Missing the Forest and the Trees: Lost Opportunities for Federal Land Exchanges

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INTRODUCTION

The mounting challenges associated with climate change, shrinking budgets, and growing populations increasingly call for a more effective and efficient federal landownership adjustment program. Private

inholdings and isolated tracts of federal land can pose significant natural resources and management challenges for federal land managers, and changing habitats and communities will require more robust and forward-looking land adjustment responses. Land exchanges have long been the primary landownership adjustment tool for the federal land management agencies, but the Bureau of Land Management and Forest Service's land exchange programs have withered due to budget cuts and increased scrutiny.

For any land exchange carried out by the Forest Service or the Bureau of Land Management ("Agencies"), federal law generally requires the Agencies to ensure that "the public interest will be well served by making that exchange."[1] To do so, the Agencies must consider the fate of the land they convey and how that is likely to affect the public interest. To help control the fate of the land they convey and the adverse impacts it may have on the public interest, the Agencies' regulations mandate that they "reserve such rights or retain such interests as are needed to protect the public interest."[2] Nevertheless, the Agencies' internal policies all but prohibit their employees from carrying out that mandate.

As a result, the Agencies are missing opportunities to better serve both the public's interests and their own. By including covenants, easements, or other restrictions on the lands they convey, the Agencies can more accurately and confidently determine the future use of the land. Doing so can have substantial benefits not only for the public interest, but also for the efficiency and defensibility of the Agencies' land exchange processes. A new policy is necessary, and its lessons will have broader applicability to dozens of federal agencies and the billions of dollars of real property transactions in which they engage.

This Article begins with a short case study that starkly illustrates the Agencies' practices and their significant shortcomings. Following the case study, the Prologue continues with a more thorough introduction to the subject and the thesis that is explored. Parts II and III describe the prominent features of the physical and historic landscape within which the Agencies' land exchange programs operate—including the Agencies' land management imperatives and their public interest lapses—while Parts IV and V explore the statutory, regulatory, and judicial landscape. The discussion demonstrates the significant responsibilities the Agencies

1. 43 U.S.C. § 1716(a) (2012).
2. 36 C.F.R. § 254.3(h) (2013); 43 C.F.R. § 2200.0-6(i) (2013).

have to guide the future use of the land they convey when necessary to serve the public interest.

Part VI explores the substantial transactional and opportunity benefits the Agencies miss by failing to consider and strategically employ restrictions on the lands they convey, and Part VII critiques the Agencies' arguments that have led to these missed opportunities. Finally, this Article suggests a framework for developing new policies that will better serve the Agencies and the public.

I. PROLOGUE: THE BLACK RIVER LAND EXCHANGE

Historically, the United States Department of Agriculture's Forest Service managed the National Forest System with a focus on timber, grazing, and recreation, and, more recently, ecosystem restoration and other multiple uses. Wildfire suppression has always been a basic and significant part of its management, but in recent decades wildfire management has begun to eclipse other important parts of the Service's mission.

In 1991, 13% of the Forest Service's budget was dedicated to wildfire management.[3] Today, nearly 50% of its budget—almost $2.3 billion taxpayer dollars—is dedicated to wildfire management.[4] As a result, the Agency's other programs—from recreation to research and forest restoration to facilities maintenance—have been squeezed into sharing an ever-diminishing slice of the budget pie.[5]

In the meantime, the Forest Service conveyed hundreds of parcels of land to private developers through land exchanges,[6] enabling some of the

3. *See* FOREST SERV., U.S. DEP'T OF AGRIC., FISCAL YEAR 2008 PRESIDENT'S BUDGET 3 (2007) [hereinafter FY 2008 BUDGET], *available at* http://www.fs.fed.us/publications/budget-2008/fy2008-forest-service-budget-justification.pdf.

4. *See* FOREST SERV., U.S. DEP'T OF AGRIC., FISCAL YEAR 2014 BUDGET OVERVIEW A-1 (2013), *available at* http://www.fs.fed.us/aboutus/budget/2014/Overview%20(COMPLETE).pdf (reporting a wildfire management budget—including large wildfire suppression funds in the FLAME account—of approximately $2.3 billion out of the Agency's total discretionary budget of approximately $4.9 billion in fiscal year 2013). Even that amount proved insufficient to cover the Forest Service's wildfire management costs, however, and the Agency was forced to borrow additional funds from its other programs to cover the unbudgeted costs. Darryl Fears, *Federal Budget to Fight Wildfires Runs Dry*, WASH. POST, Aug. 23, 2013, at A3.

5. *See, e.g.*, FY 2008 BUDGET, *supra* note 3, at 3; *see also* Fears, *supra* note 4.

6. A federal land exchange is a transaction whereby a federal land management agency conveys land or interests in land under the agency's jurisdiction to a non-federal party in return for non-federal land or interests in land. The Forest Service conducted an average of 115 exchanges per year for fiscal years 1989–99, and the BLM conducted an average of 238 exchange transactions per year (each exchange involving 2 or more "exchange transactions") over the same period. *See* INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL

dramatic growth on the fringes of the nation's wildfire-prone forests. Protecting development in this wildland-urban interface ("WUI") is estimated to account for 50 to 95% of the Agency's large wildfire suppression costs.[7] Economists also estimate that the Forest Service's costs for reducing the natural fuels that feed wildfires can range from 34 to 139% higher for each acre treated in the WUI.[8]

One of the key problems—as the Forest Service long has known—is that local governments often do not have adequate zoning, building codes, and defensible space ordinances to address wildfire risk in the WUI, and developers and homeowners in the WUI often shirk their responsibilities to build only in appropriate places, with appropriate construction, and with appropriate defensible space practices.[9]

Nevertheless, when the Forest Service exchanged 338 acres of the Apache National Forest to a landowner on the outskirts of Greer, AZ, it rejected calls to include deed restrictions to limit the development of that land.[10] It wasn't that the Forest Service lacked the authority to impose

LAND ACQUISITIONS 84-85 (2000) [hereinafter UNIFORM APPRAISAL STANDARDS], *available at* http://www.justice.gov/enrd/ENRD_Assets/Uniform-Appraisal-Standards.pdf.

7. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. NO. 08601-44-SF, FOREST SERVICE LARGE FIRE SUPPRESSION COSTS 7 (2006), *available at* http://www.usda.gov/oig/webdocs/08601-44-SF.pdf ("If these estimates are presumed to be accurate for the FS' suppression efforts nationwide, the cost of protecting privately-owned properties in the WUI would total about $547 million to $1 billion in 2003 and 2004.").

8. *See* Alison H. Berry *et al.*, *Prescribed Burning Costs and the WUI: Economic Effects in the Pacific Northwest*, 21 W. J. APPLIED FORESTRY 72, 75, 77 (2006) (stating that "results show that when prescribed fire is used in the WUI, all things equal, costs increase 139%" and that "the results of this analysis clearly indicate that per acre costs of fuel treatments increase in the WUI"); David Calkin & Krista Gebert, *Modeling Fuel Treatment Costs on Forest Service Lands in the Western United States*, 21 W.J. APPLIED FORESTRY 217, 220 (2006) (estimating that prescribed burning costs 34% more in the WUI and that mechanical treatment costs 62% more).

9. *See generally* HEADWATERS ECON., SOLUTIONS TO THE RISING COSTS OF FIGHTING FIRES IN THE WILDLAND-URBAN INTERFACE (2009), *available at* http://headwaterseconomics.org/wphw/wp-content/uploads/HeadwatersFireCosts.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-877, WILDLAND FIRE MANAGEMENT: FEDERAL AGENCIES HAVE TAKEN IMPORTANT STEPS FORWARD, BUT ADDITIONAL, STRATEGIC ACTION IS NEEDED TO CAPITALIZE ON THOSE STEPS 11–14 (2009), *available at* http://www.gao.gov/new.items/d09877.pdf. It was for this reason that the Forest Service considered amending 900 miles of private road easements across National Forest System lands in Montana to ensure that any development of the private lands served by those roads would meet minimum standards for wildfire protection. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, B-317292, PROPOSED EASEMENT AMENDMENT AGREEMENT BETWEEN THE DEPARTMENT OF AGRICULTURE AND PLUM CREEK TIMBER CO. 2, 4 (Oct. 10, 2008), *available at* http://www.gao.gov/decisions/other/317292.pdf ("[T]he easement for each subsequent owner would be conditional on the owner taking certain fire protection measures specified in the easement, under the Firewise Communities program.").

10. The purchaser indicated to the Forest Service that he had no plans to develop the land, but the Forest Service recognized that residential development of the land was reasonably foreseeable. *See*

such restrictions (it has it);[11] it wasn't that Greer or its county had appropriate WUI ordinances in place (it did not);[12] and it wasn't that the Agency had carefully considered and evaluated whether to use such restrictions (it had not).[13] The Forest Service simply rejected the calls for restrictions out of hand.

The Forest Service's decision was challenged with nine administrative appeals, which collectively argued that the decision violated the National Environmental Policy Act ("NEPA")[14] and the Federal Land Policy and Management Act ("FLPMA").[15] The Agency's decision was reversed and remanded to consider the environmental impacts of future development of the federal land and to consider including deed restrictions to address those impacts.[16] On remand, the Agency again declined to use deed restrictions, explaining that "[t]he Forest Service has long taken the position that zoning and regulation of uses on private land are within the responsibility of state and local governments. . . . 'Except as authorized by law, order, or regulation, Forest Service

SW. REGION, U.S. DEP'T OF AGRIC., ENVIRONMENTAL ASSESSMENT FOR PROPOSED BLACK RIVER LAND EXCHANGE: APACHE-SITGREAVES NATIONAL FORESTS—SPRINGERVILLE RANGER DISTRICT 6, 55 (2005) [hereinafter ENVIRONMENTAL ASSESSMENT], *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/4895_FSPLT2_029027.pdf. *See generally* SPRINGERVILLE RANGER DIST, FOREST SERV., DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT: BLACK RIVER LAND EXCHANGE 7–8 (2005) [hereinafter DECISION NOTICE], *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/4895_FSPLT2_029026.pdf. The public concerns were focused on the potential impacts of future development of the property, especially water use, but also "adequacy of the transportation system for evacuation, cumulative impacts, fire safety, increased fire hazard, increased fire hazard to forest land, [and] degradation of the forest environment." APACHE-SITGREAVES NAT'L FORESTS, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR PROPOSED BLACK RIVER LAND EXCHANGE 1–7 (2008), *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/42711_FSPLT2_028948.pdf.

11. *See* discussion *infra* Part IV.C–D; John W. Ragsdale, Jr., *National Forest Land Exchanges and the Growth of Vail and Other Gateway Communities*, 31 URB. LAW. 1, 12, 14 (1999).

12. Neither Greer nor Apache County imposed building codes or defensible space requirements designed to minimize the risk from wildfire. Greer did, however, have a Firewise program, which encourages homeowners to take measures to reduce the risk from wildfires. *See* APACHE-SITGREAVES NAT'L FORESTS, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE BLACK RIVER EXCHANGE 42 (2009) [hereinafter FEIS], *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/42711_FSPLT2_029071.pdf.

13. *See* DECISION NOTICE, *supra* note 10, at 7 ("An alternative that included a deed restriction was not fully developed or analyzed, except as the 'No Action' alternative.").

14. Pub. L. No. 91-190, 83 Stat. 853 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2012)).

15. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended at 43 U.S.C. §§ 1701–1782 (2012)).

16. *See* ENVIRONMENTAL ASSESSMENT, *supra* note 10, at 8 (describing the decision by the Appeal Deciding Officer for the Chief of the Forest Service).

policies, practices, and procedures shall avoid regulating private property use.'"[17]

It was then on to federal court, where the Forest Service's second decision was reversed and remanded with direction to analyze the potential effects of future development and the potential need for deed restrictions.[18] The Agency again rejected use restrictions,[19] but when it arrived back in court, the Agency's analysis was upheld.[20] After all, "NEPA merely prohibits uninformed—rather than unwise—agency action."[21]

A few months later, the town of Greer was evacuated as the massive Wallow Fire approached the town. The fire burned twenty-one homes in Greer, and the Forest Service spent some $80 million fighting it and trying to protect Greer and eight other WUI communities from the blaze.[22] Firefighters were able to stop the fire adjacent to the 338 newly privatized acres.[23] Though homes had not yet been constructed on that land, they will be, and how that land is developed will affect the adjacent national forest, the cost of managing that national forest, and the cost of fighting the next fire that burns through it.

This story of the Black River Land Exchange is not unique. Land exchanges have been an important ingredient in the efforts to grow communities in the WUI surrounding our national forests for decades.[24]

17. *Id*. at 11 (citing Forest Service Manual 5403.3).

18. *See* Greer Coal., Inc. v. U.S. Forest Serv., No. CV 06-0368-PHX-MHM, 2007 WL 675954, at *4–5 (D. Ariz. Mar. 1, 2007).

19. *See* FEIS, *supra* note 12, at 14, 41–43. In the end, the Forest Service continued to rely on its general policy against incorporating deed restrictions. *See id.* at 14.

20. *See* Greer Coal., Inc. v. U.S. Forest Serv., No. CV 09-8239-PCT-DGC, 2011 WL 671750, at *21 (D. Ariz. Feb. 16, 2011), *aff'd* 470 F. App'x 630 (9th Cir. 2012).

21. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989). In their second trip to federal court, the plaintiffs' argument that the exchange violated FLPMA's public interest standard was found to be barred by *res judicata*. *See Greer Coal.*, 2011 WL 671750, at *5.

22. *See* J.J. Hensley, *Wallow Fire Nets Jail Term of 2 Days*, ARIZ. REPUBLIC, Aug. 23, 2012, at B1; *Arizona Wallow Fire: 56% Contained, Grows to 520,000 Acres and May Trigger Flooding*, INTERNAT'L BUS. TIMES NEWS, June 21, 2011; *cf.* Dennis Wagner, *Fire's Fallout*, ARIZ. REPUBLIC, Oct. 16, 2011, at A1 ("The government . . . poured $109 million into fighting the blaze[and] is spending an additional $34 million on the emergency rehab effort.").

23. *Cf. Crews Put Dent in Raging Inferno*, ARIZ. REPUB., June 10, 2011, at A1. Firefighters were able to minimize the damage in Greer as a result of significant Forest Service investments in fuel treatments on adjacent national forest land. *See generally* PAM BOSTWICK ET AL., U.S. FOREST SERV., HOW FUEL TREATMENTS SAVED HOMES FROM THE 2011 WALLOW FIRE (n.d.), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5358240.pdf.

24. *See, e.g.*, 1 DANIEL, MANN, JOHNSON, & MENDENHALL, PUB. LAND LAW REVIEW COMM'N, STUDY OF FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO USE AND OCCUPANCY XI-21 to XI-26 (1969) [hereinafter USE AND OCCUPANCY] (reporting on Forest Service efforts to provide land for the City of Flagstaff, AZ, (and others) to grow, including thirty-four land exchanges

Similar stories could be told about other land exchanges and WUI fires,[25] as well as land exchanges carried out by the Forest Service's sister agency, the Bureau of Land Management ("BLM"), in the Department of the Interior. There are analogous stories, too, about some of the thousands of land exchanges that the BLM and Forest Service have completed in the last few decades[26]—land exchanges that, while producing important benefits associated with federal acquisition of land, also resulted in adverse effects associated with the disposal of federal land. These adverse effects—such as the destruction of wildlife habitat, the siltation of streams, and the introduction and spread of invasive species—impact not only the public interest, but also the Agencies' interests in the land they continue to manage.

The problem is that the BLM and Forest Service have missed many opportunities to guide the use of the land they convey to serve the public's—and their own—interests. The Agencies' land exchange regulations are strong and specific: "In any exchange, the authorized officer shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate."[27] But an investigation of their handbooks and internal memos reveals more potent instructions that all but prohibit agency officials from meeting their regulations' charge. Ironically, those same informal policies discourage the Agencies from protecting their own interests—not only the interests exemplified by the Black River Land Exchange, but also the BLM and Forest Service's interests in improving the efficiency and reducing the vulnerability of their administrative processes for developing land exchanges.

This Article dissects, diagnoses, and recommends a remedy for this problem. In short, the Agencies must ensure that "the public interest will be well served" by each exchange.[28] The Agencies have the authority to

providing more than 2800 acres for subdevelopment, commercial development, and other uses in the City during the 1950s and 60s).

25. In fact, the Forest Service had conveyed about 147 acres near Greer just a few years before the Black River Land Exchange. *See* Greer Coal., Inc. v. U.S. Forest Serv., No. CV 06-0368-PHX-MHM, 2007 WL 675954 at *12 (D. Ariz. Mar. 1, 2007).

26. During the 1990s, the Agencies were completing over 200 exchanges each year. *See* UNIFORM APPRAISAL STANDARDS, *supra* note 6, at 84–85. That rate has slowed considerably in recent years. *See* 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 14 (2009) [hereinafter GAO 2009] (reporting that only 147 exchanges were completed by the Agencies between Oct. 1, 2004, and June 30, 2008).

27. 36 C.F.R. § 254.3(h) (2013); 43 C.F.R. § 2200.0-6(i) (2013).

28. *See* 43 U.S.C. § 1716(a) (2012).

help fulfill that responsibility by including covenants, easements, or other land use restrictions in the deeds they convey or through other terms and conditions in exchange agreements with the purchasers. By doing so, the Agencies can reduce administrative costs and vulnerabilities associated with developing, evaluating, and defending land exchanges.

Restricting the future use of land conveyed by federal agencies in exchanges is not appropriate for all—perhaps even most—federal land exchanges. Use restrictions can be expensive, inefficient, complex, and otherwise unnecessary or even counterproductive.[29] They cannot alone come close to solving the problems of wildfire management in the WUI, for example, nor should they given the primary responsibilities of individuals and local governments. But there are cases where use restrictions would be expedient and, indeed, required by the Agencies' own regulations. Yet such restrictions often are never considered or are rejected without adequate explanation. It is these missed opportunities that are the focus of this Article.

