the focus of the hearing will be appraisal issues; therefore, I will limit my comments to issues pertaining to appraisals and specifically those involving the BLM, and request that this letter be submitted into the record.

First, I would like to provide the Committee with a brief background description of Shepard & Associates. Shepard & Associates, Public Land Exchange, LLC, is a Colorado and New Mexico licensed real estate partnership which functions as a proponent for land exchanges with the Bureau of Land Management, the U.S. Forest Service and National Parks System in Colorado and New Mexico. We initially began proposing and participating in land exchanges with the BLM in 1984 as a method whereby private parties might acquire public land without having to offer their own land in exchange, and the BLM could acquire properties of public interest from citizens who were not interested in BLM disposal properties. We developed the first multi-party land exchange with the BLM in Colorado in 1985, and have been conducting exchange pools since that time. Through our exchange pools, we offer private land to the federal government in exchange for BLM/USFS disposal lands then purchased directly from us by third parties. For the past fourteen years our firm has successfully exchanged thousands of acres of private land of significant public interest and usage into the public domain for thousands of acres of federal disposal properties which went to various parties, both public and private, including municipalities (Denver Water Department), ski areas (Silver Creek Ski Area), land trusts, non-profit organizations such as The Nature Conservancy, land development companies, ranchers, and other individuals needing assistance in implementing land exchanges through the labyrinth of the federal bureaucracy. In addition to our exchange pooling, we also act as consultant on a fee and commission basis for parties wishing to exchange tracts of lands directly with the BLM, U.S. Forest Service, or the National Park System.

I have two general concerns: first, that the appraisal process discourages, rather than encourages, both appraisers and private parties who wish to participate in federal exchanges; and second, that recently adopted regulations intended to eliminate perceived sporadic abuse may result in the destruction of a valuable federal program which truly serves the public interest. While it is important to be vigilantly against the occasional abuse, it seems equally important to maintain a program that rationalizes public land issues by bringing into the public domain lands of truly public interest and disposing of those public lands which belong in private hands.

At the present time, Shepard is managing several large land exchanges involving BLM, USFS and NPS. The combined value of the federal lands in these exchanges exceeds \$7 million. In order for our exchanges to be successful, it is essential that both selected federal and offered non-federal lands be appraised competently and equitably. The majority of our exchange package properties are appraised by contract appraisers who have worked successfully through federal review. The list is very small and consequently, their fees are very high. The cost of the appraisals on both sides of the exchange are typically borne by the proponent. We select the appraisers for the task and pay their fees. The appraisals are conducted using the "Uniform Appraisal Standards for Federal Land Acquisitions," as well as "Uniform Standards of Professional Appraisal Practice" (USPAP). In our BLM exchanges, "Request For Real Estate Appraisal" Form 9300-8 is the official request from BLM which identifies the public land and offered estates to be appraised. This form is given to the contract appraiser by the BLM's Chief State Appraiser. Until recently, contract appraisers have always given us summary reports to preview prior to their reports being sent to BLM for review. Upon acceptance by BLM, the report becomes the property of the BLM.

BLM appraisal review procedures generally follow the same format as any appraisal of a private property. BLM, however, establishes assumptions that the contract appraiser must employ that may or may not accurately depict the estate being appraised. Perhaps the most often cited disagreement between contract appraisers and the BLM Chief State Appraiser is the question of legal access. The BLM requires the appraiser to consider all BLM tracts as having legal access. Although the Colorado constitution allows for private condemnation to access "land locked" property, the costs of a private condemnation action can be very expensive, and the procedure is not always successful. Furthermore, private condemnation requires payment to the owner of the interest condemned. The majority of BLM properties we select are remnants left from the homesteading era and interstitial lands between mining claims. Most lack legal or physical access routes, which is why these properties have been identified for disposal. Often these land locked properties are acquired by adjacent landowners, but if the adjacent landowners pass up the opportunity, we will search for others who might be interested in acquiring an inaccessible public property. Nonetheless, BLM requires appraisers to appraise BLM properties with the assumption that they all have legal access. While an adjacent landowner has an advantage over any other prospective buyer, a non-adjacent party who acquires the property will need to secure legal access at his sole expense. The appraiser is faced with the dilemma of being compelled to base a valuation upon a legal fiction. His task is to determine fair market value without any specific buyer or seller in mind as defined by the Uniform Appraisal Standards for

Federal Land Acquisitions (1992, pg. 3), "...as the amount of cash, or terms reasonably equivalent to cash, for which all probability the property would be sold by a knowledgeable owner willing, but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy." In the private market, an appraiser would have to take into consideration the legal costs and risks in obtaining access. The lack of legal access should devalue a public property, just as it would a privately held parcel. If a particular adjacent landowner gains an advantage over another in the market, that is a fair market fact, but the non-adjacent buyer should not be penalized by fair market fiction.

