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## GAO's Comments

The following are GAO's comments on the Department of the Interior's Bureau of Land Management's (the Bureau) letter dated May 5, 2000.

1. Although concurring with our recommendations regarding its unauthorized practice—under the umbrella of assembled exchanges—of selling federal land, retaining the proceeds and using these funds to buy nonfederal land, the Bureau believes that the examples highlighted in our report are components of permissible assembled land exchanges rather than buy/sell transactions. While the Bureau undertook these transactions under the umbrella of its regulations governing assembled land exchanges, we disagree that these transactions are allowed under the agency's statutory authority governing land exchanges. FLPMA authorizes exchanges of land for land—not exchanges of land for cash—and these transactions were the latter: The Bureau or a third-party facilitator sold federal land for cash, retained the cash in escrow accounts rather than depositing it into the Treasury, and used the cash to purchase nonfederal land. Our assessment is clearly supported with evidence from ledger and escrow balances, documents prepared by the Bureau in support of these transactions (such as environmental analyses), dates when federal land was disposed and nonfederal land was acquired, and testimonial evidence from Bureau employees responsible for the transactions.

2. Information Bulletin No. 2000-104 (dated April 24, 2000) notes that Bureau employees have made occasional references to assembled land exchange transactions as sales and purchases. To avoid further misunderstandings, the bulletin (1) clarifies that these transactions should be referred to as "disposals," rather than "sales," and "acquisitions," rather than "purchases," in any documents related to exchange transactions and (2) requires that these transactions adhere to certain basic principles and mandatory process steps in order to be considered by the Bureau to be a land exchange. Some of these principles/steps address issues we raise in this report; for example, the lands proposed for an exchange must be specifically described, and initiation agreements must involve all parties. However, we believe that the Bureau's transactions involving cash (or other financial securities) are accurately described as selling and buying land—that is, giving or receiving land for money (or other financial securities)—rather than exchanging land—that is, conveying land and receiving other land.

3. Instruction Memorandum No. 2000-080 (dated Feb. 17, 2000) noted that the Bureau's land exchange handbook encourages depositing funds

received from nonfederal land exchange partners into interest-bearing accounts, reaffirmed the Bureau's policy that interest earned on escrow accounts should be deposited into the Treasury, and stated that the handbook was being revised to provide more specific guidance on handling earned interest. The Bureau also notes that it is rewriting all policy and guidance related to assembled exchanges. While clear and consistent policies are important in managing any program, it is uncertain whether Bureau employees were confused when they conducted cash transactions in the past under the umbrella of land exchanges. Furthermore, while we support the Bureau's efforts to implement financial controls over these funds, we disagree with its apparent decision to continue sell/buy transactions under the umbrella of assembled exchanges despite having no legal authority to do so.

4. Instruction Memorandum No. 2000-113 (dated May 2, 2000) supplements and replaces guidance on managing funds associated with assembled exchanges and requires state directors to bring all accounts into compliance with the revised guidance by June 15, 2000. In summary, the Bureau no longer allows cash to be held in escrow accounts to purchase nonfederal land; instead, it now requires other financial instruments—for example, cash bonds, Treasury bonds, or corporate security bonds—to be held for this purpose. The Bureau acknowledges the nonfederal exchange partner or facilitator may have cash in the escrow account—for example, if she or he has sold federal land at a price exceeding the appraised value—but now requires that escrow instructions clearly indicate that the Bureau has no control of or interest in these funds. We do not believe that the Bureau is operating within its statutory authority in exchanging land for cash or near-cash financial instruments and retaining those instruments for subsequent land purchases. Instead, the Bureau should deposit all sales proceeds into the Treasury.

5. Instruction Memorandum No. 99-126 (dated May 19, 1999) was superseded by Instruction Memorandum No. 2000-107 (dated Apr. 11, 2000), a copy of which the Bureau also provided in its comments on our draft report. The more recent memorandum revised and expanded requirements that all land exchanges will be reviewed twice—first, in conjunction with the feasibility report and second, prior to approval of the land exchange decision—and must receive concurrence at each review.