The stakes for the long-term viability of our public lands are significant. A more effective and efficient land exchange program is critical for creating more effective and efficient landownership patterns to cope with climate change,[30] shrinking agency budgets, and growing populations in and around federal lands. A more effective and efficient

29. Professor Echeverria has recognized that the policy questions surrounding whether to protect natural resource values on private land through governmental regulation or through voluntary market processes "rank among the most fundamental and pressing questions in U.S. land use policy." John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1, 1 (2005). Professor Echeverria explores the benefits and drawbacks of each approach and, ultimately, "draws a cautionary conclusion about the long-term utility of the voluntary, publicly-financed approach to land protection, especially the use of conservation easements." *Id.* at 2; *see also* John M. Vandlik, *Waiting for Uncle Sam to Buy The Farm . . . Forest, or Wetland? A Call for New Emphasis on State and Local Land Use Controls in Natural Resource Protection*, 8 FORDHAM ENVTL. LAW J. 691 (1997). Professor Korngold makes the contrary case, focusing on the unique benefits of governmentally-held conservation easements. *See generally* Gerald Korngold, *Government Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467 (2013); *see also* U.S. GEN. ACCOUNTING OFFICE, CED-80-14, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED 22-25 (1979) [hereinafter GAO ACQUISITION REPORT], *available at* http://www.gao.gov/assets/130/128531.pdf. These analyses are quite useful in considering larger policy issues in the context of this Article. When doing so, however, the unique context of federal land exchanges, which broadly represent a type of hybrid approach that can include significant aspects of both regulatory and voluntary market dynamics, should be taken into account.

30. *See, e.g.*, John D. Leshy, *Federal Lands in the Twenty-First Century*, 50 NAT. RESOURCES J. 111, 129 (2010) ("[J]ust as species will migrate in the face of climate change, our federal lands will have to do some migration as well . . . . A successful adaptation program will need to reconfigure or realign the pattern of federal landholdings with emerging needs.").

land exchange program must in turn recognize that the interactions between the management and adjustment of federal lands and adjacent non-federal lands are now more significant and demanding than ever, and the lines that traditionally have separated public and private landownership will increasingly fade as a result.[31]

Although the analyses and principles discussed here largely are applicable to all federal land disposals,[32] this Article concentrates on federal land exchanges, which are the primary tool for the land management agencies' landownership adjustment programs today.[33] While other federal agencies conduct some land exchanges, this Article also concentrates on the BLM and Forest Service because they manage 69% of the federal lands,[34] contend with most of the fragmented landholdings of the federal land management agencies,[35] and conduct the vast majority of land exchanges.[36]

31. *See id.* at 132–33; SALLY K. FAIRFAX ET AL., BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004, at 13 (2005) [hereinafter BUYING NATURE]; NAT'L RESEARCH COUNCIL, SETTING PRIORITIES FOR LAND CONSERVATION 49 (1993) ("The committee's study concluded that public and private values cannot be conveniently separated. The vigorous pursuit of public values no longer takes place only on public lands or out-of-the-way preserves and set-asides.").

32. The problem is much broader than land exchanges, and much of the discussion here equally applies in the larger context. There are more than thirty federal agencies that control hundreds of thousands of real property assets worth hundreds of billions of dollars. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO-03-122, HIGH RISK SERIES: FEDERAL REAL PROPERTY 2 (2003), *available at* http://www.gao.gov/assets/240/236999.pdf.

33. *See, e.g.*, *Sale of FS Lands*, U.S. FOREST SERV., http://www.fs.fed.us/land/staff/disposal.shtml (last visited June 20, 2013) ("The Forest Service has very limited authority to sell National Forest System lands. . . . The tool used most often for conveyance of lands within National Forest boundaries is land exchange."); Federick R. Anderson, *Public Land Exchanges, Sales, and Purchases Under the Federal Land Policy and Management Act of 1976*, 1979 UTAH L. REV. 657, 666 (1979) ("exchange historically has been the most widely used land-transaction power [by the BLM], and most likely will continue to be so under FLPMA"); NAT'L RESEARCH COUNCIL, *supra* note 31, at 166–67. The BLM patents an average of approximately 17,000 acres per year by exchange under Section 206 of FLPMA (43 U.S.C. § 1716 (2012)) and 3000 acres per year by sale under Section 203 of FLPMA (43 U.S.C. § 1713). Data compiled from Table 3-1 in BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS for data years 2006 through 2011 (the data do not include lands sold or exchanged pursuant to legislation applicable to specific land conveyances).

34. Of the approximately 643 million acres of land managed by the federal government in the United States, the BLM manages approximately 248 million acres (along with an additional 700 million acres of subsurface estate). BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 2012 at 7, 8 (2012), *available at* http://www.blm.gov/public_land_statistics/pls12/pls2012.pdf. The Forest Service manages approximately 193 million acres. FOREST SERV., U.S. DEP'T OF AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM 1 (2012), *available at* http://www.fs.fed.us/land/staff/lar/LAR2012/LAR_Book_FY2012_A4.pdf.

35. *Cf.* George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVT. L. 1, 80 (1982) ("While inholdings are

II. THE FRAGMENTATION OF THE FEDERAL LANDS

It has long been recognized that "[l]and exchanges provide a highly rational solution to an irrational land management situation."[37] To understand the importance of effective federal land exchange practices, it is necessary to appreciate the landownership management challenges the Agencies and their neighbors face. This Part explains the breadth and depth of the fragmentation of the federal lands, which are rooted in the public land policies established in the eighteenth and nineteenth centuries.

A. Disposal of the Federal Lands

Beginning in the 1780s with the cession of western land claims by some of the colonies and ending with the purchase of Alaska in 1867, the federal government secured title to some 1.8 billion acres, which

problems in all federal land systems, the BLM lands are far more fragmented than the others, making for less private security of tenure, as well as inefficient administration." (footnote omitted)).

36. The BLM and Forest Service account for about 90% of the land acquired by the four federal land management agencies through exchange during the modern era. U.S. GEN. ACCOUNTING OFFICE, GAO/T-RCED-96-73, FEDERAL LANDS: INFORMATION ON LAND OWNED AND ACQUIRED 5 (1996), *available at* http://www.gao.gov/assets/110/106338.pdf (reporting that the Forest Service acquired approximately 2,180,000 acres (67% of total) and the BLM acquired approximately 724,400 acres (22% of total) through exchange during the period 1964-1994). The Forest Service alone has acquired more than 11 million acres by exchange. *See* U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF AGRIC., NATIONAL LAND ACQUISITION PLAN 10 (2005) [hereinafter LAND ACQUISITION PLAN], *available at* http://www.fs.fed.us/land/staff/LWCF/Final%20DOIUSDA%20Land%20Acquisition%20Report%20to%20Congress.pdf.

For the BLM, the reliance on exchange as the primary tool for land ownership adjustment may change under the Federal Land Transaction Facilitation Act ("FLTFA"), which authorized the BLM to sell lands and deposit most of the proceeds in a special fund that supports land acquisition efforts for the public lands, National Forests, National Parks, and National Wildlife Refuges. *See* Federal Land Transaction Facilitation Act, Pub. L. No. 106-248, tit. II, 114 Stat. 613 (2000); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-196, FEDERAL LAND MANAGEMENT: FEDERAL LAND TRANSACTION FACILITATION ACT RESTRICTIONS AND MANAGEMENT WEAKNESSES LIMIT FUTURE SALES AND ACQUISITIONS 14 (2008) [hereinafter GAO FLTFA REPORT], *available at* http://www.gao.gov/assets/110/106338.pdf ("Since FLTFA was enacted in 2000, BLM has raised $95.7 million in revenue, mostly by selling 16,659 acres."). The BLM land sales under FLTFA generally are carried out in accordance with other applicable law, including provisions requiring the BLM to insert in any patent "such terms, covenants, conditions, and reservations as [it] deems necessary to insure proper land use and protection of the public interest." 43 U.S.C. § 1718 (2012); *see also* 43 U.S.C. § 2304(b) (2012). FLTFA expired in July of 2011 and currently is under consideration for reauthorization by Congress. *See, e.g.*, S. 368, 113th Cong. (2013); S. REP. NO. 112-69 (2011) (reporting S. 714, the "Federal Land Transaction Facilitation Act Reauthorization of 2011").

37. RALEIGH BARLOWE ET AL., LAND DISPOSAL TECHNIQUES AND PROCEDURES: A STUDY PREPARED FOR THE PUBLIC LAND LAW REVIEW COMMISSION 141 (1970); *see also* Coggins & Lindberg-Johnson, *supra* note 35, at 10.

accounts for nearly 80% of the landmass of the current United States.[38] But even at the outset, the seemingly unbroken expanse of federal land was subject to some 34 million acres of preexisting private land claims that ultimately were recognized,[39] not to mention the aboriginal title of Indian Tribes and Alaska Natives.[40]

Before the federal government had even begun to acquire the land, it already had established policy to dispose of it in an effort to encourage settlement and raise revenue.[41] The government ultimately conveyed nearly 1.3 billion acres to settlers, states, ranchers, railroads, miners, schools, lumbermen, enlistees, veterans, towns, and others to provide for homesteads, highways, reservoirs, prisons, hospitals, canals, stone quarries, salt springs, inducements to military service, townsites, asylums, public revenues, tree cultivation, wagon roads, public buildings, timber cutting, mineral production, seminaries, the construction of levees, the reclamation of arid lands and swamps, and a broad range of other purposes.[42]

The variety of disposal programs created an assortment of inefficient landownership patterns. Individual conveyances ranged from just a few acres to tens of millions of acres. On one extreme, patented mining lode claims formed a dizzying array of privately-owned parcels that chase mineral veins throughout much of the West.[43] Over 65,000 patents for more than 3.2 million acres scattered across the federal lands have been

38. BUREAU OF LAND MGMT., *supra* note 34, at 1; MARION CLAWSON, THE FEDERAL LANDS REVISITED 185–86 (1983).

39. BUREAU OF LAND MGMT., *supra* note 34, at 5–6; *see also* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 86, 119 (1968). *See generally* BENJAMIN HORACE HIBBARD, A HISTORY OF PUBLIC LAND POLICIES (1965).

40. *See generally* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

41. In 1780, anticipating future cessions of western territory from some of the colonies, the Continental Congress passed a resolution providing that "the unappropriated lands that may be ceded or relinquished to the United States . . . shall be disposed of for the common benefit of the United States." GOV'T PRINTING OFFICE, 18 JOURNALS OF THE CONTINENTAL CONGRESS 915 (Tuesday, Oct. 10, 1780); *see also* GATES, *supra* note 39, at 51 (describing the policy of disposal adopted by the Continental Congress in anticipation of future acquisition and control by the federal government). *See generally* HIBBARD, *supra* note 39.

42. *See* BUREAU OF LAND MGMT., *supra* note 34, at 5 (Table 1-2); BARLOWE, *supra* note 37, at 9–14. *See generally* MATTHIAS NORDBERG ORFIELD, FEDERAL LAND GRANTS TO THE STATES: WITH SPECIAL REFERENCE TO MINNESOTA (1915); HIBBARD, *supra* note 39.

43. Under the 1872 Mining Law, a lode claim may not exceed 1500 feet along a mineral vein and 300 feet on each side of the vein. *See* 30 U.S.C. § 23 (2012). In addition, the regulations provide that, under certain circumstances, each claim may be accompanied by multiple 5-acre mill sites that are not contiguous to the claim. *See* 43 C.F.R. §§ 3832.31, 3832.32, 3832.34 (2013).

conveyed under the 1872 Mining Law.[44] At the more systematic extreme, railroads were granted over 130 million acres of alternating square-mile sections of land extending up to 120 miles wide along their tracks,[45] creating a neat (though very difficult to manage) checkerboard of federal and private land that snakes across significant parts of the country. Western states were also systematically granted over 70 million acres of specified sections of townships that often ended up "crazily intermingled with federal and private lands."[46]

It "was a lusty affair—a headlong, even precipitous process,"[47] and by 1893, the superintendent of the census officially observed: "the unsettled area has been so broken into by isolated bodies of settlement that there can hardly be said to be a frontier line."[48] At the turn of the century, the federal government had disposed of over half of the original public domain.[49] Little or no thought had been given to the future management of forests, rangelands, growing communities, and the environment.[50]

B. "The Closing of the Public Domain"[51]

In the last quarter of the nineteenth century, as widespread abuse of the disposal laws and the land itself accumulated,[52] the longstanding policies of disposal and unregulated use of the federal lands began to fade. In 1891 Congress authorized the President to withdraw forests from entry and disposal.[53] Within weeks, President William Henry Harrison used the authority to expand the protections for Yellowstone, and within two

44. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-89-72, FEDERAL LAND MANAGEMENT: THE MINING LAW OF 1872 NEEDS REVISION 2, 10 (1989), *available at* http://archive.gao.gov/d15t6/138159.pdf.

45. *See* GATES, *supra* note 39, at 384–85. The checkerboarded federal lands also were created as a result of grants for canals and wagon roads, for example. *See id.* at 345–56.

46. Coggins & Lindberg-Johnson, *supra* note 35, at 6, 8. Typically, the States were entitled to two or four sections (often including sections sixteen and thirty-six) of each thirty-six-section-square township. *Id.* at 7, 11.

47. CLAWSON, *supra* note 38, at 25.

48. *See* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 118 (6th ed., 2007).

49. E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900-50 at 346–47 (1951).

50. *See* BARLOWE, *supra* note 37, at 14.

51. *See* PEFFER, *supra* note 49.

52. *See generally* S.A.D. PUTER IN COLLABORATION WITH HORACE STEVENS, LOOTERS OF THE PUBLIC DOMAIN: EMBRACING A COMPLETE EXPOSURE OF THE FRAUDULENT SYSTEMS OF ACQUIRING TITLES TO THE PUBLIC LANDS OF THE UNITED STATES (1908) (recounting the abuses of the federal government's land disposal programs); PEFFER, *supra* note 49, at 220 (describing deteriorated range conditions).

53. Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095 (1891) (repealed 1976).

years, he reserved an additional fourteen forests totaling some 13 million acres.[54] By the turn of the century, disposition of federal lands continued at a rapid pace, but more than 46 million acres already had been reserved as national forests.[55] And by the end of Theodore Roosevelt's presidency in 1909, that number had grown to nearly 200 million acres.[56]

However, even in the states where the federal government had at one time owned virtually all of the land, settlers and miners already had laid claim to considerable parts of the lands within the national forests.[57] In most of the East, the federal government either never owned or had already disposed of the land that was in critical need of forest and watershed protection and restoration.[58] For example, when the Alabama National Forest was reserved from the public domain in 1918, only 55% of the land within its boundaries was still owned by the federal government.[59]

The Weeks Act of 1911 authorized the President to buy land for national forests, and Presidents used that authority to cobble together enough land to establish nine national forests across the Eastern United States by 1920.[60] But even after spending years buying the land for the eastern national forests, many were established with less than 25% of the land administered by the Forest Service.[61] And as Congress quickly

54. *See* SAMUEL TRASK DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES 58 (2d ed. 1980).

55. *See* PEFFER, *supra* note 49, at 354–55 (during the first decade of the twentieth century, an annual average of 19.7 million acres were entered under the homestead and other entry laws). The initial "forest reserves" formally became "national forests" in 1907, two years after the Forest Service was created within the Department of Agriculture. *See* Act of Mar. 4, 1907, Pub. L. No. 59-242, ch. 2907, 34 Stat. 1256, 1269 (providing funding for the "forest reserves, which shall be known hereafter as national forests"); Act of Mar. 3, 1905, Pub. L. No. 58-138, ch. 1405, 33 Stat. 861, 872–73 (establishing the Forest Service within the Department of Agriculture).

56. HIBBARD, *supra* note 39, at 530–31.

57. *See* GATES, *supra* note 39, at 580 (stating that within the more than 46 million acres of national forests established by 1901, "a considerable part was privately held").

58. *See* WILLIAM E. SHANDS & ROBERT G. HEALY, THE LANDS NOBODY WANTED 13–15 (1977). Like in the West, by the turn of the twentieth century large swaths of the eastern forests had been denuded by timber companies, and the destruction and accompanying disastrous floods prompted federal action. *Id*.

59. RICHARD C. DAVIS, ENCYCLOPEDIA OF AMERICAN FOREST AND CONSERVATION HISTORY 744 (1983).

60. Act of Mar. 1, 1911, Pub. L. No. 61-435, ch. 186, 36 Stat. 961 (codified as amended in scattered sections of 16 U.S.C.); SHANDS & HEALY, *supra* note 58, at 15. By 1925, the federal government had acquired approximately 2.35 million acres under the Weeks Act. *See* EXCHANGE OF FOREST LANDS ACQUIRED UNDER THE WEEKS ACT, H.R. REP. NO. 68-1301, at 2 (1925).

61. For example, the Allegheny National Forest in Pennsylvania was established in 1923 with only 9.8% of its land under Forest Service control, the Green Mountain (VT) in 1932 with 1.8%, the Holly Springs (MS) in 1936 with 10.1%, the Jefferson (VA, WV, and KY) in 1936 with 5.6%, the

recognized, "[b]y reason of their peculiar surveys, going back in some instances to colonial times, the lands acquired by the Government are very irregular in shape" and mixed amongst private lands.[62]

C. BLM and Forest Service Landownership Today

Today, our federal lands look like paint splatters on a map of the United States—"general cartographic chaos."[63] Moreover, many of the apparently contiguous parcels are a mirage: zoom in and you often will find complex outer boundaries with sometimes scattered and sometimes scrambled inholdings of private land.[64]

The BLM administers approximately 248 million surface acres,[65] much of it so scattered that unit boundaries barely exist. In some areas, the BLM administers large blocks of land sprinkled with private inholdings, but often it is the BLM that finds itself with parcels surrounded by other state, private, and federal lands.[66]

Manistee (MI) in 1938 with 19%, and the Monongahela (WV) in 1920 with 7.9% of the land. *See* DAVIS, *supra* note 59, at 745, 759–60, 762, 766, 768.

