

SWANSON-SUPERIOR FOREST PRODUCTS, INC.

IBLA 90-315

Decided October 27, 1993

Appeal from a decision of the Oregon State Director, Bureau of Land Management, denying protest and ordering completion of a land exchange. OR 45366.

Affirmed.

1. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges--Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Nonmineral Entries and Disposals--Rules of Practice: Appeals: Standing to Appeal

A protest against an exchange of public for private land made pursuant to sec. 206 of FLPMA was properly denied when it was not established, as alleged, that the exchange would violate the Oregon and California Railroad and Reconveyed Coos Bay Grant Lands Act, statutory and regulatory requirements establishing minimum allowable value for exchange lands, or adversely affect local economies directly concerned with the exchange, or contravene the public interest. An allegation that a timber processor would be competitively disadvantaged by an exchange of a timbered tract to another timber company is found to be sufficient to establish standing to appeal from a denial of a protest against the proposed exchange but insufficient to establish that the exchange was not in the interest of the United States.

APPEARANCES: Mark C. Rutzick, Esq., and Cynthia L. Hull, Esq., Portland, Oregon, for appellant; Stan G. Potter Esq., Eugene, Oregon, for Almeyde' Resources, Inc., Donald P. Lawton, Esq., Office of the Solicitor, Portland, Oregon, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Swanson-Superior Forest Products, Inc. (Swanson), has appealed from a March 20, 1990, decision by the Oregon State Director, Bureau of Land Management (BLM), denying Swanson's protest of a proposed land exchange (OR 45366) between Almeyde' Timber Resources, Inc. (Almeyde') and BLM, and ordering completion of the exchange.

On January 4, 1990, the Eugene District Manager, BLM, issued a notice of realty action (NORA), finding that 40 acres of Federal land without legal access in Lane County, Oregon, was suitable for transfer out of Federal ownership under section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716 (1988). In exchange for the public land, Almeyde' was to transfer 358.82 acres in Lane County regarded as having important timber and wildlife values. 55 FR 1111 (Jan. 11, 1990). On February 14, 1990, Swanson filed a protest asserting that prior to exchange BLM should first offer the timber on the government parcel for sale at auction. The State Director, in rejecting the Swanson protest, found that the decision to exchange the parcels had been made in conformity with the 1983 Eugene District Management Framework Plan (MFP), and was in the public interest. The District Manager explained that:

The selected BLM tract is an isolated 40 acre parcel without legal access that is located on the limits of the City of Veneta. It is the District's belief that this parcel will be difficult to manage for timber production and related forest uses in the long term because of its proximity to residential development. The District had been considering offering the timber on the subject tract for public sale prior to receipt of the exchange proposal from Almeyde. Difficulty had been encountered, however, in securing one of the three easements needed to acquire legal access over the preferred access route which had been selected after completion of an access route study. Almeyde offered lands in exchange which adjoin BLM timberlands in areas well removed from urban and suburban residential development. The District anticipates being able to manage these offered lands for timber production and related forest uses with far less controversy and problems than would be expected on the subject selected BLM parcel. The District Manager decided, primarily for this reason, that the proposed exchange was in the public interest and should be completed. It thus appears likely that the District Manager's decision to complete the exchange would have been the same if the exchange had been proposed before a timber sale had been considered and before access acquisition difficulties had been encountered. The Almeyde offer was the first exchange proposal the District had received for the subject tract and, since lands advantageous for future BLM forest management were offered in exchange, it was viewed as a good opportunity to dispose of a tract that has been considered for some time as a prime candidate for exchange due to its location.

(Decision at 1, 2).

Swanson argues on appeal that the proposed exchange fails to conform to requirements of FLPMA section 206 because it is not in the public interest, inasmuch as the sale will cause a decrease in local revenues that would otherwise have been paid when the timber on the government land was sold. It is also contended that, because the government timberland selected for exchange is administered for permanent forest production under provision of

the Oregon and California Railroad and Reconveyed Coos Bay Grant Land Act (O&C), 43 U.S.C. § 1181(a) (1988), that it was improper for BLM to consider other uses such as wildlife habitat and multiple use objectives in reaching the exchange decision. For the same reason, Swanson contends that exchange of O&C land for other land is prohibited, that BLM should sell any standing timber before exchanging O&C land, and that, in any event, the exchange is improper because the private land to be exchanged cannot meet valuation standards set by law.

