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TREATING THE BLUE RASH: WIN-WIN SOLUTIONS AND IMPROVING THE LAND EXCHANGE PROCESS

Smith Monson*

I. INTRODUCTION

The distribution of federal, state, and private land throughout the West has resulted in a fragmented ownership pattern where “no single owner . . . owns enough contiguous land to allow effective management of land holdings,” generating “a plethora of disputes over access and similar problems.”¹ In particular, the disbursements of state trust lands under the western states’ enabling acts have created what is known as the “blue rash” on maps of the West.²

The blue rash spreads into many areas of federal conservation and reservation creating two problems: (1) it limits federal land managers’ ability to effectively manage environmentally sensitive areas and (2) it complicates management for state trust land authorities, who try to generate revenues for schools and other institutions. Both federal and state interests are important in preserving western lands and helping western states increase resources for education.

The controversy created by the blue rash is a perennial problem. In an attempt to solve the woes resulting from fragmented ownership of western lands, federal agencies and state trust authorities seek to exchange land. They conduct these exchanges administratively under the Federal Land Policy and Management Act (FLPMA) of 1976³ and legislatively by lobbying members of Congress. While methods for conducting exchanges present potential win-win solutions to treat the blue rash, there are many ways they can be improved.

This Note argues that while administrative and legislative land exchanges have the potential to remedy the blue rash, amendments to FLPMA and other federal statutes would significantly improve the process. Specifically, federal agencies and state trust authorities should take three steps: (1) Congress should grant more funding by amending the Land and Water Conservation Fund to solve agency dilemmas; (2) Congress should amend FLPMA’s public-interest- determination requirement to promote exchanges between federal agencies and state trust land authorities; and (3) Congress should amend FLPMA’s equal value requirement to incorporate conservation value as well as other ways to promote fair land exchanges. By adopting these amendments, Congress would facilitate the land exchange process and save state trust authorities and federal agencies valuable time and money.

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¹ 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 2:9 (2d ed. 2014).

² Steven M. Davis, *Preservation, Resource Extraction, and Recreation on Public Lands: A View from the States*, 48 NAT. RESOURCES J. 303, 331–32 (2008).

³ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–87 (2012).

Part II of this Note describes the development of the blue rash, including a history of federal land policies. Next, Part III analyzes the problems created by the blue rash—namely the conflicting mandates between federal agencies and state trust authorities. Part IV analyzes legislative land exchanges involving federal land and land managed by the Utah School and Institute Trust Lands Administration (SITLA), and argues that while these types of exchanges offer potential win-win solutions, they also present other problems. Finally, Part V concludes by offering examples of how amending federal statutes could make administrative exchanges a more optimal solution.

II. CREATING THE BLUE RASH: A BRIEF HISTORY OF FEDERAL LAND LAWS

A. *Acquisition and Disposal of Federal Lands*

The authority of federal land ownership stems from the Property Clause of the United States Constitution, which states, “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁴ The United States Supreme Court has acknowledged that this clause gives the federal government authority to own and retain lands under Congress’s direction.⁵ The Court has said congressional power to exercise its authority over federal land is “without limitations.”⁶

Federal land acquisition began early, when during the nation’s infancy the thirteen original states ceded title to the lands west of their borders that Great Britain had granted to them.⁷ The federal government acquired 237 million acres of land spanning from the Appalachian Mountains to the Mississippi River as a result of the original states’ cessions between 1781 and 1802.⁸ The federal government continued to acquire land through purchase, conquest, or compromise, adding the vast expanses west of the Mississippi River.⁹ Once acquired, these lands became federal property administered as territories until Congress admitted new states to the Union.¹⁰ Over time, the federal government acquired more than 1.8 billion acres of land from purchase, conquest, cession, and treaties.¹¹

⁴ U.S. CONST. art. IV, § 3, cl. 2.

⁵ See *Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976); *Camfield v. United States*, 167 U.S. 518, 525–26 (1897); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537–38 (1840).

⁶ *Kleppe*, 426 U.S. at 539 (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

⁷ PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 49–54 (photo. reprint 1979) (1968).

⁸ *Id.* at 49–55.

⁹ *Id.* at 75–86; GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 54–58 (6th ed. 2007).

¹⁰ See COGGINS ET AL., *supra* note 9, at 54–58.

¹¹ 196 BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, *PUBLIC LAND STATISTICS* 2011, at 1 (2012) [hereinafter *PUBLIC LAND STATISTICS*].

Disposal of federally owned lands started soon after the thirteen states ceded their territories.¹² The early federal government lacked the power to tax.¹³ But the nation had accumulated large debts from the Revolutionary War.¹⁴ Being land-rich and cash-poor, the federal government sold some of its newly acquired lands to help generate revenue, pay down debt, compensate veterans, and provide for public education.¹⁵

When the Continental Congress passed the General Land Ordinance of 1785 (the “Ordinance”), it established a general policy to generate revenue and pay debts.¹⁶ The Ordinance also established the federal government’s approach to land disposal, which the government used for years to come.¹⁷

In particular, two provisions significantly influenced the disposal of land and the development of the blue rash in the West.¹⁸ First, the Ordinance established a rectangular survey, which set the standard for all subsequent western land acquisitions and disposals.¹⁹ The survey divided townships into thirty-six one-square-mile parcels of 640 acres each.²⁰ These parcels were numbered, starting with “1” in the most northeastern corner and ending with “36” in the most southeastern corner.²¹ Second, the Ordinance required that section “16” in each township be reserved “for the maintenance of public schools[] within the said township.”²²

¹² GATES, *supra* note 7, at 51.

¹³ The federal government did not have the power to “lay and collect taxes on incomes” until the ratification of the Sixteenth Amendment to the U.S. Constitution in 1913. U.S. CONST. amend. XVI.

¹⁴ COGGINS ET AL., *supra* note 9, at 54.

¹⁵ *See id.*

¹⁶ 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 375–81 (John C. Fitzpatrick ed., 1933) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS].

¹⁷ *See* GATES, *supra* note 7, at 65 (“The rectangular system was one of the great features of the Land Ordinance of 1785 that has been retained in the national land system ever since.”); *see also* JON A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, AND SUSTAINABLE USE 18 (1996) (describing the General Land Ordinance as “remarkable for [its] brevity and durability”).

¹⁸ *See* Erin Pounds, Comment, *State Trust Lands: Static Management and Shifting Value Perspectives*, 41 ENVTL. L. 1333, 1337–38 (2011); *see also* SOUDER & FAIRFAX, *supra* note 17, at 18 (outlining the provisions of the Ordinance).

¹⁹ *Papasan v. Allain*, 478 U.S. 265, 268 n.3 (1986); *see also* Jeff Oven & Chris Voigt, Comment, *Wyoming’s Last Great Range War: The Modern Debate Over the State’s Public School Lands*, 34 LAND & WATER L. REV. 75, 78–79 (1999) (stating that the Ordinance “initiated a land surveying practice that became the standard for surveying each of the western land acquisitions that followed”).

²⁰ GATES, *supra* note 7, at 65.

²¹ *Id.* at 125.

²² JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 16, at 378; SOUDER & FAIRFAX, *supra* note 17, at 18.

Following the ratification of the Constitution, Congress continued to pass laws to facilitate the land disposal process.²³ Congress created the General Land Office in 1812²⁴ to oversee the disposal of federal lands under laws like the Homestead Act of 1862²⁵ and General Mining Law of 1872.²⁶ These statutes allowed the Land Office to grant, sell, or otherwise transfer federal lands into private ownership.²⁷ Similarly, railroad land grants in the 1870s provided incentives to develop a vast national transportation system.²⁸ These laws focused on entrepreneurs, speculators, military veterans, settlers, railroads, developers, and other private entities.²⁹ The transfer of federal lands under disposal laws created the checkerboard pattern of land ownership in the West that has led to myriad difficulties in managing federal lands.³⁰

In addition to disposing land to private entities, Congress granted newly admitted states land townships within their borders, furthering the fragmented ownership in the West and adding splashes of blue to western cartography.³¹ Researchers note the practice of setting aside land for education may date back to Henry V, but in the least, “the idea of granting, donating, or bequeathing land in support of schools was common throughout the colonial period.”³² The United States Supreme Court, while examining claims brought against the State of Mississippi for allegedly breaching its school trust land obligations, noted Congress granted these lands for multiple reasons

a combination of an overall practice of encouraging education, a congressional desire to accelerate the disposition of western lands at a

²³ See COGGINS ET AL., *supra* note 9, at 64–67 (describing the history of federal land disposal); see also COGGINS & GLICKSMAN, *supra* note 1, § 2:2; JANINE BLAELOCH, CARVING UP THE COMMONS: CONGRESS & OUR PUBLIC LANDS 1 (2009).

²⁴ BLAELOCH, *supra* note 23, at 1; GATES, *supra* note 7, at 28 (describing the creation of the Government Land Office in 1812).

²⁵ ch. 75, 12 Stat. 392 (1862) (codified as amended at 43 U.S.C. § 161) (repealed 1976).

²⁶ ch. 152, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. §§ 21–54 (2012)); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-223, FEDERAL LAND MANAGEMENT: OBSERVATIONS ON A POSSIBLE MOVE OF THE FOREST SERVICE INTO THE DEPARTMENT OF THE INTERIOR 7 (2009) [hereinafter GAO FEDERAL LAND REPORT 2009].

²⁷ See generally GATES, *supra* note 7, at 127 (“Thus by 1812 there was created the administrative machinery that was to manage close to a billion and a half acres spread over 30 states . . .”).

²⁸ BLAELOCH, *supra* note 23, at 1; see COGGINS ET AL., *supra* note 9, at 52.

²⁹ See COGGINS ET AL., *supra* note 9, at 64.