62. *See* EXCHANGE OF FOREST LANDS ACQUIRED UNDER THE WEEKS ACT, H.R. REP. NO. 68-1301, at 2–3 (1925). In 1922, it was estimated that there were more than 25 million acres of non-federal land within the national forests countrywide. H.R. REP. NO. 67-748, at 4 (1922).

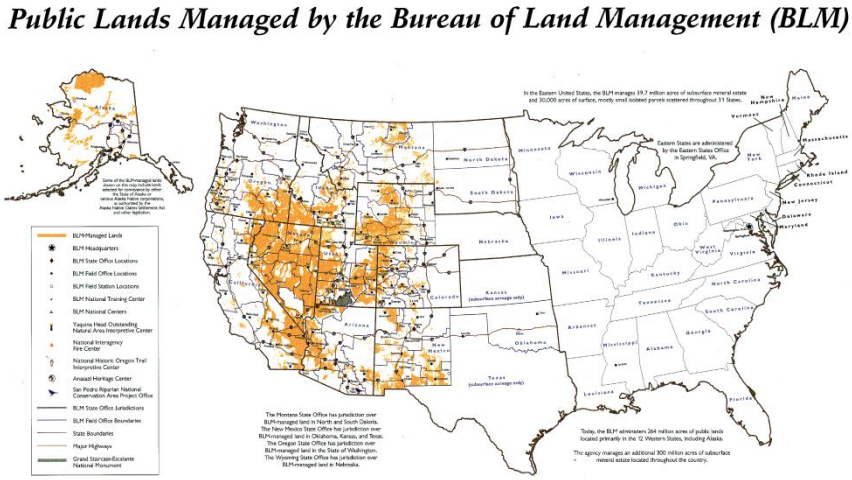
63. George Cameron Coggins, *Overcoming the Unfortunate Legacies of Western Public Land Law*, 29 LAND & WATER L. REV. 381, 382 (1993).

64. One can explore the Forest Service's fragmented holdings across the country. *My Map*, ARCGIS, http://www.arcgis.com/home/webmap/viewer.html?useExisting=1 (last visited June 19, 2013) (click on 'add' link, type 'US Forest Service Surface Ownership' into the find box and click the 'go' link, click the 'add' link in the results found, and zoom in on the relevant portion of the map).

65. BUREAU OF LAND MGMT., *supra* note 34, at 1.

66. Sally K. Fairfax, *Beyond the Sagebrush Rebellion: The BLM as Neighbor and Manager in the Western States*, in WESTERN PUBLIC LANDS: THE MANAGEMENT OF NATURAL RESOURCES IN A TIME OF DECLINING FEDERALISM 79, 88 (John G. Francis & Richard Ganzel eds., 1984).

Figure 1: Public Land Under BLM Management[67]



The boundaries of the National Forest System cover approximately 233 million acres of land in the United States, but nearly 40 million acres of it are not federally owned or administered by the Forest Service.[68] In the West, where more than 75% of the Forest Service's land is located, the Forest Service administers 90% of the land within the System's boundaries, but it still contends with more than 15 million acres of non-federal lands within the national forests there.[69] Within the national forests in the Eastern United States, the federal government owns just over half of the land.[70]

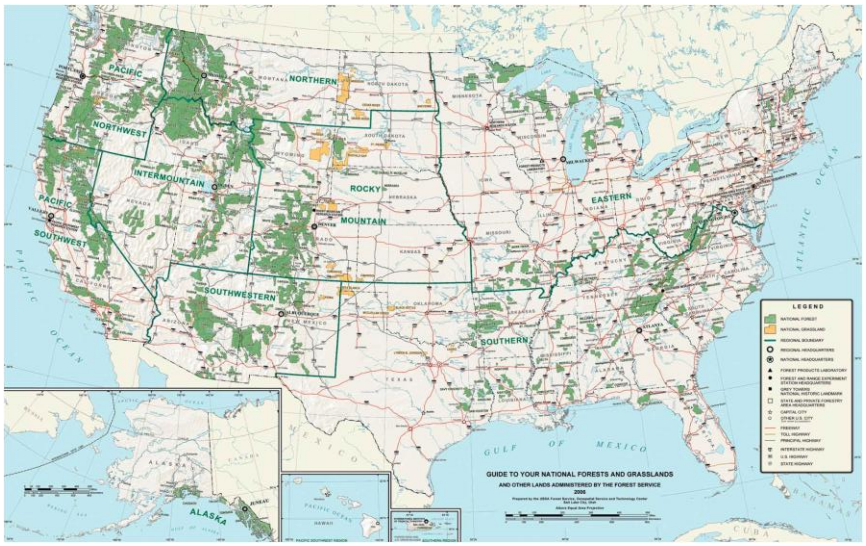
67. *Public Lands Managed by the Bureau of Land Management (BLM)*, BUREAU OF LAND MGMT., http://www.blm.gov/or/about/images/landsmap-large.gif (last visited June 20, 2013).

68. *See* FOREST SERV., *supra* note 34, at 1 (listing as located within the 232,895,585 acres of National Forest System boundaries 39,918,949 acres that are not federally owned or administered by the Forest Service).

69. *See id.* (not including Alaska, the western regions of the National Forest System include 145,534,164 acres of Forest Service land).

70. *See id.* Some eastern national forests are still composed of less than 30% federal land. *See id.* at 12–13. "These data for acreages of private land within boundaries of federal land units substantially understate the seriousness of the problem" because, in some cases, the land is "spread widely in relatively small tracts throughout the federal area" and, in others, because of "the separation of the titles to surface and subsurface resources." CLAWSON, *supra* note 38, at 233.

Figure 2: Public Land Under Forest Service Management[71]



III. THE LAND EXCHANGE: AN IMPORTANT TOOL FOR A MORE CHALLENGING FUTURE

The current federal landownership configuration is often perplexing and exasperating for federal land managers and users, adjacent landowners, and communities alike.[72] 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

71. *Guide to National Forests and Grasslands*, FOREST SERV., http://www.fs.fed.us/maps/products/guide-national-forests09.pdf (last visited June 20, 2013).

72. *See* CLAWSON, *supra* note 38, at 230–36; Coggins & Lindberg-Johnson, *supra* note 35, at 3 (in areas of checkerboarded lands, "it is next to impossible to manage the public lands successfully, for rangeland management cannot operate on a section-by-section basis"); Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENVTL. L. REV. 1, 77–82 (1994). *See generally* WILLIAM E. SHANDS, THE CONSERVATION FOUND., FEDERAL RESOURCE LANDS AND THEIR NEIGHBORS (1979); JOHN FREEMUTH, ISLANDS UNDER SIEGE: NATIONAL PARKS AND THE POLITICS OF EXTERNAL THREATS (1991); OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS (David J. Simon ed., 1988).

lands.[73] The road and trail construction and use for such access is expensive and causes erosion, spreads invasive species, and adversely affects wildlife and their habitat, for example.[74]

Development adjacent to federal lands impacts scenery, recreation, wildlife, noise levels, water and air quality, wildfire risk and costs, and other public values.[75] Before they can cut a tree, trail, or fence-line near non-federal land, agency officials often have to commission an expensive survey to determine the exact boundaries of the non-federal land—an especially daunting task in country crisscrossed with mining claims.[76] The costs to the public of inholdings and convoluted landownership patterns is extensive, and the impacts are not borne by the Agencies alone, for the non-federal landowners often face many of the same challenges.[77]

A. A Potent Tool for Use and Abuse

To reduce these many costs and impacts, the Agencies long have sought to acquire some of the most important inholdings and adjacent lands. But acquisitions can be expensive amid increasingly tight budgets,[78] and they sometimes raise concerns with local governments concerned about their tax base and with politicians and others concerned about the size and cost of managing the federal estate.[79] At the same time, the Agencies administer some land that would make more sense in

73. *See generally*, *e.g.*, Leo Sheep Co. v. United States, 440 U.S. 668 (1979) (considering access across private land to public land); Mont. Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951 (9th Cir. 1981) (holding that railroad corporation has legal right of access across Forest Service land to access its inholdings for logging, even across congressionally-protected wilderness study area); *see also* Bill Paul, *Statutory Land Exchanges that Reflect "Appropriate" Value and "Well Serve" the Public Interest*, 7 PUB. LAND & RESOURCES L. REV. 107, 111–12 (2006); Ragsdale, *supra* note 11, at 35–36.

74. *See* Robert B. Keiter, *Biodiversity Conservation and the Intermixed Ownership Problem: From Nature Reserves to Collaborative Processes*, 38 IDAHO L. REV. 301, 304 (2002); George Cameron Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1, 7 (1987).

75. *See, e.g.*, SHANDS, *supra* note 72, at 14–29; Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 240, 267 (1976); Dennis L. Lynch & Stephen Larrabee, *Private Lands Within National Forests: Origins, Problems, and Opportunities*, *in* THE ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM, 189, 210–12 (Harold K. Steen ed., 1992).

76. The BLM spent $12 million in fiscal year 2011 on cadastral surveys to support various projects. BUREAU OF LAND MGMT., *supra* note 34, at 37.

77. *See, e.g.*, SHANDS, *supra* note 72, at 30–41.

78. *See* GAO FLTFA REPORT, *supra* note 36, at 10–11 (discussing the declines in land acquisition funding for the Agencies).

79. *See, e.g.*, *id.* at 42.

non-federal ownership, including many parcels of federal land that are now isolated amid lands that were dispensed to homesteaders, miners, railroads, communities, and others. Accordingly, with very limited funding to acquire land outright, "[e]xchanges have been the most commonly used approach to land acquisition by both the BLM and FS."[80]

Federal land exchanges can be relatively straightforward and noncontroversial transactions involving small amounts of land. They also can be high-stakes, complex, and controversial transactions.[81] At stake are billions of dollars of federal land eyed by private companies, individuals, and cities for subdivisions, mines, logging, vacation residences, local public uses, and more.[82]

1. The Use

The Agencies characterize land exchanges as "discretionary, voluntary real estate transactions between the Federal and non-Federal parties."[83] By its estimate, the Forest Service has some 100 different exchange authorities,[84] but the basic statutory rules for both Forest Service and BLM land exchanges are found in Section 206 of FLPMA.[85] From the federal perspective, the touchstone for any land exchange is whether "the

80. *See* LAND ACQUISITION PLAN, *supra* note 36, at 36; s*ee also* H.R. REP. 99-743, pt. 1 (1986) (discussing the importance of land exchanges).

81. *Cf.* GAO 2009, *supra* note 26, at 8 ("Completion times for land exchanges within this period [October 1, 2004, through June 30, 2008] varied widely, from about 2 months to more than 12 years.").

82. *See* 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 11 (2000) [hereinafter GAO 2000], *available at* http://www.gao.gov/assets/240/230398.pdf (the Forest Service completed 1265 exchanges valued at about $1.066 billion during fiscal years 1989 through 1999).

83. 36 C.F.R. § 254.3(a) (2013); 43 C.F.R. § 2200.0-6(a) (2013). Congress can—and has—limited the agencies' discretion to carry out specific land exchanges. *See, e.g.*, GAO 2009, *supra* note 26, at 22–25. The result is that, as the final evaluations and terms of the exchange are developed, the non-federal party retains complete discretion to reject the exchange if it is not in its interest, but the Agency—and the public thereby—does not.

84. *See* Letter from Peter C. Myers, Deputy Sec'y, U.S. Dep't of Agric., to Hon. J. Bennett Johnston, Chairman, Senate Comm. on Energy and Natural Res. (Mar. 24, 1988) *in* S. REP. NO. 100-375, at 35, 37 (1988).

85. With regard to the Forest Service, Section 206 technically provides supplementary authority and requirements that apply to the Forest Service's other exchange authorities. *See* 43 U.S.C. § 1716(a) (2012) ("a tract of land or interests therein within the National Forest System may be disposed of by exchange by the Secretary of Agriculture *under applicable law* . . . ."); *accord* FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL 5470.11b (2003) ("[FLPMA] amends all exchange authorities by authorizing the Secretary to dispose of a tract of land or interests therein where the Secretary determines that such disposal would serve the public interest.").

public interest would be well served by making that exchange."[86] The market values of the federal land and non-federal land to be exchanged must also generally be equal.[87]

To achieve these two foundational principles, however, land exchanges often must navigate a maze of analyses, reviews, and decisions.[88] The process includes dozens of major steps, from preliminary screening, to detailed resource and environmental analyses, to conducting appraisals, to exchanging deeds[89]—though many exchange proposals never get that far in a process that can take many years to complete.[90]

Despite their importance, the Agencies' land exchange programs have all but ground to a halt in recent years. The BLM's exchange transaction rate was more than twenty times higher in the 1990s than during the period 2004 through 2008, and the Forest Service completed four times as many land exchanges annually during the 1990s.[91] The Agencies cite the expense and complication as two of the primary disadvantages of the exchange process.[92] During a three year period beginning in 2001, the

86. 43 U.S.C. § 1716(a) (2012); *see also* 16 U.S.C. § 485 (2012) (Forest Service General Exchange Act authorizes the conveyance of national forest land reserved from the public domain in exchange for "an equal value" of non-federal land "[w]hen the public interests will be benefited thereby"); 16 U.S.C. § 516 (2012) (Weeks Act authorizes the exchange of national forest land for "not to exceed an equal value" of non-federal land "[w]hen the public interests will be benefited thereby"); *cf.* 16 U.S.C. § 3192(h)(1) (2012) (ANILCA authorizes the Secretaries to acquire certain land in Alaska through exchange "on the basis of equal value" or, if "the Secretary determines it is in the public interest, such exchanges may be made for other than equal value").

87. 43 U.S.C. § 1716 (b) (2012) ("The values of the lands exchanged . . . shall be equal, or if they are not equal, the values shall be equalized."); *see also supra* note 86.

88. S*ee* LAND ACQUISITION PLAN, *supra* note 36, at 12 ("Land exchanges by their very nature are complex transactions."). *See generally* Mark J. Blando, Note, *Land Exchanges under the Federal Land Exchange Facilitation Act Department of Agriculture Forest Service*, 1 ENVTL. LAW. 327 (1994).

89. *See* GAO 2009, *supra* note 26, at 7–8.

90. *See id.* at 9 (noting that land exchange proposals were terminated "for various reasons, according to agency officials, including withdrawal of either party, changes in land values, legal action, and public opposition"); *also id.* at 14 (describing the length of time it took to complete various land exchanges); Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1075 (9th Cir. 2007) (reviewing land exchange proposed in 1989), *cert. denied*, 131 S. Ct. 1783 (2011); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 803 (9th Cir. 1999) (reviewing land exchange initially negotiated in 1988); Lodge Tower Condo. Ass'n v. Lodge Props., Inc., 880 F. Supp. 1370, 1374 (D. Colo. 1995), *aff'd*, 85 F.3d 476 (10th Cir. 1996) (reviewing land exchange first proposed in 1983).

91. *See* GAO 2009, *supra* note 26, at 16–17. A substantial list of scandals during the 1990s also affected both the complexity of the land exchange process and, apparently, the Agencies' interest in pursuing land exchanges. *See, e.g.*, GAO 2000, *supra* note 82, at 16–27; *see also* discussion *infra* Part III.A.2.

92. *See* LAND ACQUISITION PLAN, *supra* note 36, at 27. The administrative costs of exchanges "are typically approximately twice as much to accomplish as a normal purchase of a conservation

BLM spent nearly $33.5 million merely to *process* exchanges to acquire 300,113 acres.[93]

At the same time, the Agencies are presented with many more exchange proposals than they have resources to pursue.[94] In part looking for the greatest return on their investment in the complex process, the Agencies now often dedicate their efforts to large, complex exchanges[95]—the ones that usually generate the most controversy and present the greatest procedural challenges. It is an unfortunate irony that despite the need for heightened fiscal efficiency occasioned by tightening budgets, the Agencies cannot afford to pursue the very land exchanges that would provide those desperately needed efficiencies. The problem is compounded by the growing need to confront the challenges associated with a changing climate, increasing use of our public lands, and increasing settlement in and around them, in part through more robust, effective, and efficient land exchange programs.[96]

2. The Abuse

In many cases, federal land exchanges have served the public interest well. But the successful land exchanges rarely garner widespread public attention. It is the many controversial land exchanges—and some scandalous ones—that often drive perception and, to a significant degree, policy.

Unlike the historic land sale practices of the disposal era, the land exchange process requires not merely the acquiescence but the affirmative partnership of public officials charged with the public's trust. One might reasonably expect, then, that the stronger agency role would

easement or a fee title acquisition since both the disposal of lands and the acquisition of lands require review, analysis, and clearances to complete the transactions." *Id.* at 36; *see also* W. Land Exch. Project v. Dombeck, 47 F. Supp. 2d 1196, 1197 (D. Or. 1999) (reviewing Forest Service exchange that was initially suspended for lack of agency resources to conduct required analyses).

93. *See* LAND ACQUISITION PLAN, *supra* note 36, at 14 (the cost does include some cash equalization payments, but does not include the value of the acquired lands).

94. *See, e.g.*, GAO 2009, *supra* note 26, at 17–18; *A Guide to Land Exchanges on National Forest Lands*, FOREST SERV., DEP'T OF AGRIC., http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_034082.pdf (last visited June 20, 2013) ("The National Forests receive many more land exchange proposals than it [sic] has the resources to accomplish."); *cf.* Federal Land Exchange Facilitation Act of 1988, Pub. L. No. 100-409, § 4, 102 Stat. 1090 (1988) (authorizing additional appropriations "to ensure that there are increased funds and personnel available to the Secretaries of the Interior and Agriculture to consider, process, and consummate land exchanges pursuant to the Federal Land Policy and Management Act of 1976 and other applicable law").

95. *See* GEORGE DRAFFAN & JANINE BLAELOCH, COMMONS OR COMMODITY? THE DILEMMA OF FEDERAL LAND EXCHANGES 13, 16 (2000).