BLM has answered that the record supports the proposed exchange decision and that the lands sought to be acquired will, if the exchange is completed, be administered as O&C lands. In addition to this argument on the merits, BLM challenges Swanson's standing to appeal, contending that it has failed to demonstrate it was adversely affected by the exchange decision "beyond that of a member of the public generally" (Answer at 3). Swanson responds that because it was unable to either bid for the timber on the BLM parcel or to participate in an exchange of its own, its business was adversely affected, and that it seeks "the opportunity to participate in the exchange with BLM" (Reply at 1). In support of this assertion, Swanson states that it is in the timber processing business and owns 14,000 acres of timber land near Noti and Veneta, Oregon, a portion of which is near or surrounded by BLM land. It operates a sawmill in Noti that is both large enough and near enough to the public land at issue to permit successful harvesting and processing of timber from the BLM parcel. See Reply at 2; Response at 2.

[1] Contrary to the analysis proposed by BLM therefore, Swanson does not object to the proposed exchange for reasons held in common with all members of the general public, but contends that, as a timber processor with a desire to acquire timber on the Federal parcel for business purposes, it will be competitively disadvantaged by the proposed exchange. If there is a substantial likelihood of injury to some legal interest, one is "adversely affected" within the meaning of 43 CFR 4.410(a) so as to have standing to appeal. Donald K. Majors, 123 IBLA 142, 143 (1992). While there is some question concerning the value of the timber asset here at issue, we have not in the past required proof of actual damage in order to establish the necessary standing to maintain an appeal. 1/ Dorothy A. Towne, 115 IBLA 31, 35 (1990); and see Howard B. Keck, Jr., 124 IBLA 44, 46 (1992) (an exchange

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1/ Counsel for BLM relies on dictum appearing in Oregon Natural Resources Council, 78 IBLA 124, 125 (1983) for the proposition that an appellant before this Board must demonstrate "injury in fact" to show standing to appeal. It is not necessary to consider how such a test would affect review of the instant appeal, however, because the Oregon Natural Resources Council appeal was dismissed, not because the appellant lacked standing, but because the subject matter of the appeal was found to lie beyond the limited review jurisdiction of the Board. See id. at 126, 127. The language concerning standing was not necessary to the actual holding in the case therefore, which was, quite simply, that the review authority of the Board did not extend to the area the appellant had attempted to present for

case where neighboring landowner's fear of flooding from a possible but as yet unplanned project was considered a sufficient interest to support his appeal to this Board). Similarly, in Barret S. Duff, 122 IBLA 244, 246 (1992), a Federal oil and gas lessee had standing to appeal a land exchange decision that would divide surface and mineral estates in the vicinity of his leases. Although his leases were not directly affected by the exchange and he had no interest in any of the surface estates to be conveyed, Duff nonetheless was found to be adversely affected so as to have standing to appeal because of an alleged inconvenience connected with increased environmental reporting requirements and considerations of surface access for development of the mineral resource caused by the change in surface management. Consistent with our past decisions, we therefore find that participation by Swanson in the review of the administration of this exchange proposal made by a rival timber company for land covered by merchantable timber located next to Swanson-owned land is proper, and we will consider this appeal on its merits.

Section 206(a) of FLPMA, as amended, authorizes the Secretary of the Interior to dispose of a tract of public land by exchange where he

determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary \* \* \* shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community, expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary \* \* \* finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

43 U.S.C. § 1716(a) (1988).

The BLM parcel proposed for exchange is O&C land near the western city limits of Veneta that is surrounded by private land on all sides, and contains about 2 million board feet (MBF), of merchantable timber (BLM Environmental Assessment (EA) dated December 19, 1989, Appendix B).

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fn. 1 (continued)

our review. The test BLM seeks to impose on this appellant is, of course, a test applied to would-be litigants before the Federal courts. See e.g., Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800, 808 (11th Cir. 1993). As we found in In Re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982), however, considerations relevant to standing to bring an action in Federal court are "functionally discrete" from administrative decisions concerning standing before the Department. Standing to maintain an administrative appeal is best determined by a functional analysis of Departmental objectives designed to discover if "an award of standing would contribute to the attainment of [Departmental] functions." Id. at 332.

It is described as the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of sec. 35, T. 17 S., R. 6 W., Willamette Meridian, Oregon. Before deciding to exchange the isolated tract, BLM unsuccessfully attempted to obtain an easement providing convenient legal access to the public land. See affidavit of George R. Wells, Jr., and attached engineering report dated November 8, 1988.