6. We share the Bureau's concern that having expanded authority to sell certain federal land and to retain use of some or all of the sale proceeds to purchase nonfederal land would not resolve many of the problems we

reported with land exchanges—most notably, concerns about appraised values—and could create additional potential difficulties, such as increasing conflicts with local governments in their land-use controls and their infrastructure support needs. For this reason, we have deleted the suggestion that the Congress consider replacing the Bureau’s land exchange program with such expanded authority. Under existing authority, the Bureau is authorized to sell certain federal land, deposit the proceeds into the Treasury, and seek appropriated funds from the Congress to acquire desirable nonfederal land. We disagree with the Bureau’s comment that land exchanges are a highly efficient way to restructure land ownership patterns. In fact, our work has shown that they have inherent difficulties that make them noticeably inefficient, and we do not believe the administrative flexibility cited by the agencies as a reason to continue exchanges outweigh their many problems. Because of these inherent difficulties and the recurring problems that the agencies have experienced in managing their land exchange programs, we still believe that the Congress should consider directing the agencies to discontinue their land exchange programs.

7. We did not intend to endorse the Southern Nevada legislation—which we have not reviewed or evaluated—but to suggest it as a possibility if the Congress wanted to consider alternatives to the Bureau’s land exchange program. As noted above, we have deleted this suggestion from our report.

8. Interior’s Office of the Inspector General reported in 1998 that two Bureau exchanges highlighted in our report—Zephyr Cove and Del Webb—involved appraisals that did not apparently meet federal appraisal standards (see comment 11 below). According to the Inspector General reports, the Bureau used the Zephyr Cove appraisal, which resulted in nonfederal land being overvalued by as much as \$10 million, but contracted for a second Del Webb appraisal, which avoided federal land being undervalued by more than \$9 million.

9. We disagree with the Bureau’s assertion that the efforts it has made in response to the reports of the Office of the Inspector General have fully addressed all concerns raised about land valuation and appraisals. Although these efforts are worthwhile, they have not eliminated all concerns; for example, the Bureau commented that its own national review team made over 40 recommendations in November 1999 to improve the land exchange and appraisal programs. And as the Bureau noted elsewhere in its comments, we have raised questions about appraisals used in the

agencies' recent involvement in two other properties (the Headwaters Forest<sup>1</sup> and the Baca Ranch<sup>2</sup>).

10. While the Bureau is authorized to use a bargaining process to determine land values in exchanges, in the DeMar exchange this process resulted in a value for the nonfederal land that was higher than either the landowners' preliminary value estimate or the Bureau's appraised value. The Bureau's administrative record for the exchange did not provide the basis for this value, and the Bureau's chief appraiser believed that it could not be reasonably supported.

11. The Department of Agriculture's Office of the Inspector General reported that the Zephyr Cove appraisal did not consider a reservation of interest in the property's improvements (a 10,000-square-foot residence that encumbered about 6 acres), which would have reduced the land's value by as much as \$10 million. The Inspector General reported that the Service's chief appraiser said the appraisal was void because the estate had been appraised as if it included the improvements, which was not the same estate that had been conveyed to the Service, and that leaving the appraisal unchanged would result in the public's paying more than fair market value for the property. According to this analysis, the appraisal did not apparently meet federal standards, which require (among other things) that the appraiser (1) consider restrictions and encumbrances and (2) not commit a substantial error of omission or commission that significantly affects an appraisal. We have clarified the report to reflect this situation.

12. We do not assert that the nonfederal land in the Red Rock exchange was overvalued. We do share the Office of the Inspector General's concern that the Bureau (1) assigned a second appraisal reviewer—in response to the exchange proponent's unhappiness with the initial estimate—who estimated a value for the nonfederal property that was 80 percent higher than the initial appraisal reviewer's estimate, and (2) used the higher estimate without reconciling it with the lower estimate.

13. We cite the Del Webb exchange as an example of potential undervaluation of federal land. Interior's Office of the Inspector General

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<sup>1</sup> *Federal Land Management: Appraisals of Headwaters Forest Properties* (GAO/RCED-99-52, Dec. 24, 1998).