96. *See, e.g.*, *supra* notes 9, 30 and accompanying text.

insulate federal land exchanges from the abuses that were so prevalent during the land sale era.[97] Unfortunately, the Agencies' land exchange programs also have been afflicted by scandal.[98] The dozens of investigations by the Government Accountability Office ("GAO"),[99] the Inspectors General of the Interior and Agriculture Departments, and others have revealed an array of past land exchange practices that were illegal, maladroit, or unprincipled, including appraisals that fleeced taxpayers out of tens of millions of dollars and exchanges of federal land rich with natural and social resources in exchange for land that provided little or no public benefits.[100]

The scandals are too numerous to recount here, but a few examples provide some context. In one exchange, the non-federal party acquired seventy acres of federal land valued at $763,000 and sold it the same day for $4.6 million.[101] In a series of three land exchanges in Nevada, the BLM failed to base its appraisals on credible evidence and conveyed public land for $8.8 million less than it was worth.[102]

Some of the abuse has been directly related to the Agencies' refusal to reserve interests in the land they conveyed.[103] For example, a 1960 GAO

97. *See generally, e.g.*, PUTER, *supra* note 52 (recounting the abuses of the federal government's land disposal programs).

98. *See* BUYING NATURE, *supra* note 31, at 211–14; *see also* JANINE BLAELOCH, CARVING UP THE COMMONS: CONGRESS & OUR PUBLIC LANDS (2009) (providing a perspective that Congress has abused the public interest in directing land exchanges).

99. The name of the General Accounting Office was changed to the Government Accountability Office in 2004. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004).

100. *See* GAO 2009, *supra* note 26, app. II at 74–75 (providing a partial list of recent reviews and audits of the BLM and Forest Service land exchange programs); *see also* Nicholas G. Vaskov, *Continued Cartographic Chaos, Or A New Paradigm in Public Land Reconfiguration? The Effect of New Laws Authorizing Limited Sales of Public Land*, 20 UCLA J. ENVTL. L. & POL'Y 79, 87–91 (2001).

101. *See* GAO 2000, *supra* note 82, at 19.

102. *See id.* at 17.

103. The opposite also is true, as the Agencies in some cases have conveyed land that was unnecessarily devalued by use restrictions. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, REP. NO. 96-I-1025, FINAL AUDIT REPORT ON NEVADA LAND EXCHANGE ACTIVITIES, BUREAU OF LAND MANAGEMENT 4–5 (1996), *available at* http://www.gpo.gov/fdsys/pkg/GPO-DOI-IGREPORTS-96-i-1025/pdf/GPO-DOI-IGREPORTS-96-i-1025.pdf (reporting that the BLM conveyed land subject to an unused easement that resulted in a $3.8 million windfall to the purchaser); GAO 2000, *supra* note 82, at 21 (reporting that the Forest Service retained development rights at a cost of $29,000 on a portion of property with private recreation residences at the request of the private parties). In another case illustrating the affect of locally-imposed use restrictions, the GAO found that the City of Phoenix went to great lengths to use its zoning authority to devalue significantly the very federal lands it was seeking to acquire by the exchange. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-92-42, LAND EXCHANGE: PHOENIX AND COLLIER REACH AGREEMENT ON INDIAN SCHOOL PROPERTY 5, 12–13 (1992), *available at* http://www.gao.gov/asset

investigation found that a BLM land exchange shorted the government by about $120,000 because the BLM failed—despite warnings—to reserve an interest in the valuable federal mineral rights.[104] A 1991 GAO audit of five land exchanges concluded: "With regard to land transferred out of federal ownership, we found that only some of the land is currently being used and developed either as specified in the acts [of Congress] or as contemplated by the parties involved in the transfers."[105]

The scandals accumulated to the point that the GAO called on Congress "to consider directing both agencies to discontinue their land exchange programs."[106] While Congress did not act on the advice, the controversy nevertheless has put a spotlight on virtually every land exchange proposal that either Agency pursues. In addition to the government auditors, there are also non-profit watchdog organizations that scrutinize every land exchange, often with the support of local interests that could be adversely affected.

Land exchange proponents have also joined the fray. Exchange proponents now often hire any of a number of law and consulting firms that specialize in obtaining desired federal land through the exchange process.[107] They have brought many of the most controversial proposals to Congress in an effort to avoid the environmental analyses and public participation that otherwise would be required.[108] One of the unfortunate results of the practice is that the associated controversy makes it more difficult for Congress to attend to less controversial—but not necessarily less important—public land business.[109]

s/220/215562.pdf.

104. *See* U.S. GEN. ACCOUNTING OFFICE, B-141343 (1960), *available at* http://www.gao.gov/products/B-141343#mt=e-report.

105. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-92-70BR, FEDERAL LANDS: STATUS OF LAND TRANSACTIONS UNDER FOUR FEDERAL ACTS 2 (1991), *available at* http://www.gao.gov/assets/80/78273.pdf.

106. GAO 2000, *supra* note 82, at 34.

107. *See, e.g.*, Lynne Bama, *Wheeling and Dealing*, HIGH COUNTRY NEWS, Mar. 29, 1999, at 1.

108. *See* United States v. Renzi, 651 F.3d 1012, 1018 (9th Cir. 2011) (rejecting former Congressman Rick Renzi's speech and debate clause defense against "48 criminal counts related to his land exchange 'negotiations' [while in Congress,] including public corruption charges of extortion, mail fraud, wire fraud, money laundering, and conspiracy."), *cert. denied*, 132 S. Ct. 1097 (2012); *see also* Jeremy Eyre, *The San Rafael Swell and the Difficulties in State-Federal Land Exchanges*, 23 J. LAND RESOURCES & ENVTL. L. 269 (2003); Amy Stengel, *"Insider's Game" or Valuable Land Management Tool? Current Issues in the Federal Land Exchange Program*, 14 TUL. ENVTL. L.J. 567, 593–95 (2001). *See generally* BLAELOCH, *supra* note 98, at 12–21.

109. *See, e.g.*, Phil Taylor, *In Final Hours, McCain Objected to Reid Package, Ski Area Bill*, E&E DAILY (Dec. 23, 2010), http://www.eenews.net/public/EEDaily/2010/12/23/1.

The courts are also increasingly involved.[110] The maze of analyses, reviews, and decisions that the Agencies must navigate provides land exchange opponents ample opportunity to find shortcomings and take their objections to court. Courts are aware of the scandals and have substantially increased their scrutiny of exchange cases.[111]

B. Deeds, Patents, Covenants, and the Like

As briefly discussed earlier, and as will be discussed in more detail later in this Article, restricting the future use of federal land conveyed by exchange can be an important tool not only to protect and promote the public interest, but also to provide the Agencies with efficiencies in the expensive, cumbersome, and perilous process of developing, evaluating, and defending land exchange proposals.[112] The legal theory for doing so generally is a simple one: a landowner—including the United States—either can convey all of its rights to its land or it can retain some of its rights and convey others, thereby restricting or obliging future use of the land by the purchaser and subsequent owners.

Under the Property Clause, the power of the United States to guide the future use of the lands it conveys is "without limitation," as the Supreme Court explained in *United States v. City and County of San Francisco*:

> Article 4, Section 3, Cl. 2 of the Constitution provides that "The 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." The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy . . . .[113]

110. *See* GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, 2 PUBLIC NATURAL RESOURCES LAW § 13:24 (2nd ed. 2012).

111. *See* discussion *infra* Parts V–VI; *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 521 (1970) (describing the public trust doctrine as "a name courts give to their concerns about the insufficiencies of the democratic process" when the transfer of public lands and resources are at stake). *See generally* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980) (exploring the application of the public trust doctrine to federal public land management).

112. *See* discussion *infra* Part VI.

113. United States v. City & Cnty. of S.F., 310 U.S. 16, 29–30 (1940) (footnotes omitted) (quoting Light v. United States, 220 U.S. 523, 537 (1911)). In *City and County of San Francisco*, Congress had granted San Francisco land and rights-of-way from Yosemite National Park and the Stanislaus National Forest for water supply and associated hydroelectric purposes. The legislation

The legal framework generally does not require a precise understanding, but a brief explanation of a few terms is instructive. First, the BLM and Forest Service convey federal land either by "patent" or "deed" (terms which are used synonymously herein).[114] An "interest in land" is a right in land,[115] and a landowner can "reserve" an interest in land in the deed when the owner conveys it to another party, thereby providing the prior owner an ongoing right to that land.

Ongoing rights to conveyed land may take many forms. Covenants can be used to ensure that the party to whom the land is conveyed will do or not do a particular act, and they can be formulated to apply to the particular purchaser or to all future owners of the parcel of land.[116] For example, a "restrictive covenant" can be included in a deed to limit the amount of future development of the land to only one single-family dwelling, and an "affirmative covenant" can be included to require the new owner to actively mitigate some environmental impacts (for example, create defensible space from wildfires within 200 feet of the home).

Easements, which allow one landowner to use another's property,[117] may be reserved to allow the public to continue to use a trail that crosses property conveyed by the federal government, among other purposes. A "conservation easement" (which also is sometimes generally referred to as a "conservation covenant" or a "conservation restriction") can be reserved in a deed to limit development or otherwise protect the environmental and aesthetic values of the land.[118]

provided that the hydroelectric power be publicly distributed and that if San Francisco ever attempted to "sell, assign, transfer, or convey, this grant shall revert to the Government of the United States." Raker Act, § 6, ch. 4, 38 Stat. 242. The Court rejected the claim that the conditions unconstitutionally infringed on state powers: "The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular public property entrusted to it." *City & Cnty. of S.F.*, 310 U.S. at 30; s*ee also* Hutchings v. Low (The Yosemite Valley Case), 82 U.S. (1 Wall.) 77 (1872) (invalidating California legislation conveying portions of the grant to settlers).

114. Patents generally are used by the United States to convey land from the public domain, while deeds generally are used to convey land that the federal government has acquired from an entity other than a foreign sovereign. *Cf.* FOREST SERV., DEP'T OF AGRIC., FOREST SERVICE HANDBOOK 5409.13 § 37.42 (2004) [hereinafter "FOREST SERVICE HANDBOOK"].

115. JOHN M. CARTWRIGHT, GLOSSARY OF REAL ESTATE LAW 490 (1972).

116. A "covenant" is a formal agreement or promise that can be included in a deed. *See* POWELL ON REAL PROPERTY § 60.01(2) (Michael Allan Wolf ed., 2013).

117. *See, e.g.*, RESTATEMENT (FIRST) OF PROPERTY § 450 (1944).

118. The Uniform Conservation Easement Act defines "conservation easement" as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real

This Article generally will use the term "use restriction" to broadly refer to these and other legal tools that the Agencies can use to guide the future use of the federal land they convey by exchange.

IV. THE FEDERAL LAND POLICY AND MANAGEMENT ACT

From the affirmative settlement requirements that settlers had to meet to prevent reversion of their homestead to the federal government, to the explicit authority to reserve easements and other rights to land in early land exchange statutes, Congress has long sought to guide the future use of the lands it has conveyed to promote particular settlement and development policies.[119] Traditionally, use restrictions took the form of rights-of-way and reservations of minerals and timber.[120]

As new legal tools evolved to guide the use of private land, and as populations around federal lands boomed during the mid-twentieth century, interest in the appropriate role of the federal government in guiding the development of non-federal lands grew. At the same time, growing communities throughout the West were anxious to secure federal land for development. Congress responded in 1964 by chartering a commission to make recommendations regarding the federal policies relating to the retention, management, and disposition of federal lands.[121] In this dynamic environment, the Public Land Law Review Commission laid the groundwork for the passage of FLPMA and its provisions that govern the use of restrictions in federal land exchanges.

A. The Public Land Law Review Commission

The Public Land Law Review Commission ("Commission") submitted its report to Congress in 1970. The report—entitled "One Third of the Nation's Land"—endorsed the general principle that state and local governments should regulate uses of privately owned land.[122] But it also recognized that many local authorities had not adopted—and likely

property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property." NAT'L CONF. OF COMM'RS. OF UNIFORM ST. LAWS, UNIFORM CONSERVATION EASEMENT ACT § 1(1) (1981).

119. *See* BRUCE BABBITT, CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA 5 (2005).

120. *See, e.g.*, General Exchange Act, Pub. L. No. 67-173, ch. 105, 42 Stat. 465 (1922) (authorizing the Forest Service to "make reservations of timber, minerals, or easements").

121. Act of Sept. 19, 1964, Pub. L. No. 88-606, 78 Stat. 982 (1964).

122. PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 61 (1970).

would not adopt—adequate land use planning regulations.[123] Accordingly, it recommended that if federal lands were to be disposed of in areas that lacked such appropriate controls, "the agencies should be directed to include covenants in the patent, designed to service the same protective function of the site and nearby land as state or local zoning."[124] Where federal land values were implicated, the Commission recommended an even stronger federal role:

> [W]e recommend the use of such covenants to protect important values on public lands in the vicinity of such disposals. . . . Thus, if disposals are made in . . . an area which has been retained and set aside for another important public value (i.e., watershed protection or scenic preservation), the patents should contain restrictions on use, designed to protect such values. This practice should be employed without regard to whether state or local zoning regulations are in force.[125]

It also recommended that use restrictions be implemented as reversionary interests whenever federal land was sold for less than fair market value.[126]

The report—including in particular its broad view of the Agencies' role in using restrictions and guiding the future use of conveyed federal land—became the explicit foundation for the efforts of the Administration and Congress to expand the Agencies' land exchange authority in FLPMA.[127]

123. *See id.* at 61, 266.

124. *Id.* at 266. Noting that permanent restrictions could be problematic in such circumstances, it encouraged such restrictions to be "only for a reasonable length of time" to minimize enforcement obligations and to provide an opportunity for state and local governments to adopt land use regulations better suited to changing circumstances. *Id.*

125. *Id.* at 266–67.

126. *Id.* at 266. The expansiveness of the Commission's recommendations in these regards is remarkable given that the Commission misread the growing public interest in retaining public lands and protecting the environment. *See* HAROLD K. STEEN, THE U.S. FOREST SERVICE: A HISTORY 320 (Centennial ed. 2004); DANA & FAIRFAX, *supra* note 54, at 233. The conservation community was broadly critical of the report as taking a narrow view of the public interest. *See, e.g.*, NATURAL RES. COUNCIL, WHAT'S AHEAD FOR OUR PUBLIC LANDS? A SUMMARY REVIEW OF THE ACTIVITIES AND FINAL REPORT OF THE PUBLIC LAND LAW REVIEW COMMISSION 103 (1970).

127. *See* S. COMM. ON ENERGY AND NATURAL RES., WORKSHOP ON PUBLIC LAND ACQUISITION AND ALTERNATIVES, S. PUB. NO. 97-34, at 301 (Comm. Print 1981) (statement of D. Michael Harvey, Chief Counsel for the Minority, Senate Comm. on Energy and Natural Res.) ("Let me just say that going back through the history of the revision of the exchange laws, it really started with the report of the Public Land Law Review Commission.").

B. The Administration's Approach

During the Commission's deliberations, "[a] strong movement emerged espousing direct federal control of private lands."[128] Responding to that movement in August of 1970, President Nixon delivered a message to Congress calling for a "National Land Use Policy":

> The time has come when we must accept the idea that none of us has the right to abuse the land, and that on the contrary society as a whole has a legitimate interest in proper land use. There is a national interest in effective land use planning all across the nation.[129]

The following year, the White House issued a report expounding on the Administration's views:

> The traditional local zoning system is ill suited to protect broader regional, State, and national values. Local governments have a limited perspective on and little incentive to protect scenic or ecologically vital areas located partially or even entirely within their borders. Economic pressures often spur development to the detriment of the environment because of local government dependence on property taxes.
>
> Local land use regulation alone, therefore, cannot deal effectively with many of today's environmental problems . . . .[130]

The Administration thereafter developed a legislative proposal, including strong language requiring the Secretary of the Interior to impose restrictions on the future use of federal land conveyed by exchange or otherwise, and President Nixon took the unusual step of formally urging its passage by Congress.[131]

128. DANA & FAIRFAX, *supra* note 54, at 266.

129. President Richard Nixon, *Message to the Congress Transmitting the First Annual Report of the Council on Environmental Quality*, *in* GOV'T PRINTING OFFICE, ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, TOGETHER WITH THE PRESIDENT'S MESSAGE TO CONGRESS xii–xiii (1970), *available at* http://www.presidency.ucsb.edu/ws/?pid=2618.

130. GOV'T PRINTING OFFICE, ENVIRONMENTAL QUALITY: THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 61 (1971).

131. The Administration's proposal (entitled the National Resources Land Management Act of 1971) was introduced by Senator Jackson on August 3, 1971, by request. *See* S. 2401, 92nd Cong. (1971); S. REP. NO. 92-1163, at 14 (1972) (by request). Section 9(b) of the bill provided: "The Secretary shall insert in any patent or other documents of conveyance he issues under this Act such

C. The 94th Congress's Approach

Senator Henry "Scoop" Jackson, then Chairman of the Senate Committee on Energy and Natural Resources and a member of the Commission, introduced a bill based on the Commission's and Administration's recommendations.[132] The Committee explained the bill's sale and exchange section:

> This section implements three PLLRC recommendations: Recommendation No. 24 states that "Federal land administering agencies should be authorized to protect the public land environment by (1) imposing protective covenants in disposal of public lands, and (2) acquiring easements on nonfederal land adjacent to public lands". Recommendation No 117 proposes that ". . . covenants in Federal deeds should be used to protect public values", and recommendation No. 118 adds that "protective covenants should be included in Federal deeds to preserve important environmental values on public lands in certain situations, even where State or local zoning is in effect".[133]

The Senate passed the bill on a vote of seventy-eight to eleven.[134]

The House bill, which was introduced subsequent to the Senate's passage of Senator Jackson's bill, also looked to the Commission's report and included many similar provisions.[135] In conference, the text of the earlier bills' exchange provisions ended up jumbled in three sections, with the primary exchange authority in Section 206.[136] That Section authorized both the BLM and the Forest Service to enter into an

terms, covenants, and conditions as he deems necessary to insure proper land use, environmental integrity, and protection of the public interest."