The private land to be acquired by BLM consists of three noncontiguous parcels totalling 358.82 acres that adjoin public lands. Of this total, 323 acres is capable of intensive timber management and would be so managed if the exchange were consummated, resulting in a net increase of approximately 270 acres in BLM's unrestricted intensive forest land base (Land Report at 2; Answer, Attachment 4). Two of the parcels, the "Mosby Creek" tracts, are located in secs. 30 and 31, T. 21 S., R. 2 W., Willamette Meridian. Both tracts were recently logged when the EA was prepared in 1989. One of these tracts has a BLM exclusive easement for access and the other is served by a nonexclusive easement over a private logging road (EA, Appendix B). The third private parcel is the "Winberry Creek" tract in sec. 14, T. 19 S., R. 1. E., Willamette Meridian. A cruise approved by BLM's Eugene District found that this tract contained 1.2 MBF of merchantable timber (Answer, Attachments 2 and 4). The Winberry tract has "nonexclusive legal access and physical access via an unsurfaced logging road" (EA, Appendix B).

Swanson objects that the proposed exchange is not in the public interest because BLM failed to consider the needs of the local economy in making the decision to exchange the Federal land for Almeyde' property. It is asserted that the exchange would give away about 1.4 MBF of timber worth about \$490,000 in exchange for land with no timber value at all. Swanson reasons that the value of the Almeyde' parcel is less than 75 percent of the Federal parcel and that the exchange is therefore contrary to section 206(a) of FLPMA. It is contended that under section 1 of the O&C Act, 43 U.S.C. § 1181a (1988), the land must be managed for "permanent forest production" and that if the timber had been sold at public auction, Lane County would have received 50 percent of the gross revenues, which would then have been used for public services such as schools, roads, police, and fire protection. Additionally, it is suggested the local economy would have been stimulated because employment for loggers and mill workers would have been the natural result of the timber sale.

Under section 201 of the O&C Act (43 U.S.C. § 1181f (1988)), however, half of the revenues derived from the sale of O&C timber products is to be distributed to all the O&C counties in proportion to the total assessed value of such lands, with the result that only 15.7 percent of the county revenue share would go to Lane County in any one year. According to BLM's studies, while the proposed exchange would result in an immediate reduction of revenues to Lane County, the ultimate effect of the exchange should be to produce "substantial economic benefits" (Answer at 10).

BLM's decision record contains an analysis of the projected economic impacts of the exchange. In this document, BLM projected changes in allowable cut, O&C revenues, and real property taxes and timber severance taxes. See Appendices to EA. The analysis concludes that the proposed exchange

would result in an annual \$29,000 reduction in local government revenues over the first 10 years, with moderate to significant annual gains of \$30,000 to \$77,000 thereafter, as well as a small increase in BLM's allowable O&C timber cut. BLM's Eugene District realty specialist and McKenzie Resource Area Forester (Answer, Attachments 2 and 4), indicate that the parcels to be acquired in exchange either contain timber or the potential for timber in the future, are suitable for forest management, and would be so managed if the exchange took place. On the record before us, therefore, we conclude that the exchange will not result in a diminution of land administered pursuant to the O&C Act, but that there should be a small increase in such land as a result of the proposed trans-fer of Federal land.

The primary purpose declared by section 1 of the O&C Act is to promote permanent forest production to permit timber harvesting and insure a sustained yield of timber. See 43 U.S.C. § 1181a (1988). Neither that statutory provision nor the applicable regulations at 43 CFR Part 2200 bars exchange of O&C land for private land nor requires that timber harvest occur prior to such an exchange. Conditions for exchange are set forth in FLPMA. Under section 206(a) of that act, 43 U.S.C. § 1716(a) (1988), BLM must insure that the values and objectives of the Federal lands to be exchanged are not more than the values and objectives of the lands to be acquired. Departmental regulations implementing the Act provide that exchanges must be of lands of "equal value," but that "equalization" of value may be achieved by the payment of money to BLM in order to achieve "suitable" equalization of values. 43 CFR 2201.3(a).