³⁰ See Scott K. Miller, *Missing the Forest and the Trees: Lost Opportunities for Federal Land Exchanges*, 38 COLUM. J. ENVTL. L. 197, 208 (2013) (“The variety of disposal programs created an assortment of inefficient landownership patterns.”).

³¹ See CTR. ON EDUC. POLICY, PUBLIC SCHOOLS AND THE ORIGINAL FEDERAL LAND GRANT PROGRAM 2, 8 (2011) [hereinafter CEP], available at http://www.cep-dc.org/cfcontent_file.cfm?Attachment=Usher_Paper_FederalLandGrants_041311.pdf, archived at <http://perma.cc/3Q6K-GG7W>.

³² Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 803 (1992).

higher price, and a policy of trying to put the public-lands States on some sort of a par with the original States in terms of taxable property since federal land, a large portion of the new States, was not taxable by them.³³

Congress granted states section 16 of each township, fulfilling its promise to reserve land for the maintenance of public schools under the Land Ordinance of 1785.³⁴ Ohio was the first state to receive school land grants under its enabling act, which granted each section 16 to the state legislature.³⁵ Subsequent states continued to receive grants until the admission of Alaska to the Union in 1959.³⁶

However, under successive enabling acts, Congress changed the way it granted school lands.³⁷ First, as westward expansion ensued, Congress increased the number of parcels it granted to the states because western states were arid, not well suited to farming, less economically valuable, and home to fewer natural resources.³⁸ As a result, Congress gave section 36 as well as section 16 in the enabling acts for many western states.³⁹ When states in the most arid regions entered the Union, Congress increased the grant to four parcels —as seen in Figure 1—with Utah being the first of four states to receive the four sections.⁴⁰

³³ *Papasan v. Allain*, 478 U.S. 265, 269 n.4 (1986).

³⁴ *Id.* at 268–69 n.3; SOUDER & FAIRFAX, *supra* note 17, at 18.

³⁵ SOUDER & FAIRFAX, *supra* note 17, at 22.

³⁶ Marla Valdez, Note, *Constitutionality of Educational Land Grants and Mississippi State Property Interests Under Review in Papasan v. Allain*, 28 NAT. RESOURCES J. 199, 199 (1988).

³⁷ Oven & Voigt, *supra* note 19, at 79–80; *see also* Fairfax et al., *supra* note 32, at 803–32 (describing the “evolution” of the school land grant).

³⁸ *See* Sean E. O’Day, *School Trust Lands: The Land Manager’s Dilemma Between Educational Funding and Environmental Conservation, A Hobson’s Choice?*, 8 N.Y.U. ENVTL. L.J. 163, 179–80 (1999); *see also* Oven & Voigt, *supra* note 19, at 79. Professors Jon A. Souder and Sally K. Fairfax also describe, however, that the school land grants played an integral part of the compromise between states. *See* SOUDER & FAIRFAX, *supra* note 17, at 19–23. Those states that entered the Union later became more adept at the compromise and were able to negotiate for more land. *Id.*; *see also* Fairfax et al., *supra* note 32, at 815 (“[O]ver time the federal government gave more and more land to new and middle-aged states before and after accession. The states had become more effective bargainers in their own behalf.”).

³⁹ *See* SOUDER & FAIRFAX, *supra* note 17, at 20–21, 25–27; *see also* CEP, *supra* note 31, at 11.

⁴⁰ Fairfax et al., *supra* note 32, at 814 & n.47, 835 fig.2; O’Day, *supra* note 38, at 180.

6	5	4	3	2	1	6	5	4	3	2	1	6	5	4	3	2	1
7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12
18	17	16	15	14	13	18	17	16	15	14	13	18	17	16	15	14	13
19	20	21	22	23	24	19	20	21	22	23	24	19	20	21	22	23	24
30	29	28	27	26	25	30	29	28	27	26	25	30	29	28	27	26	25
31	32	33	34	35	36	31	32	33	34	35	36	31	32	33	34	35	36
6	5	4	3	2	1	6	5	4	3	2	1	6	5	4	3	2	1
7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12
18	17	16	15	14	13	18	17	16	15	14	13	18	17	16	15	14	13
19	20	21	22	23	24	19	20	21	22	23	24	19	20	21	22	23	24
30	29	28	27	26	25	30	29	28	27	26	25	30	29	28	27	26	25
31	32	33	34	35	36	31	32	33	34	35	36	31	32	33	34	35	36
6	5	4	3	2	1	6	5	4	3	2	1	6	5	4	3	2	1
7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12
18	17	16	15	14	13	18	17	16	15	14	13	18	17	16	15	14	13
19	20	21	22	23	24	19	20	21	22	23	24	19	20	21	22	23	24
30	29	28	27	26	25	30	29	28	27	26	25	30	29	28	27	26	25
31	32	33	34	35	36	31	32	33	34	35	36	31	32	33	34	35	36

FIGURE 1. Township survey and land grants in states with four parcels. (Illustration by author.)

Second, Congress also changed who received the lands. At first, Congress granted the land to the state legislatures.⁴¹ Then, Congress granted the school trust lands to each of the respective townships.⁴² Congress granted the school lands to the states themselves in the enabling acts of the final states to enter the Union.⁴³ Finally, Congress increasingly added language to enabling acts that restricted the use and scope of school land grants.⁴⁴

For example, Ohio's Enabling Act limits the grant of section 16 "for the maintenance of schools."⁴⁵ Congress changed course with later enabling acts by specifying that school land grants were "for the use and benefit of the common

⁴¹ Oven & Voigt, *supra* note 19, at 79–80; Fairfax et al., *supra* note 32, at 817–18.

⁴² Fairfax et al., *supra* note 32, at 817.

⁴³ *Id.*

⁴⁴ *See id.* at 818–20.

⁴⁵ Fairfax et al., *supra* note 32, at 818 (describing Ohio's enabling act, also known as the Act of Apr. 30, 1802, ch. 40, 2 Stat. 173).

schools.”⁴⁶ Both the Omnibus Enabling Act of 1889—admitting North Dakota, South Dakota, Montana, and Washington to the Union—and the enabling acts for Idaho and Wyoming specified terms for the sale and lease of the land and prohibited sectarian or denominational use of the land.⁴⁷ By the time New Mexico and Arizona acceded to the Union, Congress added further requirements to the management and sale of granted lands.⁴⁸ In the New Mexico-Arizona Enabling Act, Congress clearly stated that all school and institutional grant lands “shall be . . . held in trust.”⁴⁹

Several states’ enabling acts do not expressly create a trust for the state over the school and institutional lands that Congress granted them. But many courts recognize that states must hold these lands in trust for the benefit of public schools and other institutions.⁵⁰ This is largely a result of the U.S. Supreme Court’s decision in *Lassen v. Arizona ex rel. Arizona Highway Department*.⁵¹ In *Lassen*, the U.S. Supreme Court overturned a decision by the Arizona Supreme Court.⁵² The Arizona decision required Arizona’s state trust land authority to grant a right of way to the Arizona Highway Department over certain trust lands without compensation.⁵³ Relying on the terms and obligations in the Arizona Enabling Act, the U.S. Supreme Court held the Highway Department must compensate the trust for the rights of way. The Court said, “[t]he Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given.”⁵⁴ Many state and federal courts have used the U.S. Supreme Court’s reasoning in *Lassen* to find that trust principles govern the school and institutional grants found in the enabling acts of other western states.⁵⁵

⁴⁶ Oklahoma Enabling Act, Pub. L. No. 59-234, § 7, 34 Stat. 267, 272 (1906); *see also* Fairfax et al., *supra* note 32, at 818 (describing the evolution of the enabling acts).

⁴⁷ ch. 180, § 11, 25 Stat. 676, 679–80 (1889).

⁴⁸ Act of June 20, 1910, Pub. L. No. 61-219, §§ 6–10, 36 Stat. 557, 561–65; *see also* SOUDER & FAIRFAX, *supra* note 17, at 25–26.

⁴⁹ § 10, 36 Stat. at 563.

⁵⁰ *See generally* SOUDER & FAIRFAX, *supra* note 17, at 36–37 (“Trust principles . . . have come to dominate judicial understanding of school grants.” (citation omitted)).

⁵¹ 385 U.S. 458 (1967).

⁵² *Id.* at 459–60.

⁵³ *Id.*

⁵⁴ *Id.* at 466.

⁵⁵ *See, e.g.*, Dist. 22 United Mine Workers of Am. v. Utah, 229 F.3d 982, 990 (10th Cir. 2000) (holding that although the Utah Enabling Act did not create a federal trust, the language of the Act gave the Utah legislature discretion to determine management and trust principles, and holding that the lands were “held in trust pursuant to the Utah Constitution”); United States v. 78.61 Acres of Land in Dawes & Sioux Cntys., 265 F. Supp. 564, 566 (D. Neb. 1967) (holding that “the grant was undoubtedly in trust for a specific purpose” and that the state was still “under a contractual as well as a constitutional obligation to refrain from disposition or alienation of the use of [grant lands] except as allowed by the enabling act and the Constitution” (quoting State *ex rel.* Johnson v. Cent. Neb. Pub. Power & Irrigation Dist.,

In total, the disposition of federal lands, including but not limited to state land grants, has reached nearly 1.3 billion acres.⁵⁶ Congress granted nearly 78 million acres through school and institutional land grants in state enabling acts.⁵⁷

The federal government's pattern of granting state and private lands created a fragmented ownership of the American West:

[Today, t]he land ownership map of the West in many places resembles a crazy quilt, without reason or coherent pattern. Where the effects of the fragmenting grants to miners, railroads, and states are pronounced, often no single owner (states, private entities, or the federal government) owns enough contiguous land to allow effective management of land holdings. Land exchanges and cooperative efforts have accomplished some consolidation, but fragmented ownership patterns generate a plethora of disputes over access and similar problems.⁵⁸

This fragmented ownership is further complicated by the fact that the federal agencies that manage the undisposed federal lands must adhere to certain mandates, which the following the section discusses in more detail.