132. S. REP. NO. 94-583, at 36 (1975). The bill and subsequent versions of it included the Administration's language regarding terms, covenants, and conditions, and the Committee on Interior and Insular Affairs emphasized the mandatory nature of the provision: "In issuing conveyances under this Act, the Secretary *must* include those conditions . . . ." S. REP. NO. 92-1163, at 17 (1972) (emphasis added). The Committee explained that the provision was intended "to insure proper land use and to protect the public interest. Such provisions could include, *inter alia*, covenants running with the land, conditions precedent or subsequent, reverters and reversions." S. REP. NO. 94-583, at 49 (1975).

133. S. REP. No. 94-583, at 50.

134. 122 CONG. REC. 4423 (1976).

135. H.R. 13777, 94th Cong. (1976). Congressman Aspinall actively promoted reform legislation shortly after the Commission issued its report. Unlike Senator Jackson, he initially developed a bill that looked more to the broad principles of intergovernmental relations advocated by the Commission than the text of the Administration's proposal. *See* H.R. 7211, 92nd Cong. (1971); H.R. REP. NO. 92-1306, at 19–20 (1972) (explaining that H.R. 7211 was an effort to translate some of the Commission's recommendations into law). The Administration opposed Aspinall's bill. *See* H.R. REP. NO. 92-1306, at 69.

136. *See* 43 U.S.C. § 1716 (2012); *see also id.* §§ 1715, 1718.

exchange of "land or interests therein" if they found that the "public interest would be well served by making that exchange."[137]

While the effort to enact a national land use planning law was unsuccessful, it strongly influenced the development of FLPMA, starting with the Commission's report and carrying through enactment. Indeed, some early observers feared that FLPMA's federal land use planning provisions would result in "a *de facto* national land use planning and zoning process in the West."[138] Noting that "[f]ederal agencies have long yielded to the temptation to use whatever devices are at their disposal when their views run contrary to private or local government plans," one contemporaneous article predicted that the BLM's "greater presence in [state and local] land use planning and development would discourage frequent use of the BLM's power to sell or exchange," as such methods might no longer be necessary to achieve the Agency's concerns regarding the use of nearby private lands.[139]

D. The Agencies' Implementation

The Forest Service first published implementing regulations for FLPMA's land exchange authority in 1978,[140] clearly stating that the Agency "will reserve rights or retain interests that are needed for the public interest" when conveying land by exchange.[141] When the BLM proposed its regulations in 1980, they also explicitly called for "any reservations, terms, covenants and conditions necessary to insure proper land use and protection of the public interest" to be identified as part of the determination to exchange lands.[142] When the Agencies later revised their exchange regulations, they confirmed that "[c]ovenants and restrictions may be developed to protect any number of public

137. 43 U.S.C. § 1716(a).

138. Anderson, *supra* note 33, at 695 (internal quotation marks omitted).

139. *Id.* at 696–97.

140. Implementation of Procedures, 43 Fed. Reg. 24,830 (June 8, 1978).

141. *Id.* at 24,831. The regulations also provided for other "terms and conditions which each party agrees to perform" as part of an exchange. *See id.* at 24,832. In 1981, the Forest Service explained before the Senate Committee on Energy and Natural Resources that "one aspect of FLPMA . . . is that you can exchange lands or interests in lands, and we have considered the exchange of title to property surrounded by ranches for an easement on that ranch and retain an easement in the property that is exchanged . . . . [I]t is a means of acquiring that control where you do not need fee simple title." S. COMM. ON ENERGY AND NATURAL RES., *supra* note 127, at 409 (statement of Vernon L. Lindholm, Assistant Dir. of Lands, Forest Serv., Dep't of Agric.).

142. Public Lands; Exchanges; Proposed Procedures, 45 Fed. Reg. 41,860, 41,864 (June 20, 1980) (proposed 43 C.F.R. § 2200.1(c)(4)).

interests."[143] The Agencies also recognized that "[a]lthough reservations or restrictions may place burdens on the Federal and non-Federal parties, the effect of reservations or restrictions will be considered by each party prior to a decision to proceed."[144]

The Agencies' current regulations mandate:

> In any exchange, the authorized officer shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate. The use or development of lands conveyed out of Federal ownership are subject to any restrictions imposed by the conveyance documents and all laws, regulations, and zoning authorities of State and local governing bodies.[145]

However, contrary to early expectations of, and more recent calls for, expansive implementation of the Agencies' use restriction authority,[146] the Agencies' internal policy directives increasingly have disfavored use restrictions, and agency decision makers use restrictions very sparingly as a result.[147] The BLM's handbook directs that "[p]atent and deed use restrictions, covenants, and reservations should be kept to the absolute

143. Exchanges—General Procedures, 58 Fed. Reg. 60,904, 60,908 (Nov. 18, 1993); *see also* Land Exchanges, 59 Fed. Reg. 10,854, 10,858 (Mar. 8, 1994) ("Covenants and restrictions may be developed to protect any Federal interests, including cultural resources . . . .").

144. Exchanges—General Procedures, 58 Fed. Reg. 60,904, 60,907 (Nov. 18, 1993). A nearly identical statement was made by the Forest Service. Land Exchanges, 59 Fed. Reg. 10,854, 10,858 (Mar. 8, 1994).

145. 36 C.F.R. § 254.3(h) (2013); 43 C.F.R. § 2200.0-6(i) (2013).

146. *See supra* notes 138-39 and accompanying text; GAO ACQUISITION REPORT, *supra* note 29, at v ("In summary, alternatives to full-title acquisition, such as easements, zoning, and other Federal regulatory controls, are feasible and could be used by Federal agencies where appropriate."); SHANDS & HEALY, *supra* note 58, at 184; Anderson, *supra* note 33, at 695–97; Ragsdale, *supra* note 11 (arguing that the Forest Service's public interest obligations and use restriction authority call for the Agency to take an active role in private land use and community development through the land exchange process); *cf.* BABBITT, *supra* note 119, at 6 ("[T]here is . . . a considerable body of law that can and, in my view, should be used toward enhanced federal leadership in land use planning and preservation."); NAT'L RESEARCH COUNCIL, *supra* note 31, at 10, 211 (recommending that the land management agencies should increase their efforts to promote conservation on private land through easements and related mechanisms).

147. The dichotomy between the Agencies' formal interpretations of their authorities and their reluctance to use the authority in practice was identified in a lengthy investigation of the Agencies' land acquisition practices by the Comptroller General in 1970. The resulting report found that, despite formal policies encouraging the use of alternatives to land acquisition (such as zoning and easements), "land managers at the project level are very reluctant to use alternatives." GAO ACQUISITION REPORT, *supra* note 29, at 22; *see also id.* at 13, 23, 33, 42 n.1, 48, 156; *accord* SHANDS & HEALY, *supra* note 58, at 216.

minimum and used only where needed to protect the public interest."[148] The handbook's mandatory direction to line officers[149] goes on to state that, "[i]n general, mitigation in the form of deed restrictions on Federal land conveyed into non-Federal ownership should only be used where required by law or executive order, clearly supported by the environmental documentation and closely coordinated with the Field or Regional Solicitor."[150] The effect is to all but prohibit use restrictions in most cases other than where the federal land is contaminated by hazardous waste or where necessary to limit development of wetlands or floodplains.[151]

Similarly, the Forest Service manual establishes that the Agency's overarching policy with regard to restrictions is to "dispose of land with as few reservations and outstanding rights as possible."[152] While the manual does recognize that restrictions may be necessary to comply with applicable law, to provide for access to federal lands, and in a number of

148. BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, H-2200-1, LAND EXCHANGE HANDBOOK ch. I.G.2.d. (2005) [hereinafter BLM HANDBOOK], *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.72089.File.dat/h2200-1.pdf; *accord id.* at ch. II.E.2.c.

149. The "instructions provided in this handbook are mandatory unless otherwise indicated." Manual Transmittal Sheet from Thomas Lonnie, Assistant Dir., Minerals, Realty & Resource Prot. (Dec. 16, 2005), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.72089.File.dat/h2200-1.pdf.

150. BLM HANDBOOK, *supra* note 148, at ch. 6.E. The handbook correctly recognizes the fact that "[t]he regulations under 43 CFR 2200.0-6(i) provide that the public interest may be protected through the use of reserved rights or interests in the Federal land" and that "[e]nvironmental mitigation in the form of reserved Federal rights or interests should be evaluated for appropriateness as part of analysis of alternatives in the environmental documentation," but the statements do nothing but state legal facts and do not qualify the earlier direction in the manual. *Id.*

151. Executive Order 11,988 requires the Agencies, in disposing of federal land through exchange or otherwise, to "design or modify its action in order to minimize potential harm to or within the floodplain" and "attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successors, except where prohibited by law." Exec. Order No. 11,988, §§ 2(a)(2)(i), 3(d)(2), 3 C.F.R. 117 (1978), *reprinted as amended in* 42 U.S.C. § 4321 app. at 5232, 5332–33 (2012). The Department of the Interior's Field Solicitor has interpreted the requirement as permitting disposal when "[t]he patent contains restrictions and conditions that ensure the patentee can maintain, restore, and protect the wetlands on a continuous basis." *See* Mendiboure Ranches, Inc., 90 IBLA 360, 367 (1986). Executive Order 11,990 provides for the protection of wetlands in the disposition of federal land. *See* Exec. Order No. 11,990, § 1(a), 3 C.F.R. 121 (1978), *reprinted as amended in* 42 U.S.C. § 4321 app. at 5233 (2012). "When Federally-owned wetlands or portions of wetlands are proposed for lease, easement, right-of-way or disposal to non-Federal public or private parties, the Federal agency shall . . . (b) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successor, except where prohibited by law . . . ." *Id.* § 4. Agency compliance with Executive Orders 11,988 and 11,990 is subject to judicial review. *See, e.g.*, City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1166–67 (9th Cir. 2005).

152. FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL 5470.3 (2003).

other circumstances,[153] an internal memorandum to line officers flatly states: "Do not propose or agree to restrictive covenants on the Federal lands unless they are required to comply with legal, regulatory requirements, executive orders (i.e. wetlands or floodplains, cultural) or to meet Land and Resource Management Plan objectives."[154] Line officers have read the direction as precluding use restrictions except in the rare case that it is "necessary to protect critical Federal interests" and that the Agency "has neither the legal authority nor responsibility to substitute deed restrictions for local zoning controls."[155] Based on this direction and the culture it has established, most line officers involved with land exchanges state that they simply "can't" or "won't" include use restrictions in carrying out an exchange.[156]

The ongoing disconnect between congressional intent and agency authority, on the one hand, and agency policy and practice, on the other, is apparent in more recent legislation as well. For example, in 2005, Congress authorized the Forest Service to convey administrative sites by sale or exchange and to use the proceeds of such conveyances for other facilities.[157] The 2005 law provided that, "[i]n conveying an administrative site under this title, the Secretary may reserve such right, title, and interest in and to the administrative site as the Secretary determines to be necessary."[158]

However, concern over the Forest Service's constrained implementation of the reservation authority led Congress to amend the law in 2009 to mandate that such conveyances "*shall be* subject to such

153. The manual provides that "[i]n all disposals of National Forest System land or interests in land, it is essential to reserve those interests and rights-of-way necessary to comply with laws and regulations, to permit removal of reserved resources, to protect interests reserved in such documents as conservation easements, and to provide access to National Forest System lands" and that, "in addition to reservations, it may be necessary to apply specific limiting conditions to manage effectively or to protect National Forest System lands and resources." *Id.* at 5473.

154. Memorandum from James R. Furnish, Deputy Chief, Forest Serv., to Regional Directors with Lands Program Responsibilities (Oct. 14, 1999) [hereinafter Furnish Memorandum] (on file with author) (quoted in Davis Land Exchange; White River National Forest; Colorado, 65 Fed. Reg. 42,982, 42,983–84 (July 12, 2000) [hereinafter Keys Decision]).

155. Keys Decision, 65 Fed. Reg. at 42,982. Similar statements can be found in numerous other Forest Service documents. *See, e.g.*, Furnish Memorandum, *supra* note 154, at 2; Memorandum from David A. Anderson, Appeal Reviewing Officer, U.S.D.A. Forest Serv., to Appeal Deciding Officer (Dec. 3, 1999) ("Forest Service direction indicates that deed restrictions are to be imposed in rare occasions when necessary to protect critical Federal interests."), *available at* http://www.fs.fed.us/r2/projects/nepa/appeal-decisions/2000/psicc/big_union_01.html.

156. Paraphrasing numerous personal conversations with the author.

157. Forest Service Facility Realignment and Enhancement Act of 2005, Pub. L. No. 109-54, tit. V, 119 Stat. 559.

158. *Id.* § 504(a)(3).

terms, conditions, and reservations as the Secretary determines to be necessary to protect the public interest."[159] The amendment also directed the Agency to specifically evaluate whether to include terms, conditions, and reservations in the environmental analyses for proposed conveyances.[160]

V. JUDICIAL REVIEW

Given the myriad unique factors and ever-changing circumstances that must be considered in developing and approving a land exchange, Congress has delegated broad authority to the Forest Service and BLM to develop and approve land exchanges when they determine "that the public interest will be well served."[161] Land exchanges inherently require a balancing of the costs and benefits associated with the land to be conveyed by the Agencies and those associated with the land to be acquired.[162] While there have been some land exchange proposals that collapsed primarily because the land to be acquired by the federal government would provide little benefit to the public,[163] it is the disposal of the federal land that more frequently causes trouble, usually as a result of a perception of unacceptably high or uncertain costs to the public interest.[164]

Accordingly, it is critical for the Agencies to have an understanding of how the land they convey is likely to be used in the future. Without such an understanding, the Agencies may not be able to reasonably evaluate or mitigate the impacts of the exchange on the environment and on historic

159. *See* Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, div. E, tit. IV, § 422(2), 123 Stat. 748 (emphasis added).

160. *See id.*

161. 43 U.S.C. § 1716(a) (2012).

162. *See id.* (authorizing exchanges where "the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired").

163. *Cf.* Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 804 (9th Cir. 1999) (remanding land exchange for failure to adequately consider the impacts of disposal, noting that the lands acquired by the Forest Service "were, for the most part, heavily logged and roaded"); GAO 2000, *supra* note 82, at 20 (questioning the benefits of some land exchange acquisitions). A land exchange also could collapse primarily because of the high costs associated with the land to be acquired by the Agencies (e.g. hazardous waste), but the Agencies have a strong institutional incentive to avoid such exchanges.

164. The public interest benefits of conveying federal land are not irrelevant. For example, the Agencies' high costs of administering isolated tracts of federal land can be eliminated through exchanges and future uses of the disposed federal land may provide economic or social benefits for affected communities.

and cultural resources; they may struggle to determine the value of the federal land; and, ultimately, they may struggle to determine whether "the public interest will be well-served by making that exchange."[165] But by including restrictions, the Agencies can more accurately and confidently determine the future use of the land they convey, and doing so can have substantial benefits not only for the public interest, but also for the efficiency of the Agencies' processes and their ability to defend them in court.

A. Evaluating the Impacts of Disposal

Agencies generally are required to evaluate and mitigate the impact of a proposed land exchange on a wide range of public interests, including the environment, historic and cultural resources, and threatened and endangered species. NEPA provides a procedural foundation for conducting such evaluations, and it has been a primary source of the challenges—legal, financial, and temporal—that the Agencies face in pursuing and successfully completing land exchanges.[166]

The key provision of NEPA that applies to land exchanges is Section 102, which directs the Agencies to analyze the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment."[167] Specifically, for such actions, the Agencies must prepare a "detailed statement . . . on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) alternatives to the proposed action."[168] In carrying out their responsibilities under NEPA, the Agencies are obliged to "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment" and "[u]se all practicable means . . . . [to] avoid or minimize any possible adverse effects of their actions upon the quality of

165. 43 U.S.C. § 1716(a) .

166. *Cf.* Denise M. Keele *et al.*, *Forest Service Land Management Litigation: 1989–2002*, 104 J. FORESTRY 196, 200 (2006) (reporting that 68.6% of all land management litigation against the Forest Service is premised on NEPA).

167. 42 U.S.C. § 4332(2)(C) (2012). The NEPA regulations define "affecting" as "will or may have an effect on." 40 C.F.R. § 1508.3 (2013).

168. 42 U.S.C. § 4332(2)(C). The Agencies can evaluate the potential environmental effects of a land exchange by preparing a "concise" document called an "environmental assessment" ("EA"). 40 C.F.R. § 1508.9. If the EA reveals that the exchange is not likely to result in a significant environmental impact, the NEPA evaluation is complete. If, on the other hand, it reveals that the exchange may result in significant environmental impacts, a more thorough evaluation must be conducted in the form of an "environmental impact statement." *See id.* §§ 1501.3, 1501.4.

the human environment."[169] Accordingly, the analysis must consider effects on threatened and endangered species and their habitats, wetlands, and scientific, historic and cultural resources, among others.[170]

The purpose of the analysis is not only to ensure that the Agencies take a "hard look" at the environmental consequences of their actions, but also to provide relevant information and analyses to stakeholders that may play a role in the decision-making or implementation process.[171] "[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[172]

The Agencies generally view NEPA compliance in the context of land exchanges as burdensome and fraught with uncertainty and risk, which is understandable given the fiscal and legal challenges that NEPA poses.[173] The Forest Service spends about $250 million per year conducting environmental analyses for its various land management decisions,[174] and each environmental impact statement ("EIS") takes the Agency an average of 2.7 years to complete.[175] Furthermore, an inadequate environmental assessment ("EA") or EIS can cost significantly more as a result of administrative appeals, litigation, and required supplemental analyses. Partly as a result, agency officials often do not have the resources to even consider pursuing some potentially beneficial exchanges.[176]

169. 40 C.F.R. § 1500.2; *see also id.* § 1502.14(f) (agency shall "rigorously explore and objectively evaluate all reasonable alternatives," including "appropriate mitigation measures"); *id.* § 1502.16(h) (agency discussion of environmental consequences shall discuss means to mitigate any adverse environmental impacts); *id.* § 1508.25(b) (agency shall consider alternative(s) which include mitigation measures in defining the scope of analysis); *id.* § 1508.20 (defining "mitigation").

170. *See* 40 C.F.R. § 1508.27(b).

171. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349–50 (1989); *see also* Shoshone-Bannock Tribes of the Fort Hall Reservation v. U.S. Dep't of the Interior, No. 4:10-CV-004, 2011 WL 1743656, at *11 (D. Idaho May 3, 2011) (emphasizing the importance of NEPA to public participation and rejecting the BLM's argument that arrangements to evaluate the impacts of a land exchange outside of the NEPA process are sufficient).

172. *Robertson*, 490 U.S. at 350.

173. *See generally* U.S.D.A. FOREST SERV., THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT (2002), *available at* http://www.fs.fed.us/projects/documents/Process-Predicament.pdf.

174. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-97-71, FOREST SERVICE DECISION-MAKING: A FRAMEWORK FOR IMPROVING PERFORMANCE 28 (1997), *available at* http://www.gao.gov/assets/160/155845.pdf.

175. Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?*, 10 ENVTL. PRAC. 164, 168 (2008).

176. GAO 2009, *supra* note 26, at 17–18.

The National Historic Preservation Act ("NHPA"),[177] the Endangered Species Act ("ESA"),[178] the Archaeological Resources Protection Act,[179] and other laws impose complementary requirements to evaluate and mitigate the impacts of a proposed exchange on historic, cultural, and natural resources. For example, the NHPA mandates that the Agencies "take into account the effect" of a land exchange on significant historic and cultural resources.[180] In doing so, they have an affirmative responsibility to try to identify those resources and to avoid, minimize, or mitigate any adverse effects on them.[181] The NHPA regulations specifically state that the "[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance" qualify as an adverse effect.[182]

The acquisition of land by the Agencies rarely will have a significant adverse impact on the environment or historic resources.[183] However, the impacts of conveying federal land to a non-federal party who may undertake a new use clearly may, and evaluating those impacts is no doubt one of the most complicated—and important—requirements of complying with NEPA and related laws in the context of land exchanges.

While the Agencies initially hoped they could consummate exchanges without examining the environmental consequences associated with the future use of conveyed federal land, courts routinely have required them to do so.[184] NEPA requires the Agencies to evaluate not only the potential "direct effects" of a proposed "Federal action," but also the reasonably foreseeable "indirect effects"[185] and "cumulative impact"[186]

177. 16 U.S.C. §§ 470–470t (2012).

178. *Id.* §§ 1531–1544.

179. *Id.* §§ 469–469c.

180. *Id.* § 470(f) (NHPA Section 106); *see also id.* § 470(a)(1)(A) (NHPA Section 101).

181. *See* 36 C.F.R. §§ 800.4–800.6 (2013).

182. *Id.* § 800.5(a)(2)(iv).

183. Indeed, the Forest Service has determined that acquisition of land or interests in land does not have a significant effect on the environment and therefore generally may be categorically excluded from NEPA analysis. *See* 36 C.F.R. § 220.6(d)(6) ("Examples include but are not limited to: (i) Accepting the donation of lands or interests in land to the NFS, and (ii) Purchasing fee, conservation easement, reserved interest deed, or other interests in lands."); *accord* Sabine River Auth. v. U.S. Dep't of the Interior, 951 F.2d 669, 680 (5th Cir. 1992). The acquisition of land can, however, play a critical role in mitigating any environmental effects of the disposal.

184. *See, e.g.*, Nat'l Forest Pres. Grp. v. Butz, 485 F.2d 408, 411 (9th Cir. 1973) ("Defendants . . . 'doubt' whether any [environmental impact] statement was required at all . . . ."); discussion *infra* Parts V.B–C, VI.A.

185. 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. §§ 1502.16, 1508.8(b) (2013) (defining the term "effects" as including both "direct effects" and "indirect effects, which are caused by the action and are later in time . . . , but are still reasonably foreseeable").

of the federal action—including those resulting from the future use of the federal land.[187]

B. *National Forest Preservation Group v. Butz*

The seminal case on this matter is *National Forest Preservation Group v. Butz*, which rejected the notion that "the mere shuffling of titles could have no significant impact on the environment": "While the federal defendants are not themselves planning to take action 'significantly affecting the quality of the human environment,' 42 U.S.C. § 4332[(2)](C), the private defendants plan such action, and the exchange is an act without which such action could not be taken."[188]

Looking to the Public Land Law Review Commission's conclusion that the public has important interests in the "proper use of land sold by the Federal Government" and its recommendation that the Agencies include deed restrictions on future uses of the land if necessary to protect those interests,[189] the court went further:

> Nor would compliance with NEPA be excused by the ignorance of the federal authorities prior to the exchange of the plans the private party may have for the land he will receive. The short answer is that Congress has imposed an affirmative duty on the federal party to the exchange to receive assurances of the plans of the private developer prior to the exchange.[190]

186. *See* 40 C.F.R. § 1508.7 (2013) ("Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.").

187. The requirement to evaluate the impacts of a land conveyance attaches even where—unlike the case of the Forest Service and BLM—an agency is statutorily barred from restricting the future use of the land. *See* Conservation Law Found. v. Gen. Servs. Admin., 707 F.2d 626, 633 (1st Cir. 1983) (holding that the General Services Administration must evaluate site-specific development plans—even if speculative—in determining if a federal land conveyance would have a significant adverse effect on the environment and is in the public interest, even though it lacks authority to impose restrictions on future use of that land).

188. *Butz*, 485 F.2d at 411; *see also* Kleppe v. Sierra Club, 427 U.S. 390, 400 (1976) (recognizing that BLM and Forest Service actions that allow private actions to occur at some point must be analyzed). The NEPA regulations (which were issued more than five years after the *Butz* decision) are in accord, stating that the term "[m]ajor Federal action includes actions . . . which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18; *accord* National Environmental Policy Act—Regulations, 43 Fed. Reg. 55,978, 56,004 (Nov. 28, 1978). The impacts of issuing title to federal land are "potentially subject to Federal control and responsibility" not only because the Agencies can refuse to consummate an exchange, but also because they can control the non-federal purchaser's use of the federal parcel through restrictions.

189. *See Butz*, 485 F.2d at 412; *see also* discussion *supra* Part IV.A (discussing the relevant recommendations and conclusions of the Public Land Law Review Commission).

190. *Butz*, 485 F.2d at 412.

Other courts have put some outside limits on the Agencies' duty to determine and evaluate the non-federal party's future plans for the land they receive in an exchange. For example, the Agencies need not consider the impacts from subsequent purchasers' activities that were not foreseeable at the time of the analysis.[191] The Agencies are not required to evaluate a "worst-case" development scenario,[192] although doing so may overcome uncertainty regarding the environmental impacts of future development.[193] The Agencies can also properly rely on state and local regulations and likely zoning in forecasting future development,[194] but they must "take the requisite 'hard look' at well-recognized scenarios that would potentially deviate from" the standard state or local regulation and zoning forecast.[195]

Fundamentally, the touchstone is whether the future use of the federal land is "reasonably foreseeable," rather than "highly speculative."[196] When information regarding future development is incomplete or unavailable, yet "essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant," the Agency has a responsibility to obtain and evaluate the information for an EIS.[197] If it cannot, it must use "theoretical approaches or research methods" to evaluate impacts.[198] As one might imagine, evaluating indirect effects and the cumulative impact of an exchange is difficult and complex. This

191. *See* Lockhart v. Kenops, 927 F.2d 1028, 1035 (8th Cir. 1991) (stating that when conducting an exchange, the Forest Service "need not consider the possible impact of use by hypothetical subsequent purchasers. Once the land passes into private hands, later sales are no longer subject to NEPA").

192. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354–56 (1989).

193. *See, e.g.*, Lodge Tower Condo. Ass'n v. Lodge Props., Inc., 880 F. Supp. 1370, 1384 (D. Colo. 1995) (finding that the Forest Service's NEPA analysis was sufficient where it assumed a more intensive use of the conveyed federal land than was likely to actually occur), *aff'd*, 85 F.3d 476 (10th Cir. 1996).

194. *See id.*

195. *See, e.g.*, City of Williams v. Dombeck, 151 F. Supp. 2d 9, 21 (D.D.C. 2001) (zoning ordinance prohibiting groundwater use during construction on exchanged federal land did not excuse the Forest Service from taking a hard look at the possible impacts from surface water use during construction or from surface and groundwater use after construction); Greer Coal., Inc. v. U.S. Forest Serv., No. CV 06-0368-PHX-MHM, 2007 WL 675954, at *4 (D. Ariz. Mar. 1, 2007); *see also id*. at *6 ("the Forest Service must not only look at the development scenario it believes most applicable, but also other reasonably foreseeable scenarios with potentially differing environmental impacts").

196. 40 C.F.R. § 1508.8(b) (2013); *Robertson*, 490 U.S. at 356.

197. 40 C.F.R. § 1502.22(a); *see* Shoshone-Bannock Tribes of the Fort Hall Reservation v. U.S. Dep't of the Interior, No. 4:10-CV-004, 2011 WL 1743656, at *9–10 (D. Idaho May 3, 2011).

198. 40 C.F.R. § 1502.22(b)(4).

complexity makes the analyses ripe for legal challenges. But the Agencies possess the tools to limit—even eliminate—the uncertainty, complexity, and vulnerability of such analyses by limiting the potential future uses of the land they convey.

C. *Muckleshoot Indian Tribe v. U.S. Forest Service*

Muckleshoot Indian Tribe v. U.S. Forest Service illustrates the value of use restrictions and the potential consequences of ignoring them.[199] The case involved a large land exchange with the Weyerhaeuser Corporation to consolidate checkerboarded land in Washington's Mt. Baker-Snoqualmie National Forest.[200] Negotiations began in the mid-1980s, and the Forest Service issued an EIS for the exchange in 1996 that included a no action alternative and two exchange alternatives.[201]

The Forest Service ultimately settled on a modified alternative that, among other things, removed an important tribal site from the conveyance to Weyerhaeuser.[202] In 1998, the Forest Service conveyed 4362 acres comprised mostly of old growth forest—including portions of the National-Register-eligible Huckleberry Divide trail and other sites that were historically and culturally important to the Muckleshoot Indian Tribe[203]—subject to a reservation of a portion of any future royalties Weyerhaeuser might receive from mineral development.[204] In exchange, Weyerhaeuser conveyed 30,253 acres "that were, for the most part, heavily logged and roaded," and donated nearly 2000 acres to the Forest Service.[205]

199. 177 F.3d 800 (9th Cir. 1999).

200. *Id.* at 803; *see also* discussion *supra* Part II.A, C (describing the railroad land grants and the land management problems created by the resulting checkerboard of landownership).

201. *Muckleshoot*, 177 F.3d at 803. One alternative proposed transferring 6273 acres comprised primarily of old growth forest in exchange for 32,010 acres of mostly cut-over Weyerhaeuser land. In the second exchange alternative, Weyerhaeuser would retain the mineral rights to the land transferred to the Forest Service, but would donate approximately 2000 acres of its land to the Forest Service. *See id.* at 804 n.1.

202. *See id.* at 804. The final decision removed approximately 1600 acres from the conveyance to Weyerhaeuser and made a few other modifications to the second exchange alternative. *See id.* at 804 n.2. Included in the 1600 acres was land around Mule Springs, a sacred site for the Muckleshoot. *See id.*; *see also* Randel Hanson & Giancarlo Panagia, *Acts of Bureaucratic Dispossession: The Huckleberry Land Exchange, the Muckleshoot Indian Tribe, and Rational(ized) Forms of Contemporary Appropriation*, 7 GREAT PLAINS NAT. RESOURCES J. 169, 183, 185–86 (2002).

203. The trail is "an important tribal ancestral transportation route." *Muckleshoot*, 177 F.3d at 807; *see also* Hanson & Panagia, *supra* note 202, at 185–90 (describing the cultural and religious importance of the sites).

204. *See Muckleshoot*, 177 F.3d at 804.

205. *Id.*

The court rejected the adequacy of the EIS on multiple grounds, in significant part focusing on the fact that the Forest Service did not adequately consider using deed restrictions to avoid the adverse impacts of the exchange on natural and cultural resources. The court held that the Forest Service failed to meet its obligations under the NHPA to minimize the effects of the exchange on the historically and culturally important features of the Huckleberry Divide Trail.[206] The court faulted the Forest Service for rejecting an easement or covenant to address the adverse effects that Weyerhaeuser's foreseeable logging operations would have on the trail, noting that the NHPA regulations "suggest that when federal land with historic properties is sold or transferred, this 'adverse effect' becomes 'not adverse' if adequate restrictions or conditions are included to preserve the property's significant historic features."[207]

The court also rejected the Forest Service's EIS because it failed to evaluate a reasonable range of alternatives, pointing out that the Agency refused to fully consider an alternative that "would have placed deed restrictions on the land traded to Weyerhaeuser, requiring that the lands be managed under National Forest Service standards, rather than allowing Weyerhaeuser to log the land pursuant to the less stringent standards of Washington state law."[208] Relying on the Agency's regulations stating that the Forest Service "shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate,"[209] the court held that "[a] detailed consideration of a trade involving deed restrictions or other modifications to the acreage involved is in the public interest and should have been considered."[210] Lastly, the court held that the Forest Service failed to adequately analyze the foreseeable environmental impacts of Weyerhaeuser's future logging operations on the watershed and other natural resources in the area.[211]

On remand, the Agency had to start again with exchange negotiations, scoping, public comment, and drafting a supplemental and then final

206. *Id.* at 808. The Forest Service instead had proposed to map and photograph the trail. *Id.*

207. *See id.* at 813 n.6 (citing 36 C.F.R. § 800.9(c)(3)); *see also id.* at 808–809. The Forest Service argued that it would be "too expensive and impractical to monitor Weyerhaeuser's land practices," and while the court specifically did not decide whether those reasons were valid, it left the Agency with virtually no choice but to devise protections for the historic resources. *Id.* at 808–09.

208. *Id.* at 813.

209. 36 C.F.R. § 254.3(h) (1999); *accord* 36 C.F.R. § 254.3(h) (2013).

210. 177 F.3d at 814.

211. *Id.* at 814.

supplemental EIS that fully considered the use restrictions.[212] More than twenty years after the beginning of the exchange negotiations, and seven years after it originally issued its EIS, the Forest Service decided to buy back from Weyerhaeuser (for $6 million) about 750 acres of old growth forest and portions of the historically and culturally important trail, along with a 400-foot protective easement for other portions of the trail that were conveyed to Weyerhaeuser.[213] The outcome was remarkably similar to an alternative it had rejected earlier, in part because it did not want to bear the cost of reserving a protective easement for the trail.[214]

The significant financial, institutional, and political expense of the Huckleberry Exchange litigation and resulting reparations could have been avoided had the Forest Service fully considered and included use restrictions in the first place. Whether *Muckleshoot* will come to be relied on as a broadly applicable precedent or distinguished as the product of "'very rare' circumstances,"[215] the case is a striking illustration of how effective use restrictions could be in successfully implementing a land exchange. An easement or covenant protecting the trail and some of the natural resources not only would have served the public interest and saved tax payers $6 million, but also likely would have satisfied the court that the Agency had mitigated any adverse effects, adequately considered a reasonable range of alternatives, and disclosed the (substantially reduced) environmental impacts.

VI. USING RESTRICTIONS TO NAVIGATE THE LAND EXCHANGE PROCESS, ADMINISTRATIVE REVIEW, AND THE COURTS

The *Butz* and *Muckleshoot* cases illustrate the need for and potential power of use restrictions when evaluating and defending land exchanges. This Part summarizes how use restrictions can help the Agencies to more successfully and efficiently navigate the key elements of the land

212. Hanson & Panagia, *supra* note 202, at 193–201 (detailing the background and response to the litigation).

213. *See* Hanson & Panagia, *supra* note 202, at 195. The final supplemental EIS stated that "[n]o timber harvest, road construction, or motorized use would occur within the trails easement." *Id.* at 200.

214. *Id.* at 201 n.267.

215. City of Sausalito v. O'Neill, 386 F.3d 1186, 1208 (9th Cir. 2004) (explaining that *Muckleshoot's* holding requiring the Forest Service to analyze an alternative that would require legislative action was the result of the "'very rare' circumstances" in that case); *cf.* Letter from Gloria Manning, Appeal Deciding Officer, U.S.D.A. Forest Serv., to Christopher J. Krupp, W. Land Exch. Project (Apr. 8, 2002) (distinguishing the *Muckleshoot* case, but nevertheless upholding an appeal of a land exchange calling for consideration of use restrictions), *available at* http://www.fs.fed.us/land/staff/appeals/2002/021300_0001.htm.

exchange process, including evaluating impacts under NEPA and similar statutes, conducting appraisals, and determining the public interest.

A. Successfully Complying with NEPA and Related Laws

The complexity of complying with NEPA, the ESA, the NHPA, and related laws when processing a land exchange will often hinge on identifying and evaluating the impact of the reasonably foreseeable uses of the land that the federal agency is considering conveying. But as a result of the Agencies' policies that strongly discourage use restrictions, the Agencies miss opportunities to make compliance with such laws less complicated, expensive, and vulnerable to legal attack.[216] For example, in the context of NEPA, the strategic use of such restrictions can be critical tools for accomplishing the following successfully: (1) identifying and evaluating the reasonably foreseeable indirect effects; (2) mitigating impacts on the environment, endangered species, and historic and cultural resources; (3) limiting and narrowing the range of alternatives that must be considered; (4) identifying and evaluating the cumulative impact; and (5) using categorical exclusions. Although not described here in any length, similar analyses would demonstrate the value of use restrictions in complying with the ESA, the NHPA, and related laws.

1. Indirect Effects

By restricting the future use of exchanged federal land, the Agencies can substantially narrow the range and intensity of the indirect effects of a land exchange, thereby reducing the complexity of the required analysis and—as the *Muckleshoot* case illustrates—the risk that it will be judged inadequate.[217] The Lyneta Ranches land exchange in California provides another useful example. The BLM proposed to convey 8322 acres of public lands that were scattered among private lands owned by Lyneta Ranches in exchange for 5243 acres of private lands located

216. *Cf.* U.S. GEN. ACCOUNTING OFFICE, *supra* note 174, at 4 (identifying the "inadequate attention that the Forest Service has given to improving the process" as a key cause of the Agency's inefficiencies in complying with NEPA).