Another inequity in the appraisal of public land vs. private land arises in situations in which a condition for disposal of a public property is the encumbrance of the federal land with a conservation easement upon its disposal. Certain properties cannot legitimately be disposed of without providing certain environmental protections. The patentee is required to encumber the public property with a conservation easement simultaneously with the issuance of the patent. The easement usually restricts the development potential of the property. Although the new owner of the property may recoup certain federal tax advantages from the encumbrance, the appraiser is faced with another legal fiction. He may not reduce the value of the property resulting from the encumbrance. Of course, in the private market, a conservation easement usually results in a substantial devaluation of a property's market value.

The most disturbing issue I have encountered with federal appraisal procedures in fourteen years of conducting federal land exchanges is the requirement of the BLM's Chief State Appraiser in Colorado that private appraisers who have been privately contracted must withhold their reports from the contracting party until the report has been submitted to, reviewed and approved by the BLM. This runs entirely contrary to notions of private property, and is especially insulting to appraisers. The insinuation is that an appraiser may be influenced in favor of the contracting party. Until an appraisal report is reviewed and adopted by BLM, it remains the property of the party paying for it. We have been threatened with lawsuits by clients if we disclose the results of an appraisal to BLM prior to review by the client. BLM will not review an appraisal until Form 9300-8 is issued, but we often need to have summary appraisals conducted well in advance of Form 9300-8. Because certain properties and market conditions will dictate a complicated appraisal analysis, the summary appraisal is the most sensible initial scoping tool. Form 9300-8 from BLM usually is not issued until after numerous other steps have been completed and entered into the case file, but I have been instructed by BLM not to contract appraisals of federal land, or private offered lands, until Form 9300-8 is issued. Fear of being reprimanded by the BLM Chief Appraiser has resulted in some contract appraisers refusing to appraise private or federal properties which may be involved in an exchange until they receive Form 9300-8. Form 9300-8 is only given to one appraiser per property. If a client wants a second opinion by contracting another appraisal, the results would be superfluous because BLM will only review one report. If either BLM or a private party has any questions about an appraisal, a second opinion seems the fairest way to answer their concerns.

Appraisal considerations appear to be behind the most recent Memorandum No. 98-42 from the Director of the Department of the Interior to all State Directors. The passing and

implementation of the Federal Land Exchange Facilitation Act (FLEFA) was apparently intended to expedite exchanges. Whatever expedience was gained from FLEFA, however, has now been stalled by Memo 98-42. That directive now requires all exchanges over \$500,000 of federal lands to be subject to review by Washington to maintain "the credibility of our land exchange program and protect the public interest." The Director's edict is generally believed among BLM personnel and others involved in land exchanges to be the result of certain land exchanges in Nevada in which a proponent profited from the federal land acquisition. If this is the case, all exchanges over \$500,000 in the entire west are being held up because of appraisal questions raised by one exchange. How can a Washington, D.C. review panel, or the Assistant Secretary, be in a better position than the state and local personnel together with private professional appraisers to determine the fairness and validity of an exchange, or its appraised value? If an appraisal resulted in a favorable value to a private party in an exchange, then the most sensible remedy would be to require a second opinion of the appraisal rather than more bureaucratic review. Unfair or inaccurate appraisals can cut both ways. There are many federal disposal properties and highly desirable potential private land acquisitions for BLM which have failed to be exchanged because of unacceptable appraised values.

Appraisals are the single most important consideration in a land exchange. The second greatest killer of land exchanges is time. The longer an exchange takes to close, the higher the likelihood of failure. When I first began participating in federal land exchanges, I was told that the final file document was usually the death certificate of the proponent. Fortunately, we have successfully closed many land exchanges without becoming a morbidity statistic. Nonetheless, time is always working against an exchange. If appraisal procedures are not brought in line with standards used in the private marketplace, if BLM insists on screening local and state decisions in Washington and continues to follow an iconoclastic approach to private markets and appraisers, future federal land exchanges will be plagued by failure and the biggest loser will be, ironically, the public interest BLM is trying to protect.

Thank you for the opportunity to express my views and opinions in this matter and I am always available to assist your committee in any way you might deem appropriate.

Sincerely,



David Carrick

[HANSLET.DOC/HB62]