Concerning Swanson's arguments concerning the relative values of the parcels to be exchanged, it appears that "the final appraisal for this exchange has not yet been completed," and that based on initial inspections by appraisers "the exchange, as proposed, is outside the cash equalization range by about \$37,000 and that Almeyde' "will need to add land to their side of the exchange" (Answer, Attachment 2). While the decision to pursue an exchange has been made, a final determination whether the offered lands are equal to or within 25 percent of the value of the BLM land has not yet been made. Departmental regulation 43 CFR 2201.5(c)(2) permits a money payment for equalization of value not to exceed 25 percent of the value of the public lands to be conveyed. Since final appraisal has not been made and valuation terms have not been set, Swanson's argument concerning a viola-tion of section 206(a) of FLPMA is premature on the record now before us for review. We cannot assume that BLM will ignore this limitation on its authority to consummate the sale. It is clear that if the ultimate valuation of the properties to be exchanged is not equal (or cannot be equalized), the exchange may not be made. See 43 CFR 2201.3. The question concerning proper valuation, therefore, remains to be decided by BLM and is not yet ripe for our review.

Swanson also contends that BLM violated the O&C Act by considering wildlife habitat values and multiple use objectives in its decision to pursue the exchange. Swanson asserts that wildlife and multiple use considerations play no role in management decisions on O&C lands which are to be managed for timber production and sale. Swanson also expresses fears that

following exchange the acquired lands will be managed as multiple use public lands rather than as O&C lands.

BLM admits that the main consideration in pursuing the exchange was to facilitate timber management, as the O&C Act requires. There is, however, no statutory provision limiting consideration of other relevant planning factors in the management of O&C lands, including such matters as conservation of wildlife habitat, and protection of threatened and endangered species, among other environmental values considered integral to BLM's forest resources management policy under the O&C Act. For example, section 1181a provides that, incident to the primary purpose of the Act, principal management goals shall include "protecting watersheds" and "regulating stream flow." In any event, lands acquired in exchange for O&C lands

"shall be administered in accordance with the same provisions of law applicable to[] the revested or reconveyed lands exchanged for the lands acquired by the Secretary." 43 U.S.C. § 1715(e) (1988). The argument that the exchanged lands will not be administered as O&C lands must, therefore, be rejected as contrary to law.

Swanson also argues that the proposed exchange is arbitrary and capricious because BLM did not consider exchanges with parties other than Almeyde'. Swanson asserts that BLM "did not even approach Swanson, an adjoining landowner, about a potential exchange despite the fact that Swanson owns many tracts adjacent to or surrounded by BLM land" (Statement of Reasons (SOR) at 10-11). Swanson states that if BLM had considered alternatives, it could have obtained legal access to the Federal parcel over Swanson property and sold the timber at public auction prior to exchanging the land. Swanson says it is ready to give BLM legal access to the Federal parcel (SOR at 3).

Swanson, however, cites no authority that required such an exchange proposal be made to Swanson. The applicable regulation states that a proposal for an exchange "may be submitted by a person who owns lands \* \* \* or by the Bureau of Land Management." 43 CFR 2201.2(a) (emphasis added). That regulation specifies how proposals are to be submitted and processed, including the situation in which two proposals are filed for the same Federal land. 43 CFR 2201.1(e). Swanson has not shown how it was deprived of any legal rights simply because BLM did not propose exchange of the Federal parcel for some unspecified property owned by Swanson. Swanson's rights to participate in the exchange process were exercised when it filed a protest against the exchange and subsequently brought this appeal when the protest was denied.

BLM explains that it did consider seeking legal access across Swanson property, but concluded that such a route was disadvantageous because it would also have required access over land owned by the Lane County Girl Scouts as well as construction of a substantial length of new road. See Wells affidavit, supra. The route would not have provided the most direct available access to the Federal land and would have required redundant mileage to transport logs (id.). The record reveals that BLM examined the

access options suggested by Swanson when evaluating the proposed exchange. Swanson has not shown that there was any error in the evaluation of this aspect of the exchange proposal.

Nor has Swanson presented any evidence tending to show that the exchange would not be in the public interest, nor that it is in any way inconsistent with section 206(a) of FLPMA. The denial of Swanson's protest is therefore affirmed because BLM's conclusion that the public interest is served by proceeding with the exchange has not been shown to be in error. See Barrett S. Duff, supra. Nonetheless, the question of valuation of the properties to be exchanged remains to be decided. The valuation decision, when it is made, will be subject to appeal to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Arness  
Administrative Judge

127 IBLA 386

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the ultimate resolution of this appeal, I find myself in substantial conflict with certain aspects of the lead opinion's discussion of standing both generally and as it relates within the confines of this specific appeal.