<sup>2</sup> *Federal Land Management: Land Acquisition Issues Related to the Baca Ranch Appraisal* (GAO/RCED-00-76, Mar. 2, 2000).

reported that the chief appraiser in the Bureau's Nevada State Office reviewed the proponent's appraisal of the federal land and found that it did not comply with federal standards, that the Bureau removed Nevada's chief appraiser from the appraisal review process and replaced him with a nonfederal appraiser—recommended by the proponent—who approved the appraisal, and that the Bureau's chief appraiser then accepted the second reviewer's results. In its comments, the Bureau states that it then ordered a second appraisal, not as a direct result of the Office of the Inspector General's announced review, but because it was not satisfied with the first appraisal. Importantly, the second appraisal met federal standards, estimated the federal land's value to be \$9 million higher than the first appraisal, and was used by the Bureau in completing the exchange.

14. Although the Bureau suggests that the subsequent sales reported in Clark County were not arm's-length transactions and the resale prices did not indicate the properties' market values, it provided no information to support this position. In the absence of information to the contrary, we believe that resale prices from county land records are reasonable indicators of the properties' market values.

15. The Bureau disagreed with our assessment that in two exchanges—Cache Creek and Red Rock—it did not show that the benefits of acquiring the nonfederal land matched or exceeded the benefits of retaining the federal land, stating that this analysis was done in the environmental and planning documents for the exchanges. We continue to believe that our assessment is correct. When the Bureau initiated the Cache Creek assembled exchange, it did not specifically know which nonfederal lands it would acquire—only that they would lie within an area of roughly 100 square miles that has high-value resources, such as habitat for bald eagles—and environmental and planning documents prepared by the Bureau for the exchange did not identify the benefits of acquiring specific nonfederal parcels. For the Red Rock exchange, the Bureau commented that it had responded to the 1996 report of Interior's Office of the Inspector General that the nonfederal land was acquired to provide habitat for endangered fish, a management recommendation contained in several land-use plans. We found that, in turn, the Inspector General estimated that these plans supported the acquisition of fewer than 25 percent of the 2,461 nonfederal acres that were questioned. We have clarified our report.

16. The Bureau commented that exchange initiation agreements were not required before 1993 and that they have been consistently prepared ever since. We have clarified our report and do not indicate that such an

agreement was needed for the Cache Creek assembled exchange, which began in 1990. However, initiation agreements were needed for each of the seven phases of the Montrose assembled exchange, which began in 1994, but were not prepared for the first three phases.

17. While the Bureau has not yet acquired any nonfederal land in the city of Elko exchange, in April 1999 the Bureau's Elko Field Office Manager signed a Decision Record approving the exchange. In addition, documents we obtained from the Bureau indicate the agency's support for this exchange.

18. We disagree that the cash transactions conducted under the umbrella of assembled land exchanges are authorized under the Bureau's statutory authority to conduct land exchanges. We believe that the Bureau's analysis—for example, that these transactions are land exchanges because they followed the Bureau's requisite regulatory requirements for land exchanges—is circular and unconvincing. FLPMA authorizes exchanges of land for land, not land for cash or other financial instruments.

19. Bureau officials who are or have been involved in conducting cash transactions under the umbrella of assembled exchanges told us that these transactions provide the agency important flexibility to acquire nonfederal lands; specifically, they have readily available funds to buy nonfederal land when it comes on the market and avoid the lengthy and uncertain process of requesting and receiving appropriations from the Congress.

20. Our report does not refer to a legal opinion by Interior's Office of the Solicitor. Representatives of the Solicitor's Office have verbally expressed support for the position taken by the Bureau and Interior on this issue during several discussions with us.

21. We disagree with the Bureau's characterization of the Montrose assembled exchange as a ". . . pilot effort involving a land exchange and acquisition by purchase using appropriated funds" because it primarily involved sales and purchases using nonappropriated funds. In total, the Bureau sold about 6,800 acres of federal land and bought about 16,000 acres of nonfederal land—and exchanged 240 acres of federal land for 113 acres of nonfederal land. The Bureau generated and used about \$6.4 million in nonappropriated funds, compared to about \$2.3 million in appropriated funds.