B. Withdrawal, Reservation, Retention and Federal Land Management Mandates

While creating policies to dispose of federal lands, Congress also adopted policies to withdraw and reserve certain lands for federal purposes. *Withdrawing* federal land removes it from disposal under federal laws. *Reserving* federal land removes the land from disposal for a particular national purpose. One example was The Land Ordinance of 1785's reservation of section 16 of every township to maintain public schools.⁵⁹ Other reservations included the authorization and funding of military reservations.⁶⁰

8 N.W.2d 841, 847–48 (Neb. 1943)); *Cnty. of Skamania v. State*, 685 P.2d 576, 583 (Wash. 1984) (holding that the reasoning in *Lassen* applied to Washington's Enabling Act).

⁵⁶ PUBLIC LAND STATISTICS, *supra* note 11, at 1.

⁵⁷ *Id.* at 5.

⁵⁸ COGGINS & GLICKSMAN, *supra* note 1, § 2.9 (citations omitted).

⁵⁹ GATES, *supra* note 7, at 65.

⁶⁰ GAO FEDERAL LAND REPORT 2009, *supra* note 26, at 6–7.

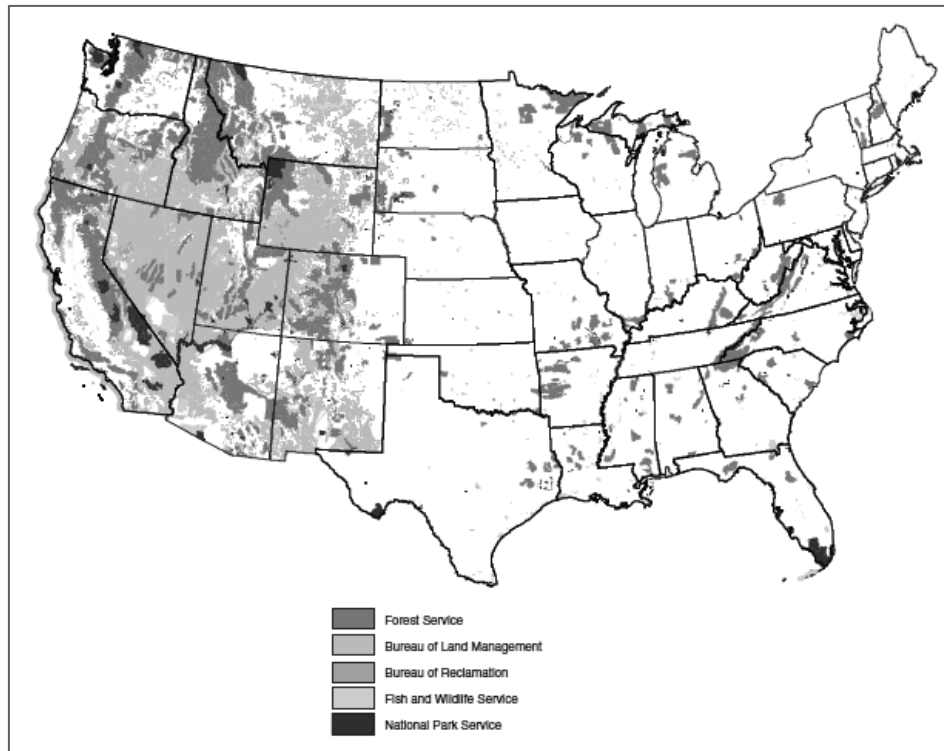


FIGURE 2. Federal land managers in the West.⁶¹

Early on, withdrawal and reservation policies focused on retaining lands for future disposals or future reservations, including Indian trading posts, military and mineral reservations, and other public purposes.⁶² With the reservation of Yosemite and Yellowstone in the nineteenth century, Congress paved the way for reserving lands for recreation and preservation uses.⁶³ Other national parks followed, and soon thereafter, Congress enacted the National Park Organic Act,⁶⁴ laying the foundation for the National Park System.⁶⁵ In 1891, Congress authorized the President to reserve and protect forests, which led to the creation of the National Forest System.⁶⁶ In 1903, President Theodore Roosevelt pioneered the use of withdrawal to protect

⁶¹ *Id.* at 14 fig.1.

⁶² 1 CHARLES F. WHEATLEY, JR., *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* 55–60 (1969).

⁶³ *See* JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 5–8 (1980).

⁶⁴ National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1–4 (2012)).

⁶⁵ *See* SAX, *supra* note 63, at 5.

⁶⁶ General Revision Act, ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (repealed 1976); BLAELOCH, *supra* note 23, at 2.

wildlife habitats, leading to the National Wildlife Refuge System.⁶⁷ Today, many federal agencies—including the National Park Service, the U.S. Forest Service, and the U.S. Fish and Wildlife Service—manage these withdrawn and reserved lands.⁶⁸

Along with withdrawal and reservation policies, retention policies also created a marked shift from disposal of federal lands and led to the creation of the Bureau of Land Management (BLM). *Retaining* federal lands keeps otherwise disposable lands in federal ownership. Retention of federal lands started with the Taylor Grazing Act of 1934.⁶⁹ Under the Act, Congress created the U.S. Grazing Service to manage livestock grazing on federal lands, which was the first step toward ending federal land disposal.⁷⁰ As the years passed, controversies arose over the Grazing Service’s management policies, and as a result, the federal government merged the Service with the General Land Office to create the BLM in 1946.⁷¹

As the nation’s population expanded and society became more and more mobile, the demand for public land use increased.⁷² Congress responded by enacting two laws in 1964 that continued the shift from disposal to retention. The first law created the Public Land Law Review Commission (PLLRC), which was to recommend “modifications in existing laws, regulations, policies, and practices” to determine whether and which federal lands should be retained or disposed.⁷³ The second law, the Classification and Multiple Use Act, ordered the BLM to classify lands for retention or disposal and to manage those lands for multiple purposes pending recommendations by the PLLRC.⁷⁴ In 1970, the PLLRC completed its commission and recommended

[t]he policy of large-scale disposal of public lands . . . be revised and that future disposal should be only those lands that will achieve maximum benefit for the general public in non-Federal ownership, while retaining in Federal ownership those whose values must be preserved so that they may be used and enjoyed by all Americans.⁷⁵

⁶⁷ Robert L. Fischman, *The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy*, 21 J. LAND USE & ENVT. L. 1, 9–11 (2005) (describing President Roosevelt and the creation of Pelican Island).

⁶⁸ See GAO FEDERAL LAND REPORT 2009, *supra* note 26, at 7.

⁶⁹ Pub. L. No. 73-482, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315–315r (2012)).

⁷⁰ See *id.* § 1, 48 Stat. at 1269 (requiring the Grazing Service to manage only those lands “pending [their] final disposal”).

⁷¹ Reorganization Plan No. 3 of 1946, § 403, 60 Stat. 1097, 1100 (codified as amended at 43 U.S.C. § 1201 (2012)).

⁷² PUBLIC LAND STATISTICS, *supra* note 11, at 1.

⁷³ Act of Sept. 19, 1964, Pub. L. No. 88-606, § 4, 78 Stat. 982, 983 (expired 1970) (previously codified at 43 U.S.C. §§ 1391–93); see also *id.* § 1, 78 Stat. at 982 (detailing the purpose of the PLLRC).

⁷⁴ Pub. L. No. 88-607, § 1(a), 78 Stat. 986, 986 (1964) (expired 1970) (previously codified at 43 U.S.C. §§ 1411–18).

⁷⁵ U.S. PUB. LAND LAW REVIEW COMM’N, ONE-THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND TO CONGRESS 1 (1970) [hereinafter PLLRC REPORT].

Following these two laws and the PLLRC's recommendations, Congress formally ended the disposal of federal lands by enacting the Federal Land Policy and Management Act (FLPMA) of 1976.⁷⁶ Section 1701(a) of FLPMA states,

Congress declares that it is the policy of the United States that . . . public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest.⁷⁷

"Today, the BLM administers about 247.5 million surface acres of public land and approximately 700 million acres of Federal subsurface mineral estate in the United States," making it the largest of the federal land management agencies.⁷⁸ Most of the BLM's lands are in Alaska and eleven other western states.⁷⁹

Thus, the withdrawal, reservation, and retention policies of the United States created a vast management system of federal land that is spread primarily throughout the West. These policies, along with the disposal policies of much of the nineteenth and twentieth centuries, created a land ownership pattern that often makes islands of state and private land holdings within federally withdrawn, reserved, or retained lands, or vice versa. In particular, many of the congressionally granted school and institutional trust lands end up as islands amidst federally owned and managed lands. Many maps of the West identify school grant lands in blue,⁸⁰ which led to the moniker "blue rash."

The following section discusses in more detail the problems that arise from fragmented ownership, particularly as they relate to the objectives of federal land managers and state trust authorities, whose mandates often conflict and make it difficult to effectively manage lands in the West.

III. PROBLEMS OF THE BLUE RASH: CONFLICTING MANDATES

The problem with the blue rash in management of western lands is twofold. First, the fragmented land ownership deters federal land managers from effectively managing their lands according to their mandates, especially if these lands are reserved for environmental protection.⁸¹ Second, the fragmented land ownership

⁷⁶ Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701–87 (2012)).

⁷⁷ 43 U.S.C. § 1701(a) (2012).

⁷⁸ PUBLIC LAND STATISTICS, *supra* note 11, at 1.

⁷⁹ *Id.* at 7.

⁸⁰ See, e.g., *Utah Land Status and Areas of Responsibility*, STATE OF UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION (October 2014), http://tlamap.trustlands.utah.gov/download/maps/statewide/SurfaceMineral_st36x48_shd.pdf, archived at <http://perma.cc/5Z6B-774E>.