217. Unless a use restriction forecloses any effects, the Agencies must still analyze the reduced effects. *See, e.g.*, City of Williams v. Dombeck, 151 F. Supp. 2d 9, 21 (D.D.C. 2001) ("To say the use of this water is 'limited' [by a covenant to use during emergencies] does not suffice as a 'hard look' at the amount of groundwater which is likely to be used during emergencies, nor does it provide an analysis of the impact of the use of that water upon the environment.").

among larger blocks of public lands.[218] The BLM's EA for the exchange only evaluated a no action alternative and the proposed exchange.[219]

The BLM land was subject to frequent flooding, however, and a number of neighbors objected to the exchange because they were concerned that potential private development of the land would displace floodwaters onto their own neighboring land.[220] The BLM responded to those concerns by conducting a hydrologic study, which concluded that floodwater displacement could be mitigated through engineered mitigation measures on the BLM land.[221] The study also identified the potential for adverse impacts to wetlands.[222]

Lyneta Ranches responded to these findings with a plan to implement a number of engineered measures to mitigate the potential for floodwater displacement.[223] At the same time, the BLM decided to impose two deed restrictions, both of which were mandated by executive orders to protect floodplains and wetlands.[224] The first deed restriction required Lyneta Ranches to either maintain the existing wetlands or implement specific measures to mitigate wetland impacts. The second limited development in the floodplain to agricultural uses. However, the BLM did not require Lyneta Ranches to implement any of the engineered mitigation measures that the hydrologic study had discussed or that Lyneta Ranches had volunteered to address potential floodwater displacement.[225]

On administrative appeal, the BLM's consideration of the impacts of the exchange on wetlands (which had been mitigated with a deed restriction) was found to be sufficient.[226] Fortuitously, a challenge to the Agency's evaluation and consideration of the likely impacts of potential future development on wildlife habitat was also rejected because the deed restriction protecting those wetlands happened to have sufficiently limited the potential for adverse impacts to wildlife habitat.[227]

218. *See* Mendiboure Ranches, Inc., 90 IBLA 360, 360 (1986).

219. *See id.* at 361.

220. *See id.* at 361–62.

221. *See id.* at 363.

222. *See id.* at 367–68.

223. *See id.* at 362.

224. *See id.* at 363; *see also supra* note 151 (describing the executive orders).

225. *See Mendiboure Ranches*, 90 IBLA at 360. The restrictions, which were published in the Federal Register, cited both the executive orders and Section 206 of FLPMA. Realty Action; Exchange of Public Lands; Lassen and Modoc Counties, CA; Correction, 49 Fed. Reg. 50,792, 50,792 (Dec. 31, 1984).

226. *See Mendiboure Ranches*, 90 IBLA at 370–71.

227. *See id.* at 371 ("By providing for the maintenance of a wetlands area of at least 320 acres through a patent restriction, BLM has taken measures to protect wildlife within the selected lands."); *see also* City of Williams v. Dombeck, 151 F. Supp. 2d 9, 19–21 (D.D.C. 2001) (covenant limiting

However, the unanimous panel found that Executive Order 11,988[228] required more specific protections for the floodplains and that the Agency had neither ensured that the floodplain values would be protected nor evaluated the potential benefits of the engineered measures that were proposed to mitigate the impacts on those values.[229] As a result, the panel remanded the case "with directions to evaluate the effects of the proposed exchange on the floodplain . . . and to prepare an appropriate restriction in the deed of conveyance delineating measures for floodplain preservation."[230]

By using restrictions in the Lyneta Ranches exchange, the BLM successfully narrowed the potential indirect effects of the exchange to the point that its evaluation and mitigation of impacts on wetlands and wildlife was upheld. Had the BLM also included a restriction requiring Lyneta Ranches to implement the engineered floodplain mitigation measures that already had been identified and proposed, it likely would have succeeded in complying with NEPA and the executive orders with a hydrologic study and a simple environmental assessment that included only one action alternative.[231]

2. Mitigation

Mitigating the impacts of agency actions is a key purpose of NEPA and a requirement of the NHPA, the ESA, and other federal laws and policies.[232] The Agencies would benefit from seriously considering use restrictions as part of land exchanges not only as a potential *requirement* for complying with such laws, but also as an *opportunity* to make compliance less costly and uncertain.

While NEPA technically does not impose an obligation on the Agencies to actually mitigate the adverse environmental impacts of an

future groundwater use on exchanged land to emergencies obviated analysis of groundwater impacts from non-emergency use).

228. *See supra* note 151.

229. *See Mendiboure Ranches*, 90 IBLA at 369–70.

230. *Id.* at 370.

231. Courts understandably have been skeptical about relying on the stated intentions of purchasers, especially when it comes to mitigating environmental impacts. *See infra* note 237.

232. *See supra* notes 169–80 and accompanying text; *see also* discussion *supra* Part V.C (discussing the *Muckleshoot* case). Section 7 of the ESA generally requires the Agencies to avoid and minimize the effects (direct and indirect) of "any action authorized, funded, or carried out by" the Agencies (together with the cumulative effects of future state and private actions) that may "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *See, e.g.*, 16 U.S.C. § 1536(b)(3)(A) (2012); 50 C.F.R. §§ 402.02, 402.14 (2013).

exchange (their charge is merely to identify, analyze, consider, and explain),[233] the case law amply demonstrates the peril of failing to take reasonable steps to mitigate impacts. A land exchange is likely to be controversial if its impacts are ignored, and any court that is skeptical of the public interest merits of an exchange has ample opportunity to confine the Agency in the labyrinth of the NEPA process.[234]

NEPA does impose a concrete requirement to undertake a detailed EIS whenever a land exchange may potentially have significant environmental effects.[235] The Agencies can avoid the significant additional time, expense, and risks that accompany preparing an EIS if they commit to avoiding or mitigating those effects with use restrictions. By doing so, they can comply with NEPA by completing a shorter and less complex EA and issuing a finding of no significant impact ("FONSI")—a process is known as a "mitigated FONSI."[236] The Council on Environmental Quality's guidance emphasizes that a mitigated FONSI is appropriate "when the NEPA process results in *enforceable* mitigation measures" and "an agency commits to perform or ensure the performance of them."[237] Accordingly, use restrictions provide a solid basis for a mitigated FONSI.[238]

233. *See* discussion *supra* Part V.A; *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–51 (1989); 40 C.F.R. § 1505.2(c) ("[Agencies must s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not."). *But see* Grindstone Butte Project v. Kleppe, 638 F.2d 100, 103 (9th Cir. 1981) ("[I]n exercising discretion to impose terms and conditions upon rights-of-way granted over federal lands, the Secretary must comply with NEPA's mandate to protect the environment.").

234. *See, e.g.*, Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800 (9th Cir. 1999); San Luis Valley Ecosystem Counsel v. U.S. Forest Serv., 2007 WL 1463855, at *10 (D. Colo. May 17, 2007).

235. *See supra* note 168 (describing responsibility and citing authorities for preparing an EIS).

236. *See id*. *See generally* Memorandum from Nancy H. Sutley, Council on Env'tl Quality, Appropriate Use of Mitigation and Monitoring the Appropriate Use of Mitigated Findings of No Significant Impact (Jan. 14, 2011), *available at* http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

237. Sutley, *supra* note 236, at 7 & n.18. Relying on statements of intention by the non-federal party to an exchange, for example, is not likely to pass muster, as there remains a high degree of uncertainty whether the mitigation will be carried out and effective. *See, e.g.*, Nat'l Wildlife Fed'n, 82 IBLA 303, 315 (1984) (rejecting proposed land exchange justified in part on stated intentions of the purchaser: "The intentions of the potential owner, whoever that might be, do not ensure proper land use and protection of the public interest, however. What is the remedy for the public if the land is conveyed and the owner or his grantee sodbusts the entire acreage? Clearly, without some reservation in the deed there is none. Assurances of the potential owner do not ensure proper land use and protection of the public interest. The State Director should have studied the possibility of proposing conditions or covenants to guarantee protection of wildlife and recreational values in the land."); Shoshone-Bannock Tribes of the Fort Hall Reservation v. U.S. Dep't of the Interior, No. 4:10-CV-004-BLW, 2011 WL 1743656 (D. Idaho May 3, 2011) (rejecting an EA for a land exchange where the state agency retained the right to approve a waste disposal plan for the

To illustrate, in *Shasta Resources Council v. Department of the Interior*, the BLM proposed a land exchange that would have disposed of property along a creek that a biological assessment determined contained "marginal" habitat for salmon and steelhead trout.[239] Nevertheless, the California Department of Fish and Game was "concerned that future development [of the Federal Parcel would] mobilize and deposit sediment in the spawning gravel placed at the Salt Creek and Sacramento River confluence."[240] To mitigate these potential effects on the stream, the BLM took the uncommon step of imposing a covenant on the federal land that prohibited development within a certain distance from the stream and limited bridge construction over it. The court upheld the BLM's EA and FONSI, finding that "[a]lthough BLM acknowledged that development on the Federal Parcel may pose some risk to Salt Creek fisheries, the agency took steps to mitigate this risk through mandatory setback covenants and consultation with other expert agencies."[241]

3. Range of Alternatives

The "heart" of an environmental analysis is the evaluation of alternatives to the proposed action.[242] The Agencies are required to evaluate "all reasonable alternatives," or at least a reasonable range of them.[243] An EA need only contain "brief discussions" of alternatives and their impacts, while an EIS must "rigorously explore" alternatives and

exchanged land and the EA concluded that future effects of waste disposal were too uncertain to analyze in detail); Greer Coal., Inc. v. U.S. Forest Serv., No. CV 06-0368-PHX-MHM, 2007 WL 675954 (D. Ariz. Mar. 1, 2007) (rejecting Forest Service land exchange EA where the Forest Service relied on local zoning and the non-federal party's stated intention not to develop the land, in part because local zoning suffered from a loophole that allowed for adverse environmental effects on groundwater); W. Land Exch. Project v. Bureau of Land Mgmt., 315 F. Supp. 2d 1068, 1092–94 (D. Nev. 2004) (holding that a mitigated FONSI for land disposal was inadequate where mitigation measures were merely a commitment to develop a plan).

238. *See* Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1121 (9th Cir. 2000) (upholding mitigated FONSI where, even though a mitigation plan was not completely developed, the Army Corps included conditions in its permit requiring approval of the mitigation plan based on preexisting standards before any development could occur).

239. 629 F. Supp. 2d 1045, 1064 (E.D. Cal. 2009).

240. *Id.* (alteration in original).

241. *Id.* at 1066; *see also supra* Part VI.A.1 (discussing the Lyneta Ranch Exchange, Mendiboure Ranches, Inc., 90 IBLA 360 (1986)).

242. 40 C.F.R. § 1502.14 (2013); *accord* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,028 (Mar. 16, 1981).

243. *See, e.g.*, 40 C.F.R. § 1502.14; Natural Res. Def. Counsel v. Morton, 458 F.2d 827, 834–38 (D.C. Cir. 1972); City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997).

their impacts.[244] In either case, the wider the range of alternatives that must be considered and analyzed, the greater the potential for increased costs, complexity, and litigation risk associated with the Agency's environmental analysis.

The Agencies should "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of their actions upon the quality of the human environment."[245] Accordingly, whenever the reasonably foreseeable future use of federal land may have significant adverse impacts on the environment, the Agencies must evaluate one or more alternatives that include use restrictions to mitigate those impacts,[246] even if they ultimately reject them.[247]

However, beyond the Agencies' black letter responsibility to evaluate use restriction alternatives, the Agencies can benefit from strategically employing them to successfully narrow the range of alternatives that must be considered.[248] The range of alternatives the Agencies must consider narrows as the scope and intensity of the environmental impacts of the proposed action become less substantial.[249] Thus, by using restrictions to reduce or mitigate the environmental impacts associated with future development of conveyed federal land (as discussed above),[250] the Agencies can narrow the range of alternatives they must analyze.

244. 40 C.F.R. §§ 1508.9(b), 1502.14(a).

245. *Id.* § 1500.2(e).

246. *See Id.* § 1502.14 ("agencies shall . . . (f) Include appropriate mitigation measures not already included in the proposed action or alternatives"); *see also supra* Part V.C (discussing the *Muckleshoot* case).

247. *See, e.g.*, Greer Coal., Inc. v. U.S. Forest Serv., No. CV 06-0368-PHX-MHM, 2007 WL 675954, at *6 (D. Ariz. Mar. 1, 2007) (Forest Service's consideration of range of alternatives that included use restrictions was adequate, even though the Agency ultimately rejected those alternatives); *cf.* Shasta Res. Council v. U.S. Dep't of the Interior, 629 F. Supp. 2d 1045, 1053–54 (E.D. Cal. 2009) (BLM not required to conduct detailed study of easements and deed restriction alternative where their use would be inconsistent with the resource management plan, would not demonstrably further the Agency's policies, and would be unlikely to be implemented). After all, "NEPA merely prohibits uninformed—rather than unwise—agency action." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989). It should be kept in mind, however, that "unwise" agency action still may be subject to review in the context of FLPMA's public interest determination. *See* discussion *infra* Part VI.C.

248. *Cf.* U.S.D.A. FOREST SERV., *supra* note 173 (discussing the difficulties involved in determining a reasonable range of alternatives).

249. *See, e.g.*, Sierra Club v. Espy, 38 F.3d 792, 803 (5th Cir. 1994); Earth Island Inst. v. U.S. Forest Serv., 697 F.3d 1010, 1021–23 (9th Cir. 2012).

250. *See supra* Part VI.A.1–2.

The range of alternatives in an environmental analysis also can be limited by narrowing the Agency's statement of purpose and need for the proposed action.[251] While the Agencies have broad discretion in defining the purpose and need, courts will not uphold a purpose and need statement that is unreasonably narrow[252] or that does not comport with congressional and agency policy.[253] For example, in *National Parks and Conservation Association v. BLM*, the Agency proposed a land exchange to provide land to a company that wanted to transform a mine site into a landfill.[254] The BLM stated the purpose and need for the project primarily in terms of benefiting the company.[255] As a result, the BLM analyzed five action alternatives, all of which were relatively minor variations of the proposed landfill development.[256] The court held that "[a]s a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives."[257] While the purpose and need statement for a land exchange may properly consider the goals of the non-federal party, it must focus on the purpose and need of *the agency* in serving the public interest.[258]

The court's reasoning illustrates that the more substantial the public interest goals for the disposal of the federal land, the more likely it is that the Agencies will be able to successfully narrow the range of alternatives they must consider. For example, if federal land is to be conveyed to a private party who may develop the land without any responsibility to the public interest, the only potentially valid public purpose in conveying the land is likely to be eliminating the Agency's cost of continuing to manage it, and there likely would be a range of alternatives to such an exchange that could achieve that goal.[259] By including use restrictions to

251. *See* 40 C.F.R. § 1502.13 (2013).

252. *See, e.g.*, Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 814 n.7 (9th Cir. 1999) (a statement of purpose and need that would limit the alternatives to "land-for-land exchanges . . . would certainly be too narrow"); *see also* Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 666–67 (7th Cir. 1997).

253. *See* Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 1783 (2011).

254. *See id.* at 1062–63. Like many exchanges, the private party initially proposed the exchange to the BLM. The company's plan was "to develop the largest landfill in the United States" next to Joshua Tree National Park. *Id.*

255. *Id.* at 1071.

256. *See id.* at 1063.

257. *Id.* at 1072.

258. *See id.*

259. The exchange therefore would hinge almost exclusively on achieving the goals associated with the Agency's acquisition, but those goals too might be achieved by a number of less desirable

promote the public interest, however, a stronger agency purpose and need for the conveyance of federal land can be articulated and a narrower range of alternatives justified.

Whether restrictions are used to narrow the range of alternatives by reducing the intensity of the environmental impacts or strengthening the Agency and public purpose, the Agencies can benefit by reducing the complexity and costs of their environmental analyses and their litigation risk.

4. Cumulative Impact

Analyzing the "cumulative impact" of an action can be as—or more—challenging than evaluating indirect effects.[260] When considering a land exchange, the Agencies must evaluate "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts."[261] A "'[c]umulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[262]

Given the growing land adjustment needs and ongoing management actions on and around much of the Agencies' landholdings, it is increasingly important for the Agencies to manage the impacts of their land exchanges. If the Agencies fail to control the impacts of their various land exchanges over time, then the accumulating impacts are likely to result in significant challenges. First, those impacts may accumulate to the point that the cumulative impact analysis that is required for subsequent projects becomes very complex and onerous. Second, those analyses are increasingly likely to reveal significant cumulative impacts that demand the preparation of an EIS (rather than an EA). Third, the Agencies may find it increasingly difficult to justify their projects in light of their public interest and other responsibilities under FLPMA, the ESA, and the NHPA, for example.

or viable alternatives. *See, e.g.*, Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 814 & n.7 (9th Cir. 1999) (finding that the EIS should have evaluated purchasing the private land instead of conducting an exchange).

260. *See* COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, at v (1997), *available at* http://ceq.hss.doe.gov/nepa/cce nepa/exec.pdf.

261. 40 C.F.R. § 1508.27(b)(7) (2013); *see also id.* § 1508.25(a)(2).

262. *Id.* § 1508.7.

Cumulative impact management may be especially important where a series of land exchanges are expected in a single area, or where the potential impacts associated with the development or management of conveyed federal land may exacerbate the impacts of future federal land management projects in the same area.[263] By containing the uncertainty, complexity, and impacts associated with the future use of conveyed land, the Agencies can reduce the burdens, complexities, and limitations associated with the cumulative impacts of future agency actions.