Initially, I wish to note that I agree that appellant has alleged sufficient facts on which to predicate a finding of standing to appeal. Thus, appellant has asserted that, as a timber processor, it would desire to submit a bid for the timber on the BLM parcel, a possibility which the proposed exchange would vitiate. Moreover, while not substantively compelling, appellant's assertion that it would desire to complete a similar exchange for the BLM parcel also provides a sufficient basis for predicating standing in this appeal.

In the course of its discussion of whether or not appellant has exhibited the requisite standing to appeal, however, the lead opinion rejects BLM's assertion that under our precedents an appellant must show an "injury in fact" and suggests that this question has never been decided by the Board. See supra n.1. I must emphatically disagree.

The lead opinion argues that the discussion on this question in Oregon Natural Resources Council, 78 IBLA 124 (1983) was dicta. I do not see how such a conclusion could be sustained under any fair reading of that decision. In ONRC, the Board initially examined the question of appellant's standing to appeal, noting that, while appellant objected to a proposed BLM sale of 44 isolated parcels, it failed to explain how it was adversely affected by this proposal. Noting that the language of section 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1988), compared favorably with the language of 43 CFR 4.410, the Board declared that the interpretation of section 10 of the APA by the Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972), as requiring an allegation of an "injury in fact" was equally applicable to those seeking review of decisions of BLM officials before the Board. Id. at 125-26. Examining ONRC's standing to appeal in light of this requirement, the Board determined that "[i]ts appeal evinces nothing more than a deep concern in the issues surrounding the proposed land sale. Thus, its appeal is not properly before us and must be dismissed." Id. at 126.

Following its determination that ONRC lacked standing to appeal, the Board proceeded to note that appellant "appears to be attacking BLM's classification of the land as suitable for disposition by public sale" and went on to observe that the Board lacked jurisdiction over classification appeals and over protests to resource management plans. Id. (emphasis supplied). The Board did not, however, purport to dismiss the appeal on either of these jurisdictional bases. Indeed, the Board's jurisdictional discussion, far from being the ratio decidendi of the decision was, itself, clearly dictum, a cautionary exposition on the limits of its review authority. The lead

opinion's contention that the Board based its dismissal of ONRC's appeal on jurisdictional defects and that the standing discussion was dictum is simply belied by the text of that decision.

Moreover, it seems to me somewhat late in the day to revisit the question of whether or not an appellant must show an "injury in fact" in order to invoke this Board's jurisdiction. Indeed, the cases expressly so hold-ing are numerous. See, e.g., Colorado Open Space Council, 109 IBLA 274, 280 (1989); Save Our Ecosystems, Inc., 85 IBLA 300, 302 (1985). I simply cannot agree with the clear implication in the lead opinion that the requirement that an appellant must demonstrate an "injury in fact" as a prerequisite to a showing of standing is somehow not already firmly fixed in our precedents. <sup>1/</sup>

The second area in which I must disagree with the lead opinion is in the consideration which it accords appellant's argument that the proposed exchange injures Lane County by decreasing the revenues which it will receive from O&C timber sales. It seems to me that, under our precedents, such a challenge to the sale could only be brought by Lane County. Thus, in Save Our Ecosystems, Inc., *supra*, we noted that "an appellant must make a showing of injury in fact on each specific matter for which it seeks review." In Burton A. McGregor, 119 IBLA 95 (1991), we granted an appellant standing to challenge a land exchange between BLM and a private party based on his allegations of use of the BLM lands. Nevertheless, we expressly found that his objections to the exchange based on the assertion that it would be contrary to the public interest because it would remove grazing land from the public domain would not be considered because he "failed to describe how he is adversely affected by the impact of the proposed exchange on grazing and, thus, lacks the requisite standing to raise this issue." *Id.* at 103 n.9.

So, too, in the instant case, appellant has simply failed to establish a nexus between its interests and its complaint that the proposed exchange would be detrimental to Lane County. In point of fact, though expressly apprised of the proposal, the Lane Council of Governments declined an opportunity to comment on the exchange. Appellant's challenge to the exchange on the basis that it is detrimental to Lane County should be summarily dismissed.

Subject to these caveats, I am in accord with the analysis of the lead opinion and agree that the decision below should be affirmed.

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James L. Burski  
Administrative Judge

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<sup>1/</sup> It is, however, my view that, as noted *supra*, appellant has alleged the "injury in fact" necessary to support standing to appeal under 43 CFR 4.410.