⁸¹ See Martin Nie, *Whatever Happened to Ecosystem Management and Federal Land Planning?*, in *THE LAWS OF NATURE: REFLECTIONS ON THE EVOLUTION OF ECOSYSTEM*

limits state trust land authorities' ability to effectively meet their mandates to manage the land for the benefit of trust beneficiaries like public schools and institutions.⁸²

This section begins by briefly addressing the general federal land management mandates. The section then examines in more detail the conflict between the BLM's conservation mandate in managing Wilderness Study Areas (WSAs) and the Utah School and Institutional Land Administration's (SITLA) mandate to manage state trust lands.

A. Federal Agency Mandates

The various federal land management agencies operate under different mandates. Some, including the BLM, operate under more than one mandate depending on how land is designated. In general, the BLM and the Forest Service manage their lands under the Multiple-Use Sustained-Yield Act.⁸³ This mandate requires the agencies to account for multiple uses of the land, including recreation and providing for a sustained yield of renewable resources, including timber, fish and wildlife, and forage for livestock.⁸⁴ Where BLM lands are designated for environmental protection, like Wilderness Study Areas, the BLM operates under a stricter mandate to manage the lands for preservation purposes.⁸⁵

Under its mandate, the National Park Service manages lands "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."⁸⁶ This unimpaired mandate includes the conservation of scenery, natural and historical objects, and wildlife.⁸⁷ Similarly, the Fish and Wildlife Service manages its lands for the benefit of present and future generations, conserving and restoring fish, wildlife, and plant resources and their habitats where appropriate.⁸⁸

MANAGEMENT LAW & POLICY 68, 69 (Kalyani Robbins ed., 2013) ("[T]he 'blue rash' of state trust lands scattered throughout the West . . . presents multiple challenges to ecosystem management.").

⁸² Jason M. Keith, Note, *The 1998 Utah Schools and Lands Exchange Act: Project BOLD II*, 19 J. LAND RESOURCES & ENVTL. L. 325, 337 (1999). Keith argues that federal reservations and environmentally sensitive designated areas, like national parks and BLM Wilderness Study Areas, impact a state trust authority's ability to meet its mandate when state trust lands are located within those areas because the development potential of those lands is limited to the mandate of the adjacent federal land. *Id.*

⁸³ See 16 U.S.C. §§ 529, 1604(e)(1) (2012); 43 U.S.C. §§ 1701(a)(7), 1712(c)(1) (2012).

⁸⁴ See 16 U.S.C. §§ 529, 1604(e)(1); 43 U.S.C. §§ 1701(a)(7), 1712(c)(1).

⁸⁵ 43 U.S.C. § 1782(c).

⁸⁶ See 16 U.S.C. § 1.

⁸⁷ See *id.*

⁸⁸ See *id.* § 668dd.

B. The Conflict Between Wilderness Study Area and SITLA Mandates

The conflicts between federal land managers and state trust authorities often occur within federal conservation areas because of incompatible mandates. For example, as part of the BLM's multiple-use mandate, FLPMA requires the BLM to identify "roadless areas of five thousand acres or more . . . as having wilderness characteristics as described in the Wilderness Act."⁸⁹ The wilderness characteristics under the Wilderness Act include land that

- (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable;
- (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation;
- (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and
- (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.⁹⁰

Once the BLM identifies potential wilderness areas, it must send them to Congress for review and designation.⁹¹ After review, Congress may designate these areas as wilderness areas for the preservation of the wilderness resources or release them for non-wilderness uses.⁹² The areas pending review are known as Wilderness Study Areas (WSAs), and, pending such review, the BLM "shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness."⁹³ This language is known as the non-impairment standard.⁹⁴

Generally, the non-impairment standard requires the BLM to prohibit actions or impacts that contradict Congress's prerogatives under the Wilderness Act.⁹⁵ Specifically, the non-impairment standard precludes road construction or other surface-disturbing development activities, effectively eliminating development within WSAs.⁹⁶

SITLA's mandate requires that trust lands be managed in the "most prudent and profitable manner possible" to support public schools and institutions.⁹⁷ In doing so,

⁸⁹ 43 U.S.C. § 1782(a).

⁹⁰ 16 U.S.C. § 1131(c).

⁹¹ 43 U.S.C. § 1782(a)–(b).

⁹² *Id.* § 1782(c).

⁹³ *Id.*

⁹⁴ *See generally* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 59 (2004) (identifying section 1782 as a non-impairment standard).

⁹⁵ *See* 43 U.S.C. § 1782; 16 U.S.C. § 1133(c).

⁹⁶ *See* 16 U.S.C. § 1133(c) (prohibiting all commercial enterprises within designated wilderness areas except existing road construction, motorized equipment, facilities, and private rights).

⁹⁷ UTAH CODE ANN. § 53C-1-102(2)(b) (West 2014).

SITLA “must be concerned with both income for the current beneficiaries and the preservation of trust assets for future beneficiaries, which requires a balancing of short and long-term interests so that long-term benefits are not lost in an effort to maximize short-term gains.”⁹⁸ However, the mandate of each state’s trust land authority should not be simplified as merely creating an obligation to “secure the highest monetary return” for its beneficiaries.⁹⁹ Rather,

the trust doctrine is more flexible than supposed. Maximum economic benefit is a very flexible mandate. More important, the trust mandate to preserve the corpus of the trust while making the trust productive permits more conservative management, and a broader range of social benefits, than the maximum benefits perspective at first implies.¹⁰⁰

When SITLA lands are found within federal reservations and preservation areas like WSAs, it invites conflict between the state and federal authorities. The conflict arises because the federal mandates limit the development potential of SITLA and other states’ trust authorities’ lands.¹⁰¹ Similarly, the landlocked SITLA and state trust authority lands limit the ability of the BLM and other federal agencies to manage and protect wilderness. This is because the state trust authorities may seek to develop their inholdings, resulting in roads or other improvements within a WSA or other preservation area.¹⁰²

IV. TREATING THE BLUE RASH WITH LAND EXCHANGES: THE POTENTIAL WIN-WIN SOLUTIONS AND IMPROVING THE PROCESS

To treat the conflicting mandates that arise from the blue rash, many state trust authorities and federal agencies have sought to use the land exchange process.¹⁰³ Currently, there are two processes available to effect land exchanges between federal and nonfederal parties, including state trust authorities. First, parties may work directly with federal agencies—generally the BLM or Forest Service—to negotiate

⁹⁸ *Id.* § 53C-1-102(2)(c).

⁹⁹ WILLIAM C. PATRIC, *TRUST LAND ADMINISTRATION IN THE WESTERN STATES* 7 (1981).

¹⁰⁰ *Id.* at 801–02.

¹⁰¹ *See* Keith, *supra* note 82, at 337.

¹⁰² *See* *Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979) (holding that state trust authorities must have access to inholdings within federal wilderness areas because “[w]ithout access[,] the state could not develop the trust lands in any fashion and they would become economically worthless”); *see also* Miller, *supra* note 30, at 213–14 (“The Agencies are burdened by the perpetual need to provide for and regulate both access across the federal lands for non-federal inholders and their own access across non-federal lands.”).

¹⁰³ *See* Miller, *supra* note 30, at 215; RALEIGH BARLOWE ET AL., *LAND DISPOSAL TECHNIQUES AND PROCEDURES: A STUDY PREPARED FOR THE PUBLIC LAND LAW REVIEW COMMISSION* 141 (1970) (“Land exchanges provide a highly rational solution to an irrational land management situation.”).

an administrative land exchange under FLPMA. Second, a party desiring to exchange land with the federal government may work with members of Congress to authorize or require an exchange.

Land exchanges can be an effective method to treat the problems associated with the blue rash, and they may even present a potential win-win solution that allows federal and state land managers to better meet their respective mandates. These win-win solutions have mostly been effectuated through legislative land exchanges. However, while land exchanges present win-win solutions, both administrative and legislative exchanges are difficult and often require significant resources and time.

First, this section briefly describes the process behind administrative exchanges and lists potential reasons why state trust authorities resort to Congress when conducting an exchange. Second, this section examines legislative exchanges in Utah and how they may provide win-win solutions. Finally, this section argues that, while important to help address problems with the blue rash, legislative exchanges do not provide the optimal solution because they fail to effectively involve the public and require more time and resources than are needed to complete an exchange. Rather, a better way to address the blue rash is for Congress to amend federal statutes to incentivize cooperation between federal land managers and state trust authorities. Such incentives would still allow public concerns to be effectively addressed while decreasing the time it takes to complete an exchange that would otherwise go through the legislative process.

A. Administrative Exchanges

Most administrative land exchanges involve the BLM and the Forest Service because these agencies manage the most acreage of federal land.¹⁰⁴ FLPMA authorizes both agencies to conduct administrative land exchanges.¹⁰⁵ Other federal statutes, like the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), and agency policies place additional restrictions on the exchange process.¹⁰⁶

¹⁰⁴ See Miller, *supra* note 30, at 206.

¹⁰⁵ See 43 U.S.C. § 1716 (2012). For a more comprehensive discussion of the history of land exchange law, see Bill Paul, *Statutory Land Exchanges that Reflect “Appropriate” Value and “Well Serve” the Public Interest*, 27 PUB. LAND & RESOURCES L. REV. 107, 112 (2006) (describing the history of the Weeks Act of 1911, the General Exchange Act of 1922, and the Taylor Grazing Act of 1934). The Taylor Grazing Act of 1934 added an important criterion for land exchanges by allowing the Grazing Service (predecessor to the BLM) to “engage in land exchanges of equal value only if the public interest would benefit from such exchanges.” *Id.* (emphasis omitted).

¹⁰⁶ See Miller, *supra* note 30, at 231–33 (outlining restrictions on the land exchange process under NEPA and other agency regulations); Paul, *supra* note 105, at 113 (outlining ESA’s restrictions on land exchanges).