22. The Bureau commented that the statewide facilitation agreement between the Bureau and the third-party facilitator, which includes the

Cache Creek assembled exchange, discusses the process for exchanging federal and nonfederal land. We do not agree that this agreement gives the Bureau any legal authority to conduct cash transactions under the umbrella of the assembled exchange. We also found that the current agreement was not reviewed by Interior's Office of the Solicitor and are troubled by certain provisions—such as allowing the facilitator to sell federal land at greater than appraised value and retain any amounts exceeding the appraised value to cover miscellaneous costs.

23. Although the statewide facilitation agreement (which includes the Cache Creek exchange) lists three provisions under which it can be terminated, our concern is that the assembled exchanges conducted under the agreement have no definite end—that is, a specific date or event. An official in the Bureau's California State Office told us that the Bureau can keep this assembled land exchange going for as long as the Bureau has federal land it wants to dispose of and nonfederal land it wants to acquire in California.

24. The Bureau commented that it conveyed federal land to the facilitator through documents (deeds and patents) stating “for and in consideration of other lands.” Although the facilitator may have an agreement to subsequently give the Bureau land, at the time of the transfer of federal land, the facilitator did not give financial consideration to the Bureau.

25. The cognizant official in the Bureau's California State Office told us in December 1999 that the Bureau and the facilitator issue joint instructions for the escrow account and that neither party has sole authority or total control. It is unclear from the Bureau's comments whether this situation has been changed since that time. If the facilitator now solely controls the escrow account, we question the propriety of the Bureau's allowing the facilitator to (1) retain sales proceeds that exceed the appraised value of the federal land and (2) deduct any portion of the sale proceeds to cover its costs. The Bureau should receive all proceeds from selling federal land, should pay the facilitator's fee from available appropriations if warranted and supported by an invoice, and should promptly deposit the proceeds into the Treasury.

26. We disagree with the Bureau's comment that the Two Crow assembled exchange is not a sale of public land—see comments 1 and 18 above. We also found an April 1997 letter in which the Bureau describes its plan to sell federal land to raise funds to buy the ranch under the umbrella of an assembled land exchange: “It is our intention to make the Rocky Mountain

Elk Foundation [the landowner] whole by selling as many disposal acres as are required to meet the \$3,000,000 purchase price. The BLM proposes to reimburse the Elk Foundation through a process called a ‘pooled’ or ‘assembled’ land exchange. This entails disposing of isolated parcels of public land to willing buyers. The proceeds from these sales would transfer directly to the Elk Foundation as reimbursement for the purchase price of the Two Crow property.”

27. The Bureau commented that it solicited the third-party facilitator to assist the landowner in the Two Crow assembled exchange, that the landowner—not the Bureau—directs the facilitator in this regard, and that the facilitator is not acting as the Bureau’s agent in selling federal land. However, a representative of the facilitator told us that its role in this exchange is to market the federal land to potential buyers and that it does not have a contract with the landowner to market the nonfederal land. Based on this, we question the Bureau’s assertion that the landowner directs the facilitator.

28. The Bureau presents no support for its position that retaining and using proceeds from selling federal land in assembled land exchanges does not augment the agency’s appropriations, and we continue to believe that this practice does just that. This practice generates nonappropriated funds that, by definition, exceed appropriated funds. It is now the agency’s responsibility to report to the President and the Congress all relevant facts and actions taken and to determine whether the Bureau violated the Antideficiency Act.

29. The Bureau’s national review team’s recommendations addressed clarifying guidance for and improving management controls over land exchanges—including assembled land exchanges. However, they do not address the lack of statutory authority for selling and buying land under the umbrella of assembled land exchanges, which is our concern.

30. Our report did not state that the Bureau does not centrally track land exchange information; we state that the Bureau does not centrally track the number or value of exchanges it completes annually. We think it is important to explain this for the reader, but we do not draw any conclusions or make any recommendations regarding the Bureau’s program data.

31. We have revised our report to reflect updated information recently provided by the Bureau.

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32. While we agree that the presence of an escrow account does not necessarily mean that the account includes cash, neither does a year-end zero balance in an escrow account necessarily mean that the escrow account never included cash. The Bureau's revised policy on and ongoing review of escrow accounts, as well as its planned audit of all financial records associated with assembled exchanges, should clarify any reporting inconsistencies and, more importantly, determine whether sales proceeds were handled properly and public funds were used appropriately.