FLPMA provides objectives and procedural obligations for the agency executing the exchange.¹⁰⁷ Under FLPMA, agencies must adhere to two primary requirements: (1) that exchanges well serve the public interest and (2) that exchanges of land be of equal value.¹⁰⁸

First, in considering what well serves the public interest, “the Secretary concerned 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.”¹⁰⁹ These factors must be weighed against the agency’s value in keeping the land.¹¹⁰ Such land exchanges may only occur within the same state so as not to deplete state land holdings and potential royalties in the counties.¹¹¹

Typically, courts grant significant deference under the arbitrary and capricious standard to agency decisions regarding the public interest.¹¹² In *National Coal Ass’n v. Hodel*,¹¹³ the U.S. Court of Appeals for the D.C. Circuit exhibited such deference, stating “[t]he Secretary’s public interest determination is one involving a variety of factors, the relative weights of which are left in his discretion. We will not second-guess his conclusion that the [land] exchange . . . was in the public interest.”¹¹⁴ Similarly, the Tenth Circuit Court of Appeals described FLPMA as giving the agency the “authority and responsibility to define the contours of ‘public interest.’”¹¹⁵ Also, the court clarified that the authority to determine whether an exchange well serves the public interest does not extend to a state “for itself or for its citizens.”¹¹⁶

Thus, under arbitrary and capricious judicial review, agency determinations of what well serves public interest may not coincide with what a state trust authority determines to be in the public interest. Yet both the federal and state interests are important. The deferential review may deter state trust authorities from challenging an agency’s denial of a land exchange for not being in the public interest, potentially discouraging them from taking part in the process from the beginning.

FLPMA’s second major requirement demands the lands exchanged be of equal value, as determined by appraisal.¹¹⁷ If the lands are not of equal value, they may be equalized in cash payments not to exceed 25% of the total value of the federal land

¹⁰⁷ 43 U.S.C. § 1716.

¹⁰⁸ *Id.* § 1716(a)–(b).

¹⁰⁹ *Id.* § 1716(a).

¹¹⁰ *Id.* § 1716(b); *see also* Paul, *supra* note 105, at 112–13.

¹¹¹ 43 U.S.C. § 1716(b); *see also* Holly Chamberlain, *A Plan of Action: A New Alternative to Traditional School Trust Land Exchanges in the West?*, 23 J. LAND RESOURCES & ENVTL. L. 241, 250 (2003).

¹¹² *See Nat’l Coal Ass’n v. Hodel*, 825 F.2d 523, 531 (D.C. Cir. 1987).

¹¹³ 825 F.2d 523 (D.C. Cir. 1987).

¹¹⁴ *Id.* at 532.

¹¹⁵ *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992).

¹¹⁶ *Id.*

¹¹⁷ 43 U.S.C. § 1716(b), (d) (2012).

in the exchange.¹¹⁸ BLM and Forest Service regulations state, an exchange “shall comply with the appraisal standards . . . and, to the extent appropriate, with the [Department of Justice] Uniform Appraisal Standards for Federal Land Acquisitions . . . when appraising the values of the Federal and non-Federal lands involved in an exchange.”¹¹⁹

In *Andrus v. Utah*,¹²⁰ the U.S. Supreme Court clarified the Secretary of the Interior’s authority to determine equal value in the context of exchanges involving federal and state trust lands.¹²¹ In that case, Utah’s state land authority (now SITLA) sought in lieu selections, or land parcels elsewhere, to replace originally granted lands that were unavailable for reasons such as settlement.¹²² Utah “argued that the Secretary of the Interior had to approve any lands that the state chose so long as the lands were equal in size to the originally designated lands.”¹²³ The Secretary argued, however, that the equal value requirement meant equal monetary value and not equal acreage. Therefore, the Secretary could refuse the selection because the lands the state sought to acquire and the lands it sought to dispose had a “grossly disparate value.”¹²⁴ The Supreme Court agreed with the federal government, stating that it could not “identify any sensible justification for Utah’s position that it is entitled to select any mineral lands it chooses regardless of the value of the school sections lost.”¹²⁵ Thus, in land exchanges, equal value is not a matter of equal acreage; it considers only equal monetary value.

In determining the monetary value of lands to be exchanged, BLM and Forest Service regulations require that “[a] qualified appraiser[] shall provide to the [federal agency] appraisals estimating the market value of Federal and non-Federal properties involved in an exchange.”¹²⁶ In estimating market values, an appraiser must consider the highest and best use of the appraised properties as well as the market value or prices paid for similar properties in a competitive market.¹²⁷

Courts have held the highest and best use under the Uniform Appraisal Standards for Federal Land Acquisition means, “the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.”¹²⁸ Additionally, courts hold “the highest and best use must also be: (1) physically possible; (2) legally permissible; (3) financially feasible; and

¹¹⁸ *Id.* § 1716(b).

¹¹⁹ 43 C.F.R. § 2201.3 (2013); 36 C.F.R. § 254.9 (2013).

¹²⁰ 446 U.S. 500 (1980).

¹²¹ *Id.* at 520.

¹²² *Id.* at 501.

¹²³ Jeremy Eyre, *The San Rafael Swell and the Difficulties in State-Federal Land Exchanges*, 23 J. LAND RESOURCES & ENVTL. L. 269, 271 (citing *Andrus*, 446 U.S. at 504).

¹²⁴ *Andrus*, 446 U.S. at 503–04.

¹²⁵ *Id.* at 510.

¹²⁶ 43 C.F.R. § 2201.3-1(a) (2013); 36 C.F.R. § 254.9(a) (2013).

¹²⁷ 43 C.F.R. § 2201.3-2(a); 36 C.F.R. § 254.9(b).

¹²⁸ E.g., *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1066–67 (9th Cir. 2010) (internal quotations marks omitted).

(4) must result in the highest value.”¹²⁹ Thus, potential improvements may be considered in an appraisal under the above criteria.

While FLPMA governs the land exchange process, other laws significantly impact the process. One such law is the National Environmental Policy Act (NEPA) of 1969.¹³⁰ NEPA is a procedural requirement that ensures a federal agency will take a hard look at the environmental consequences of a federal action and evaluate potential project alternatives before making a final decision.¹³¹ NEPA does not preclude a federal agency from taking actions with adverse environmental impacts; it simply requires that the agency fully understand and consider adverse impacts as early as possible in the decision process.¹³² The Act states that its policies and goals supplement those of federal agencies.¹³³

NEPA requires completion of a detailed statement on the environmental effects that are likely to result from major federal actions significantly affecting the quality of the human environment.¹³⁴ This requirement is normally satisfied by completion of an Environmental Impact Statement (EIS).¹³⁵ An EIS must evaluate environmental impacts and possible alternatives to the action.¹³⁶ The lead agency may prepare an environmental assessment (EA) to determine if the proposed action would produce a significant environmental impact.¹³⁷ If the agency finds no significant impact, it releases a finding of no significant impact (FONSI), which details why the agency has chosen not to conduct an EIS.¹³⁸ Land exchanges are almost certain to constitute major federal actions significantly affecting the environment, and therefore, require completion of an EIS.¹³⁹

The Endangered Species Act of 1973 (ESA)¹⁴⁰ also significantly impacts land exchanges. If a listed species is present on lands proposed for exchange, the ESA requires that the exchange agency enter into consultation with the U.S. Fish and Wildlife Service.¹⁴¹ Consultation works to “insure that any [land exchange] . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.”¹⁴² Thus, if a species is listed, the ESA applies and may significantly limit

¹²⁹ E.g., *id.* at 1067.

¹³⁰ 42 U.S.C. §§ 4321–70h (2012).

¹³¹ *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).

¹³² *See id.* at 1141–42.

¹³³ 42 U.S.C. § 4335.

¹³⁴ *Id.* § 4332(2)(C).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 40 C.F.R. § 1508.9 (2013).

¹³⁸ *Id.* § 1508.13.

¹³⁹ *See Miller, supra* note 30, at 202 (describing the Black River Land Exchange, a Forest Service exchange that was reversed and remanded for NEPA review).

¹⁴⁰ 16 U.S.C. §§ 1531–44 (2012).

¹⁴¹ *Id.* § 1536(a)(2) & (c)(1).

¹⁴² *Id.* § 1536(a)(2).

the parameters of the land exchange. It may also take more time to complete an exchange because of the mandatory involvement of another federal agency.

Together FLPMA, NEPA, and the ESA require an integrated, holistic management approach that maintains the biological diversity of plant and animal species in a given region.¹⁴³ This holistic approach prioritizes conservation in the land exchange process.¹⁴⁴ Indeed, the federal interest in conservation may create an incentive for federal agencies to engage in exchanges that advance conservation objectives by facilitating sensitive landscape protection.

The administrative land exchange process has had mixed results over FLPMA's lifetime. For example, in a 2009 report, the Government Accountability Office (GAO) showed that from 1989 to 1999 the Forest Service completed an average of 115 exchanges per year.¹⁴⁵ In contrast, from 2000 to 2008, the agency completed just 29 exchanges per year.¹⁴⁶ From 2003 to 2011, the BLM initiated only 132 applications for land exchanges in many of the western states.¹⁴⁷ These numbers account for all land exchanges with the BLM, including with private parties.¹⁴⁸ Federal-state land exchanges are presumably an even smaller portion of these accounted exchanges.

The GAO lists three main reasons for a decline in agency land exchanges: "the availability of qualified staff, changing priorities, and the availability of funding."¹⁴⁹ As discussed below, addressing the problems identified by the GAO could lead to a rise in the number of exchanges between federal agencies and state trust authorities.¹⁵⁰ In turn, more exchanges could lead to improved efficiency in land conservation and management and improved revenues for schools and other institutions.¹⁵¹

Leading up to these problems, many criticized certain BLM and Forest Service land exchanges. This scrutiny resulted from many complaints that multiple exchanges failed to meet FLPMA's standards.¹⁵² First, agencies did not follow the

¹⁴³ See Paul, *supra* note 105, at 113.

¹⁴⁴ *Id.* at 113; see Robert B. Keiter, *Biodiversity Conservation and the Intermixed Ownership Problem: From Nature Reserves to Collaborative Processes*, 38 IDAHO L. REV. 301, 312–14 (2002).

¹⁴⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-611, FEDERAL LAND MANAGEMENT: BLM AND THE FOREST SERVICE HAVE IMPROVED OVERSIGHT OF THE LAND EXCHANGE PROCESS, BUT ADDITIONAL ACTIONS ARE NEEDED 16 (2009) [hereinafter GAO EXCHANGE REPORT 2009].

¹⁴⁶ *Id.*

¹⁴⁷ Bureau of Land Mgmt., BLM Land Exchanges—Completed, Pending, Terminated, FY 2003 to Present (Nov. 2, 2012) [hereinafter BLM Spreadsheet] (unpublished spreadsheet) (on file with Utah Law Review) (showing 132 Federal-state land exchanges).

¹⁴⁸ *Id.*

¹⁴⁹ GAO EXCHANGE REPORT 2009, *supra* note 145, at 8, 17–19.

¹⁵⁰ See *infra* Part III.C.

¹⁵¹ See *id.*

¹⁵² U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-00-73, BLM AND THE FOREST SERVICE: LAND EXCHANGES NEED TO REFLECT APPROPRIATE VALUE AND SERVE THE PUBLIC INTEREST 23–27 (2000).

requirements needed to show the land exchanges they conducted served the public interest.¹⁵³ Second, many exchanges resulted in a net loss in value of the land exchanged in contrast to FLPMA's equal value requirement.¹⁵⁴

In effort to fix the image of administrative land exchanges, the BLM and the Forest Service adopted more stringent appraisal policies.¹⁵⁵ In a 2009 report, the GAO said the new procedures required the appraisals to be scrutinized by higher agency officials.¹⁵⁶ The report states: "To ensure that exchanges were meeting requirements and agency guidance, both agencies established headquarters exchange review teams in 1998 and required the teams to review most exchanges at two critical stages during the exchange process—the feasibility and the decision stages."¹⁵⁷

These new appraisal procedures may deter state trust land authorities from seeking to exchange lands with the agencies administratively because they may result in lost time and money.¹⁵⁸ This is especially true when agency approval of appraisals take close to a year or more.¹⁵⁹ After that period of time, an appraisal may no longer reflect market values, which may pose significant loss to the state trust authority's or federal agency's land values.¹⁶⁰

In addition to delayed appraisal approval, the GAO notes agencies often require the nonfederal party to pay for the appraisal process because of constraints on the agency.¹⁶¹ Thus, the combination of having to pay for an appraisal with the potential that the appraisal may not be approved in a timely manner creates disincentives for state trust authorities to seek administrative land exchanges because they may waste valuable time and money.¹⁶²

¹⁵³ *Id.* at 4, 20–23.

¹⁵⁴ *Id.* at 4 (stating the BLM and Forest Service "have given more than fair market value for nonfederal land they acquired and accepted less than fair market value for federal land they conveyed because the appraisals used to estimate the lands' values did not always meet federal standards").

¹⁵⁵ GAO EXCHANGE REPORT 2009, *supra* note 145, at 26–27. Procedurally, both the BLM and Forest Service undergo five steps for a given exchange: (1) develop exchange proposals; (2) evaluate the feasibility of exchange proposals; (3) exchange processing and documentation—including NEPA documentation and any arbitration of appraisal disputes; (4) decision analysis and approval—review of decision by Washington D.C.; and (5) title transfer. BUREAU OF LAND MGMT., REL. 2-294, LAND EXCHANGE HANDBOOK H-2200-1 (PUBLIC) 1-15 to 1-17 (2005).

¹⁵⁶ GAO EXCHANGE REPORT 2009, *supra* note 145, at 26–27.

¹⁵⁷ *Id.* at 27.

¹⁵⁸ *Id.* at 15–16 (noting the timeliness of the appraisal process often causes significant agency delays in executing land exchanges).

¹⁵⁹ Interview with Joy Wehking, Realty Specialist, Bureau of Land Mgmt., Utah State Office, in Salt Lake City, Utah (Nov. 5, 2012).

¹⁶⁰ *Id.*

¹⁶¹ GAO EXCHANGE REPORT 2009, *supra* note 145, at 18.

¹⁶² *See id.* at 10 (explaining that the nonfederal party grows disinterested in the exchange and withdraws from the process when a new appraisal is required).

The complex and overlapping web of statutes, regulations, and policies applicable to federal land exchanges necessitates a balancing of numerous competing but legitimate government interests. Striking this balance takes time and careful analysis, which can drive up the costs involved in acting upon exchange proposals. The difficult process of wading through the rigorous public interest and appraisal standards that protect important federal interests in an exchange may increase conflicts between the federal agencies and the state trust authorities.

Adding to the conflict, agencies face significant challenges in the exchange process because of internal agency constraints—loss of qualified staff, decreases in agency funding, and changes in priorities. Taken together, these strains on the land exchange process weaken conservation goals for public lands and prevent federal and state land managers from effectively managing their lands. These constraints and conflicts may influence state trust authorities to approach Congress to legislate exchanges, which the next section analyzes in more detail.

B. Legislative Land Exchanges as a Win-Win to Treat the Blue Rash: Examples from Utah

Utah has often sought legislative exchanges to remedy the problems associated with SITLA inholdings within federal lands. Starting in the 1980s, Governor Scott Matheson proposed “Project BOLD” in response to the ruling in *Andrus*.¹⁶³ Project BOLD sought to facilitate an unprecedented exchange of 2.5 million acres of state trust lands that were scattered across the state, many parcels of which were inholdings within protected federal lands, for 2.5 million acres of federal lands that were consolidated and more suitable for development.¹⁶⁴

Though this proposed legislative exchange had great potential, Project BOLD failed because many feared the valuation process, and it was unclear “how the different state and federal systems would exchange mineral values.”¹⁶⁵ Also, many did not want to interrupt the status quo, including ranchers and mining companies that did not want to lose their preferential treatment under the BLM’s land management.¹⁶⁶ Project BOLD may simply have been too big and come too early.¹⁶⁷ Despite Project BOLD’s failings, other examples from Utah indicate that federal-

¹⁶³ See, e.g., Chamberlain, *supra* note 111, at 253 (stating that Governor Matheson initiated Project BOLD to solve Utah’s “trust lands inholding problem and increase revenue from these lands”).

¹⁶⁴ See UTAH NATURAL RESOURCES & ENERGY, PROJECT BOLD: ALTERNATIVES FOR UTAH LAND CONSOLIDATION AND EXCHANGE (1982) [hereinafter Project BOLD]; see Keith, *supra* note 82, at 334–39.

¹⁶⁵ Keith, *supra* note 82, at 336.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* at 344.

state trust land exchanges may provide a “win-win” solution for all parties involved.¹⁶⁸

One such example is the Utah Schools and Land Exchange Act (USLEA) of 1998.¹⁶⁹ Leading up to this exchange, President Clinton designated 1.7 million acres as the Grand Staircase-Escalante National Monument (Monument) in 1996 under the authority of the Antiquities Act of 1906.¹⁷⁰ Many of Utah’s leaders publicly challenged President Clinton’s move.¹⁷¹ SITLA filed suit against the federal government over the designation because it threatened SITLA’s ability to generate revenues by creating over 177,000 acres of state trust inholdings.¹⁷²

Secretary Bruce Babbitt started negotiations with Governor Mike Leavitt in response to the SITLA lawsuit and the immediate public outcry related to the Monument being created “at the expense of Utah’s schoolchildren.”¹⁷³ As a result of the negotiations, Congress approved the exchange of over 376,000 acres of SITLA inholdings within the Monument and other national parks and monuments, for federally owned lands, subsurface mineral rights, and \$50 million.¹⁷⁴ Congress also declared the land exchange satisfied FLPMA requirements.¹⁷⁵ USLEA was an effective, win-win solution because it allowed SITLA to secure lands it could develop.¹⁷⁶ The exchange also consolidated lands with high conservation value in the Monument and other federal conservation areas, facilitating effective federal management of the lands.¹⁷⁷

The Utah Recreational Land Exchange Act of 2009 (URLEA),¹⁷⁸ provides another example of a win-win solution. Under URLEA, the BLM will acquire over

¹⁶⁸ See Matthew Kirkegaard, *Land Exchanges and Public Land Bills in Utah*, 14 HINCKLEY J. POL. 15, 17 (2013) (“Despite the challenges associated with land exchanges and county lands bills, there are a host of benefits to be considered as well.”).

¹⁶⁹ Pub. L. No. 105-335, 112 Stat. 3139 (1998).

¹⁷⁰ Cynthia Heideman, Note and Comment, *Multiple Use Policies in the Grand Staircase-Escalante National Monument: Is Clinton’s Promise Legitimate or Mere Political Rhetoric?*, 16 BYU J. PUB. L. 37, 37 (2001).

¹⁷¹ Keith, *supra* note 82, at 338.

¹⁷² BLAELOCH, *supra* note 23, at 27–28.

¹⁷³ Keith, *supra* note 82, at 338, 342–44 (quoting Jim Woolf, *A Pretty, Great Monument?; Clinton Likes it, Many Utahns Don’t*, SALT LAKE TRIB., Sept. 19, 1996, at A1.) (internal quotation marks omitted).

¹⁷⁴ *Id.* at 342–43.

¹⁷⁵ See Utah Schools and Lands Exchange Act of 1998, Pub. L. 105-335, § 2(9), (15), 112 Stat. 3139, 3140–41 (codified as amended at 16 U.S.C. § 431 (2012)) (stating that passing USLEA is in the public’s interest and that the exchange of interest between Utah and the United States in USLEA was equal in value).

¹⁷⁶ See *id.* § 2(3), 112 Stat. at 3139.

¹⁷⁷ See *id.* § 2(14), 112 Stat. at 3141 (describing USLEA as resolving “many longstanding environmental conflicts”).

¹⁷⁸ Pub. L. No. 111-53, 123 Stat. 1982 (2009).

25,000 acres of lands “with high conservation and recreation value.”¹⁷⁹ In return SITLA will acquire nearly 35,000 acres of land with high development potential.¹⁸⁰ The exchange is a win-win because it “protects environmentally-sensitive lands along the Colorado River corridor and helps position SITLA with lands more suitable for development.”¹⁸¹

Lastly, a potential win-win legislative exchange is found in the proposed Hill Creek Cultural Preservation and Energy Development Act (“Hill Creek”).¹⁸² On January 22, 2013, Senators Orrin Hatch and Mike Lee introduced the Hill Creek proposal to prompt the exchange of culturally and environmentally sensitive SITLA lands found within the Uintah and Ouray Indian Reservation for unappropriated BLM and reservation lands.¹⁸³ As part of the exchange, the federal government and the state of Utah will retain an overriding interest in the exchanged land because of the potential for mineral extraction.¹⁸⁴

The Hill Creek proposal is a win-win for two reasons. First, the Hill Creek proposal allows the federal government, the tribes, and the state to share in revenues produced on the former reservation lands. Thus, the Hill Creek exchange allows the involved parties to bypass the equal value requirement by offering a way to equally share the value of the land. Avoiding the equal value requirement is important in this case because the valuable mineral resources involved may fluctuate greatly during a lengthy appraisal process.¹⁸⁵ Second, the Hill Creek proposal is a win-win for environmentalists and developers because it recommends preservation of high-value conservation areas and allows mineral extraction in less environmentally and culturally sensitive areas.

While USLEA, URLEA, and the Hill Creek proposal present win-win solutions to treat the blue rash, legislative exchanges are not without problems. For example, URLEA was delayed for a number of years because of the appraisal process.¹⁸⁶ Similarly, there were delays in administrative exchanges because the BLM failed to

¹⁷⁹ Deena Loyola, *SITLA, BLM Finalize 60,000-Acre Utah Recreational Land Exchange Act*, SITLA, (May 9, 2014), <http://trustlands.utah.gov/sitla-blm-finalize-60000-acre-utah-recreational-land-exchange-act/>, archived at <http://perma.cc/4R7A-W9LQ>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² S. 27, 113th Cong. (2013) (as reported by S. Comm. on Energy & Natural Res., June 27, 2013).

¹⁸³ *Id.*

¹⁸⁴ *Id.* sec. 2, § 5.

¹⁸⁵ See ERIN MASTRANGELO, U.S. ENERGY INFO. ADMIN, AN ANALYSIS OF PRICE VOLATILITY IN NATURAL GAS MARKETS 1 (2007) (showing a graph depicting the drop in the price of natural gas from over \$18 per million Btu to \$4 per million Btu within a six-month time period).

¹⁸⁶ *Getting State Trust Lands Out of Wilderness Study Areas: The Utah Recreational Land Exchange Act*, GRAND CANYON TRUST, http://www.grandcanyontrust.org/utah/trust-lands_actions.php, archived at <http://perma.cc/Z34D-NT96> (last visited Aug. 25, 2014).

prioritize funding its portion of the appraisal,¹⁸⁷ and mineral potential reports further delayed the appraisal process.¹⁸⁸

Another way legislative exchanges pose problems is that they require less public scrutiny to complete an exchange.¹⁸⁹ Criticism exists over the fact that legislative exchanges do not require public notification.¹⁹⁰ They allow Congress to bypass important review under NEPA, FLPMA, and the ESA.¹⁹¹ Further, citizens cannot appeal Congress's decision to complete an exchange, and there is no duty to disclose appraisal information.¹⁹² These are important issues, and the administrative land exchange process may help address these problems.¹⁹³

Lastly, legislative exchanges create complications because they require significant amounts of time and political capital. For example, Congress legislated 16 of the 132 land exchanges that the BLM initiated and/or completed between 2003 and 2012.¹⁹⁴ Of these sixteen legislated exchanges, the BLM has completed nine and seven are pending.¹⁹⁵ The nine completed exchanges took an average of nine and a half years from inception to the date the BLM finalized the exchange.¹⁹⁶

¹⁸⁷ *Id.*

¹⁸⁸ Kristen Millis, *State and Federal Land Swap*, MOAB SUN NEWS (May 1, 2013, 8:00 AM), http://www.moabsunnews.com/news/article_3b62cd18-b1d2-11e2-8479-0019bb30f31a.html, archived at <http://perma.cc/5VV9-9DRF>.

¹⁸⁹ BLAELOCH, *supra* note 23, at 27, 88; Emily Bregel, *Delay of Environmental Study 'Crux' of Resolution Copper Debate, Opponents Say*, ARIZONA DAILY STAR (Sept. 8, 2013, 12:00 AM), http://azstarnet.com/business/delay-of-environmental-study-crux-of-resolution-copper-debate-opponents/article_ac1ab2fc-a4c6-5ed3-a077-3416f7fbf9e9.html, archived at <http://perma.cc/9Y5Y-GECY>.

¹⁹⁰ BLAELOCH, *supra* note 23, at 12–14.

¹⁹¹ *Id.* at 12.

¹⁹² *Id.*

¹⁹³ *See infra* Part IV.C.

¹⁹⁴ BLM Spreadsheet, *supra* note 147.

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* For example, Congress legislated a Montana exchange in the Crow Boundary Settlement Act of 1994, which the BLM completed in July of 2003. *Id.*; Pub. L. No. 103-444, 108 Stat. 4632 (codified as amended at 16 U.S.C. §§ 410aaa to 410aaa-7 (2012)). The California Desert Protection Act of 1994 was introduced in January 1993 and completed in phases from November 2003 and June 2006. Pub. L. No. 103-433, 108 Stat. 4471 (codified as amended at 16 U.S.C. §§ 410aaa to 410aaa-7 (2012)); BLM Spreadsheet, *supra* note 147. The Acoma Pueblo Mineral exchange took five years from the passage of the bill in June 2001 to BLM completion in June 2006. Act of Feb. 6, 2002, Pub. L. No. 107-138, 116 Stat. 6 (codified as amended at 16 U.S.C. § 460uu-44 (2012)); GAO EXCHANGE REPORT 2009, *supra* note 145, at 21. The Santo Domingo Pueblo Claims Settlement Act of 2000 was completed in January 2008. Pub. L. No. 106-425, 114 Stat. 1890 (codified as amended at 25 U.S.C. §§ 1777–1777e (2012)); BLM Spreadsheet, *supra* note 147. The Idaho Land Enhancement Act was initiated in 2005 and completed in September 2008. Pub. L. No. 109-372, 120 Stat. 2645 (2006); BLM Spreadsheet, *supra* note 147. The Great Sand Dunes National Park and Preserve Act of 2000 was completed in 2009. Pub. L. No. 106-530, 114 Stat. 2527; BLM Spreadsheet, *supra* note 147. The Ojito Wilderness Act was completed in December 2010. Pub. L. No. 109-94, 119 Stat. 2106 (2005) (codified as amended at 16 U.S.C.

Additionally, SITLA reports that URLEA took about twelve years to move from idea to completion.¹⁹⁷

In contrast, administrative exchanges average just over three and a half years.¹⁹⁸ Thus, land managers and state trust authorities lose an average of six years when completing legislative exchanges. Land exchanges between these land managers do not need to be so lengthy or costly. The following section details how amendments to federal statutes could speed up the process and provide incentives for state trust authorities to use administrative land exchanges instead of legislative exchanges.

C. Amending FLPMA to Treat the Blue Rash Through Administrative Exchanges

Amendments to FLPMA and other statutes could help mitigate the significant time and costs it takes to complete an exchange and promote cooperation between the federal agency and state trust land authorities. Administrative exchanges may also avoid the criticism that legislative exchanges may overlook important federal statutory safeguards.¹⁹⁹

There are three ways Congress could amend federal statutes to incentivize administrative land exchanges between federal agencies and state trust authorities: (1) provide funding to prioritize these exchanges, (2) fast-track the public interest determination, and (3) allow equal value to include conservation values and revenue sharing.

1. Increase Agency Funding

With deficits and congressional deadlock over the budget, Congress might be hesitant to increase agency funding for land exchanges. But because agency funding could be relatively small, time sensitive, and targeted at removing nonfederal inholdings from environmentally sensitive areas, Congress should approve the funding. In particular, Congress should mandate that the funds be used first for the exchange of school trust lands in areas of high conservation value because of the public interest in improving federal management of protected lands and the state interest of generating revenue for education.

While finding funds is a complex issue beyond the scope of this Note, the Land and Water Conservation Fund (LWCF) may be an appropriate source. In 1965, Congress created the LWCF in a bipartisan effort to safeguard natural, water,

§ 1132 (2012)); BLM Spreadsheet, *supra* note 147. The San Juan Basin Wilderness Protection Act of 1984 was completed in June 2011. Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, sec. 1022, § 104, 110 Stat. 4093, 4095 (codified in scattered sections of 16 U.S.C.); BLM Spreadsheet, *supra* note 147.

¹⁹⁷ Loyola, *supra* note 179 (noting the idea for the land exchange started in 2002 and the exchange was completed on May 9, 2014).

¹⁹⁸ See BLM Spreadsheet, *supra* note 147 (listing land exchanges in western states and how long they took from initiation to completion).

¹⁹⁹ See BLAELOCH, *supra* note 23, at 12.

cultural heritage, and recreational resources.²⁰⁰ The LWCF takes revenues from resource depleting activities, like oil and gas development, on federal lands to supply the fund.²⁰¹ Originally, Congress created the LWCF with a funding level of \$900 million for the purpose of acquiring lands for recreation and conservation.²⁰² However, Congress has not fully funded the LWCF on many occasions.²⁰³ The LWCF is set to expire on September 30, 2015.²⁰⁴

In addition to funding acquisition of conservation lands, Congress should amend 16 U.S.C. § 460l-9 to include funding for land exchanges that involve the exchange of environmentally sensitive lands. To make this possible, Congress should extend LWCF beyond the 2015 deadline.²⁰⁵ Appropriations for land exchanges from the LWCF should then authorize funding for exchanges that remove inholdings from federal conservation areas.

In addition, appropriations should last for a given period, say five to six years, in which time the agencies would need to work closely with state trust authorities and other private land owners to effectuate an exchange. Funding for each state should be based on the amount of inholdings in corresponding federal conservation areas. This process would insure agencies' efforts for exchanges are focused on the most sensitive areas.

Also, providing these funds helps address the major agency setbacks the GAO identified as influencing the decrease in administrative land exchanges. First, with funding agencies would be better able to hire or pay qualified realty specialists to conduct the exchanges. Second, the funds would help focus agency priorities by facilitating exchanges that consolidate environmentally sensitive areas. Lastly, the funding would directly address the lack of funding problem. Thus, by providing relatively minimal and targeted funding, Congress could amend the LWCF and begin to effectively address the problems created by the blue rash in the West.

2. *Public Interest*

While providing more funding to bring about administrative exchanges is perhaps the most effective way to improve the exchange process, it provides only

²⁰⁰ LAND & WATER CONSERVATION FUND, 2011 ANNUAL REPORT: FUNDING AND PROTECTING PARKS WHERE YOU LIVE 2 (2011).

²⁰¹ 16 U.S.C. § 460l (2012); *see also id.* § 460l-5.

²⁰² *Id.* §§ 460l-5, 460l-9.

²⁰³ *See* Land & Water Conservation Fund, *Funding Status*, NAT'L PARK SERV., <http://www.nps.gov/nrcr/programs/lwcf/funding.html>, *archived at* <http://perma.cc/3YBT-U5TU> (last modified Oct. 29, 2013) ("Since the inception of the program in 1965, annual appropriations from the Fund for recreation grants have ranged from a high of \$369 million in 1979 to four years of zero funding from 1996 to 1999.").

²⁰⁴ 16 U.S.C. § 460l-5.

²⁰⁵ In February 2013, Senator Max Baucus introduced the Land and Water Conservation Authorization and Funding Act of 2013 to eliminate the 2015 termination date of the LWCF. *See* S. 338, 113th Cong. (2013). The Bill did not pass out of Committee. *Id.*

part of the treatment of the blue rash. To further address the problem, Congress should increase incentives to complete land exchanges between federal agencies and state trust authorities by amending the public interest requirement under FLPMA.

In the context of federal-state trust land exchanges, the issue with the public interest determination is one of focus. FLPMA's current public interest broadly focuses on all land exchanges. Yet, the most important public interest consideration in a land exchange between federal and nonfederal parties is increasing the ability of federal agencies to effectively manage lands, especially those found in environmentally sensitive areas. Similarly, there is a strong public interest in allowing state trust authorities to effectively manage their lands to generate revenues for their beneficiaries. Thus, for certain exchanges the public interest determination under FLPMA must be narrowed to reflect these important federal and state interests.

Congress should amend FLPMA to reflect the public interest of removing inholdings from federal conservation areas and helping state trust authorities meet their mandates. For example, land exchanges already meet one important public interest when they involve lands within federally designated environmentally sensitive areas—they improve federal management. FLPMA amendments should direct that these exchanges only need to pass through NEPA review and meet the equal value requirement.²⁰⁶

Congress could also amend FLPMA to help solve the conflicts between state and federal interests by limiting the deference courts give to an agency's public interest determination in a given exchange. A statutory amendment stating that federal-state trust authority exchanges are presumed to be in the public interest, unless supported by substantial evidence, could tighten this deferential standard. As described above, courts review agency exchanges under the arbitrary and capricious standard of review.²⁰⁷ By requiring a substantial evidence standard, an agency could support its decisions with only what it has on the record.

Arguably, the substantial evidence standard is not significantly different than the arbitrary and capricious standard.²⁰⁸ But the presumption that these exchanges are in the public interest would create a higher standard for the agency to overcome. Additionally, the substantial evidence requirement still allows an agency some leeway to reject an exchange. This proposed amendment would address GAO's concern with a shift in agency priorities because the presumption would prioritize these exchanges by potentially incentivizing agency action.

²⁰⁶ Another potential amendment not addressed in this Note is whether Congress should streamline NEPA review for land exchanges between federal agencies and state trust authorities.

²⁰⁷ See *supra* text accompanying notes 112–116.

²⁰⁸ See *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984) (“[T]here is no *substantive* difference between what [the arbitrary and capricious test] requires and what would be required by the substantial evidence test.”).

3. *Equal Value*

In addition to providing funding and refining the public interest determination, amending FLPMA's equal value requirement could promote the exchange of federal and state trust lands. There are three potential ways to amend the equal value requirement to incentivize exchanges between federal and state trust authorities: (1) place a time limit on the review of an appraisal, (2) allow appraisals to consider conservation and ecosystem value, and (3) allow for equal value to include revenue sharing.

As addressed above, one reason that state trust authorities may not participate or may lose interest in an administrative exchange is the lengthy appraisal-review process. One solution would be to legislatively mandate that department review of an appraisal take place within a period of time so that an appraisal does not lose its value. Finding the appropriate time frame may need more evaluation, but reviews that exceed six months should not be tolerated. Requiring timely review of agency appraisals would also help address the problems related to agencies shifting their priorities away from completing land exchanges. The timely review will also require increased funding from the LWCF or other appropriations.

Congress could also amend FLPMA's equal value requirement to allow the requirement to include conservation and ecosystem values. Because conservation of ecosystems provides inherent economic benefits to society, there should be a mechanism in place for conservation values to be considered in an appraisal.²⁰⁹ There are a variety of ways to place economic value on ecosystem conservation not found in the marketplace.²¹⁰ Ecosystems may be valued for how they contribute to society, like purifying water or capturing carbon.²¹¹ Value may also be placed on conservation actions and their effects on different stakeholders.²¹²

The equal value/fair market consideration under FLPMA does not account for the potential ecosystem values. Amending FLPMA to broaden the scope of equal value could allow ecosystem values to be considered in an exchange, thereby increasing the value of state trust authority lands that have less development potential. In addition, it could create more conservation-focused practices among state trust authorities, giving them a new avenue to generate revenues.²¹³

While it may be difficult to assess a direct value of conservation of western lands, the fact remains that these land uses are important and valuable to large segments of the American public. Thus, FLPMA should include a provision that

²⁰⁹ See STEFANO PAGIOLA ET AL., WORLD BANK ENV'T DEP'T, NO. 101, ASSESSING THE ECONOMIC VALUE OF ECOSYSTEM CONSERVATION 9–13 (2004), available at <http://www.cbd.int/doc/case-studies/inc/cs-inc-iucn-nc-wb-en.pdf>, archived at <http://perma.cc/7XRM-BWX9>.

²¹⁰ See *id.*

²¹¹ *Id.* at 13–18.

²¹² *Id.* at 18–26.

²¹³ See Adam I. Davis, *State Trust Lands: The Ecosystem Services Report 3* (Lincoln Inst. of Land Policy, Working Paper No. WP07AD1, 2006) (describing ecosystem value as a potential tool to enhance revenues among state trust land authorities).

allows these public values to be considered. Considering conservation values, however, may cause unwanted results. For example, assessing the value of a given landscape's ecological value could be lengthy and expensive. These types of appraisals may not always be easy to replicate because different lands have distinct flora, fauna, and sensitive habitats. Yet, even with the potential to increase appraisal expenses, the costs could be off-set by making sure appraisals are reviewed in a timely manner.

Another way to incentivize exchanges between federal and state trust authorities is to amend FLPMA to allow revenue sharing in the equal value requirement. Revenue sharing entails that both federal and state trust authorities take equal part in the revenues generated from the lands being exchanged. Equal sharing in the profits is especially beneficial when exchanges involve lands of high mineral value because it allows the exchange parties to bypass a potentially cumbersome appraisal process, as seen in URLEA.

Revenue sharing can be problematic if it applies only to one type of resource or does not include unknown mineral deposits.²¹⁴ Thus, a revenue sharing provision must accommodate all potential resource development and take into consideration unknown mineral deposits.²¹⁵ Revenue sharing helps protect the federal interest in not losing highly valuable lands and provides incentives for state trust authorities to participate in administrative exchanges by limiting the need for lengthy appraisals.

V. CONCLUSION

The history of public land laws from disposal to retention has created a fragmented ownership in the West. The school land grants led to a spotty pattern of state trust land ownership. This in turn creates conflict between the mandates of federal agencies—whose mandate is to protect environmentally sensitive areas—and state trust land authorities—whose mandate is to generate revenues for their beneficiaries. Both mandates promote important public interests.

Legislative land exchanges present potential win-win solutions for extricating state trust lands from within federal conservation areas, but they require a process that is too long and onerous. However, by improving the process for administrative exchanges Congress could promote more efficient exchanges and increase cooperation between federal and state trust land managers. Thus, Congress should provide funding for land exchanges involving environmentally sensitive areas. Additionally, Congress should amend FLPMA's public interest and equal value requirements to incentivize cooperation in the administrative land exchange process.

²¹⁴ See Utah Recreational Land Exchange Act of 2009, Pub. L. No. 111-53, § 3(f), 123 Stat. 1982, 1984.

²¹⁵ See Hill Creek Cultural Preservation and Energy Development Act, H.R. 356, 113th Cong. § 5 (2013) (enacted).