5. Categorical Exclusions

The Forest Service has determined that a category of land exchanges in which the "resulting land uses remain essentially the same" generally will not have a significant impact on the environment, and the Agency accordingly has established a "categorical exclusion" from the requirement to develop an EA or EIS under NEPA for such exchanges.[264] The Agency's regulations illustrate a few qualifying examples, including conveyances to "a State agency, local government, or other non-Federal party (individual or organization) with similar resource management objectives and practices."[265]

This categorical exclusion authority holds considerable promise for substantially decreasing the time and expense of implementing qualifying land exchanges.[266] Despite that promise, the authority is rarely used. This is not surprising given the Agency's policies that

263. *See, e.g.*, Hall v. Norton, 266 F.3d 969, 978 (9th Cir. 2001) (remanding for consideration of whether the BLM assessed the impact of future development of exchanged federal land on air quality not only from the proposed land exchange, but also from the potential conveyance of other federal land in the area that had been identified for disposal); Hall v. Norton, 93 F. App'x 105, 107 (9th Cir. 2004) (upholding BLM's remand analysis where it evaluated "the potential impact of all reasonably foreseeable public and private land development in the Las Vegas Valley, going so far as to assume that 25,540 acres of public lands designated as 'likely to be disposed' would actually be disposed"); *see also Muckleshoot*, 177 F.3d at 809–12 (faulting the Forest Service for failing to adequately evaluate the cumulative impact associated with a past and a future land exchange in the same area as the proposed land exchange).

264. *See* 36 C.F.R. § 220.6(d)(7) (2013); *see also* 40 C.F.R. § 1508.4 (defining "categorical exclusion"). The BLM has not established any categorical exclusions for land exchanges. *See* GAO 2009, *supra* note 26, at 7 n.12.

265. *See* 36 C.F.R. § 220.6(d)(7).

266. *See generally* Memorandum from Nancy H. Sutley, Council on Envtl. Quality, Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act 3 (Nov. 23, 2010), *available at* http://ceq.hss.doe.gov/ceq_regulations/NEPA_CE_Guidance_Nov232010.pdf; *see also* Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1024 (10th Cir. 2002) (upholding use of categorical exclusion for interchange of mineral fraction fragments).

discourage officials from using restrictions to ensure that the resulting land uses would, in fact, remain essentially the same.[267]

For example, without use restrictions, the Forest Service cannot categorically exclude a land exchange that likely would result in the development of a hotel and conference center on the federal land, even if the land already contained a parking lot and tennis courts and was in an area designated by the Forest Service for high density use and development: the specific use would change.[268] Nor can it use the categorical exclusion for an exchange with a timber company conveying land already designated by the Forest Service for timber management: the company's timber management practices may differ from the Forest Service's.[269] The Forest Service also likely cannot rely on a categorical exclusion for a land exchange with a mining company, even if the mining company already has plans and rights to mine the federal land: federal oversight could have an effect on those plans.[270]

By employing restrictions that objectively demonstrate to the public and the courts that the resulting land uses will, in fact, "remain essentially the same,"[271] the Forest Service and the BLM will have more

267. Courts generally will scrutinize a decision to rely on a categorical exclusion and require an adequate explanation of and convincing statement for relying on it. *See, e.g.*, Alaska Ctr. for Env't v. U.S. Forest Serv., 189 F.3d 851, 857 (9th Cir. 1999). *But see Citizens' Comm. to Save our Canyons*, 297 F.3d at 1023 (applying a deferential standard). Because of the extensive laws and policies governing Forest Service and BLM land management, those agencies have a higher burden to show that the land use will remain essentially the same than do some other federal agencies that acquire and dispose of property pursuant to more flexible legal and policy regimes. *Cf.* Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337, 1343–44 (9th Cir. 1995) (upholding the Farmers Home Administration's decision to dispose of land it acquired by default without conducting a NEPA review because the use of the land would not change).

268. *See* Restore: The N. Woods v. U.S. Dep't of Agric., 968 F. Supp. 168, 176–78 (D. Vt. 1997).

269. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., REP. NO. 08601-27-SF, W. REGION AUDIT REPORT: FOREST SERV. NAT'L LANDOWNERSHIP ADJUSTMENT TEAM 5 (2002) ("the use of the Federal land after the exchange would not remain 'essentially the same' because the timber management practices of private companies differed from the timber management practices of the FS").

270. In *Center for Biological Diversity v. U.S. Dep't of the Interior*, the court considered an EIS that failed to compare the environmental impacts of mining operations conducted on private land with the likely impacts of mining that would be conducted on the land if it were retained by the BLM. 623 F.3d 633, 640 (9th Cir. 2010). Despite the fact that the mining company had detailed plans and rights to mine the BLM land under the Mining Law of 1872, the court rejected the BLM's argument that the foreseeable mining use would remain essentially the same regardless of whether it remained under the management of the BLM or was conveyed into private ownership. *See id.* at 641–46. The case provides a striking example of the level of scrutiny that courts are likely to impose on claims that the future use of federal land is likely to remain the same after it is conveyed into non-federal ownership.

271. *See* 36 C.F.R. § 220.6(d)(7) (2013).

opportunities and success taking advantage of the significant benefits that the categorical exclusion offers.[272]

B. Successfully Appraising Federal Land for its "Highest and Best Use"

FLPMA generally provides that the market value of the federal lands and non-federal lands to be exchanged either "shall be equal" or "shall be equalized by the payment of money."[273] To estimate the market value, the Agencies generally must "[d]etermine the highest and best use of the property"[274] based on "an appraiser's supported opinion of the most probable and legal use of a property."[275]

Determining the "most probable and legal use of a property" conveyed into non-federal ownership usually is no easier for an appraiser than it is for the Agencies, and it too is often a basis for challenge.[276] Given the occasionally scandalous history of federal land exchange appraisals,[277] courts understandably are attuned to potential problems with appraisals and they have been willing to invalidate them when it appears that the public may not be getting fair value.[278] There are cases where appraisals

272. Where an exchange is with a non-federal party that has "similar resource management objectives and practices," *id.*, the market value of restrictions designed to ensure that the resulting land uses will remain essentially the same are likely to be low and any objections by the non-federal party relatively minimal, *see supra* note 237 (describing courts' skepticism about relying on the stated intentions of the non-federal party regarding development or mitigation plans); *infra* note 352 (discussing the low market value of restrictions on uses that already are restricted by regulation).

273. 43 U.S.C. § 1716(b) (2012).

274. 36 C.F.R. § 254.9(b)(1)(i); 43 C.F.R. § 2201.3-2(a)(1) (2013); *see also* 36 C.F.R. § 254.3(c) ("An exchange of lands or interests shall be based on market value as determined by the Secretary through appraisal(s), through bargaining based on appraisal(s), through other acceptable and commonly recognized methods of determining market value, or through arbitration."); *accord* 43 C.F.R. § 2200.0-6(c).

275. *See* 36 C.F.R. § 254.2 (defining "[h]ighest and best use"); *accord* 43 C.F.R. § 2200.0-5(k). The Agencies' regulations define highest and best use as the "most probable" use of land, but the Uniform Standards require broader consideration based on the "reasonable probability" of a given use. UNIFORM APPRAISAL STANDARDS, *supra* note 6, at 34, 66, 82. FLPMA specifically requires the Agencies' regulations "to reflect nationally recognized appraisal standards, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisitions." 43 U.S.C. § 1716(f); *accord* 36 C.F.R. § 254.9; 43 C.F.R. § 2201.3.

276. *See, e.g.*, Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1184 (9th Cir. 2000) ("In general, if a proposed use is reasonable and not merely speculative or conjectural, an element of risk is an insufficient basis upon which to exclude that use from consideration. The case law is replete with examples of highest and best uses for which various contingencies must occur prior to their effectuation.").

277. *See* discussion *supra* Part III.A.2.

278. *See, e.g., infra* note 280. *But see* Comm. of 100 on Fed. City v. Hodel, 777 F.2d 711, 720 n.3 (D.C. Cir. 1985) (applying a "highly deferential" standard under the APA to the National Park Service's determination that the values of lands proposed for exchange were "approximately equal").

have overestimated the value of the lands to be acquired by the federal Agencies.[279] However, it is the appraisal of the federal land to be conveyed by the Agencies that often runs into trouble, and this trouble is frequently based on the difficulty of accounting for the future use of that land.[280]

Agency policymakers have made their line officers keenly aware that use restrictions may reduce the market value of federal land.[281] And there is no doubt that some use restrictions (such as some conservation easements) can be notoriously difficult to appraise,[282] and their use may make an appraisal more vulnerable as a result. But when the highest and best legal use of the federal land appears relatively certain, and the appraisal appears to fairly estimate the value of that use, then the appraisal is likely to be upheld. Because use restrictions are a powerful tool for reducing the uncertainty regarding the future use of the land, they can produce a more defensible appraisal as a significant beneficial byproduct.

It would be inappropriate for the Agencies to reduce the value of federal land with use restrictions merely to facilitate a defensible appraisal, but they should nonetheless be aware of the potential benefit. For example, because the Forest Service generally is precluded from selling western timber into the export market, it must usually rely on the unfamiliar appraisal methods used for timber available for export when conveying land to a timber company.[283] In such a case, the Forest Service may decide to continue to restrict for a period of years the export of timber from the land it proposes to convey in order to ensure a

279. *See, e.g.*, GAO 2000, *supra* note 82, at 17–18.

280. *See, e.g.*, *Desert Citizens*, 231 F.3d 1172 at 1187 ("The government must not wear blinders when it participates in a real estate transaction, particularly if the result, as here, is the transfer of a flagrantly undervalued parcel of federal land to a private party."); Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1067–68 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1783 (2011). In both the *Desert Citizens* and *NPCA* cases, the court set aside the land exchange in part because the appraisal of the federal land was based on an assumed future use that was different from the most likely—and apparently more profitable—use of the land as a landfill. *See Desert Citizens*, 231 F.3d at 1180–87; *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1068–69.

281. *See infra* Part VII.A. The Uniform Appraisal Standards require appraisals to identify and account for zoning and other land use regulations, including deed restrictions. *See* UNIFORM APPRAISAL STANDARDS, *supra* note 6, at 16–17.

282. *See, e.g.*, Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 11–14 (2012).

283. *See* 16 U.S.C. § 620a (2012); OFFICE OF INSPECTOR GEN., *supra* note 269, at 6–7 (2002) (finding that the Forest Service inappropriately relied on its own timber appraisal methodology—which assumes that export is prohibited—instead of relying on private industry's methodology—which assumes that logs could be exported—in appraising federal land for exchange).

continued supply of timber to local mills that the Forest Service relies on for its forest management programs. A byproduct of that restriction might be that the Forest Service relies on its substantial expertise in valuing the timber in accordance with its own methodology.[284] As a result, the appraisal may be more accurate and the courts may afford it greater deference given the agency's level of expertise.[285]

Similarly, the BLM may decide to limit development of a parcel of federal land to a single dwelling in order to mitigate potential impacts on wildlife habitat. If the circumstances included uncertain application of zoning, or uncertain or changing market conditions for more intensive development, for example, the use restrictions might happen to make the appraiser's job of determining "the highest and best use of the property" based on "the most probable and legal use of a property" much easier and more defensible.[286]

C. Ensuring that the Public Interest Will be Well Served

It may be that "NEPA merely prohibits uninformed—rather than unwise—agency action,"[287] but FLPMA imposes a substantive mandate that allows the BLM or Forest Service to go forward with a land exchange only if it "determines that the public interest will be well served by making that exchange."[288] In essence, FLPMA's public interest mandate gives courts some of the very powers they lack under NEPA.

As with their early arguments that land exchanges were not subject to NEPA, the Agencies also have argued that their public interest determinations are not judicially reviewable.[289] A number of early decisions seemed to agree.[290] However, at least since the passage of

284. Another byproduct may be that the Forest Service would receive a lower value for its land (and, as a result, would receive private land of less value in exchange). The Forest Service would get the benefit of its bargain, however, in the form of a more stable local milling infrastructure that could help to increase the quality and reduce the costs of its land management activities.

285. *Cf.* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-1050, INTERIOR'S LAND APPRAISAL SERVICES: ACTIONS NEEDED TO IMPROVE COMPLIANCE WITH APPRAISAL STANDARDS, INCREASE EFFICIENCY, AND BROADEN OVERSIGHT 5 (2006), *available at* http://www.gao.gov/assets/260/252004.pdf (noting that appraisals involving minerals, timber, and water rights "require specialty appraisal skills").

286. *See supra* notes 269–73 and accompanying text.

287. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).

288. 43 U.S.C. § 1716(a) (2012).

289. *See, e.g.*, Lodge Tower Condo. Ass'n v. Lodge Props., Inc., 880 F. Supp. 1370, 1377 (D. Colo. 1995), *aff'd*, 85 F.3d 476 (10th Cir. 1996).

290. *See* Lewis v. Hickel, 427 F.2d 673, 677 (9th Cir. 1970) (concluding in the context of the Agency's *rejection* of a land exchange proposal "that the determination of 'public interest' is one 'by

FLPMA, courts have consistently held otherwise,[291] and it appears that the Agencies have given up on the effort to avoid review.[292]

The notion that deed restrictions can be useful in strengthening a public interest determination for a land exchange was not lost on Secretary of the Interior James Watt and his Deputy, William Horn, when they developed a land exchange in the early 1980s.[293] The exchange was designed to permit oil exploration and development operations within a designated wilderness area inside of the Alaska Maritime National Wildlife Refuge.[294] The proposal was loaded with largely illusory environmental restrictions on the future development of the various refuge lands that were to be exchanged by the parties.[295] But the court in *National Audubon Society v. Hodel* had no trouble seeing through the use restrictions.[296] The court rejected the argument that the Secretary's public interest determination was not subject to judicial

law committed to agency discretion' and therefore unreviewable. Administrative Procedure Act § 10, 5 U.S.C. § 1009 (1964)"); Sierra Club v. Hickel, 467 F.2d 1048, 1053 (6th Cir. 1962) ("[I]f a third person is allowed to litigate the validity of exchanges of land made by the Secretary of Interior, whenever he believes that the Secretary acted improperly, there will be no more exchanges and the action of Congress providing for them will be frustrated.").

291. *See Lodge Tower*, 880 F. Supp. at 1377–78 (ruling that a public interest determination under FLPMA is reviewable; distinguishing pre-FLPMA cases); Nat'l Coal Ass'n v. Hodel, 675 F. Supp. 1231, 1242 (D. Mont. 1987), ("[T]he enumerated factors of § 206 of FLPMA do provide a meaningful standard upon which judicial review may rest."), *aff'd on other grounds sub nom.*, N. Plains Res. Council v. Lujan, 874 F.2d 661 (9th Cir. 1989); Nat'l Audubon Soc'y v. Hodel, 606 F. Supp. 825, 833–35 (D. Alaska 1984) (ruling that the Secretary's determination under the Alaska National Interest Lands Conservation Act's bare "public interest" standard was reviewable). *See generally* COGGINS & GLICKSMAN, *supra* note 110, § 13:33.

292. *Cf.* Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1180 (9th Cir. 2000) (rejecting the BLM's argument that because the plaintiff could have challenged an exchange on the basis that it violated FLPMA's public interest requirement, the court should rule that the plaintiff lacked standing to challenge the land exchange appraisals). *But see Lodge Tower*, 880 F. Supp. at 1377 ("Defendants next urge that there can be no judicial review of the administrative determination that the exchange is in the 'public interest,' because the action 'is committed to agency discretion by law.'").

293. *See Nat'l Audubon*, 606 F. Supp. at 827.

294. *Id.* at 827–29.

295. *See id.* at 829–30, 837–45. The conveyance of the federal land was to be "for fifty years, or so long as commercial oil production activities occur in the Navarin Basin" in exchange for some non-federal interests in another refuge. *Id.* at 827. The authority for the land exchange was the Alaska National Interest Lands Conservation Act, which authorizes non-equal value land exchanges to further its purposes if "the Secretary determines it is in the public interest." 16 U.S.C. § 3192(h) (2012).

296. *Nat'l Audubon*, 606 F. Supp. at 837–45.

review and held that the Secretary's determination "suffers from serious errors of judgment and misapplication of law."[297]

The case illustrates that courts are both equipped and willing to overturn an agency's public interest determination when it appears to be unjustified.[298] Courts have looked to the factors that the Secretaries are required to consider under Section 206(a) of FLPMA.[299] While such a limited review is not required by the plain language of the statute,[300] sound public policy,[301] or the Agencies' regulations,[302] the case law also demonstrates that it likely does not matter given the breadth of the statutory charge.[303]

National Audubon Society v. Hodel also illustrates that there are limits to using the power of restrictions to sustain a public interest determination (especially when used disingenuously).[304] Within those limits, however, use restrictions nevertheless can be used effectively in promoting the public interest and the Agency's apparent concern for it. The logic should by now be familiar:

297. *Id.* at 846; *see also id.* at 835 (holding that the Secretary's public interest determination was reviewable under the arbitrary and capricious standard).

298. *But see* Paul, *supra* note 73, at 121 ("The lack of objective standards when it comes to the Agencies' evaluation of the public interest factors vests the Agencies with such wide latitude there are virtually no limitations on agency action.").

299. *See* Lodge Tower Condo. Ass'n v. Lodge Props., Inc., 880 F. Supp. 1370, 1378 (D. Colo. 1995), *aff'd*, 85 F.3d 476 (10th Cir. 1996); Nat'l Coal Ass'n v. Hodel, 675 F. Supp. 1231, 1243 (D. Mont. 1987), *aff'd on other grounds sub nom*; N. Plains Res. Council v. Lujan, 874 F.2d 661 (9th Cir. 1989).

300. 43 U.S.C. § 1716(a) (2012); *see also* LaRue v. Udall, 324 F.2d 428, 430-31 (1963) (finding that Congress did not intend to restrict the breadth of the term "public interest" as a requirement for conducting exchanges under the Taylor Grazing Act).

301. *See* Paul, *supra* note 73, at 121, 126–27. *See generally* Susan Jayne Brown, *David and Goliath: Reformulating the Definition of "The Public Interest" and the Future of Land Swaps After the Interstate 90 Land Exchange*, 15 J. ENVTL. L. & LITIG. 235 (2000). If agencies only are interested in promoting their own interests, they may leave a gap among their interests, the interests protected by local government, and the private interests of the purchaser. Moreover, because agencies routinely (and appropriately) rely on a broad scope of public interests in defending land exchanges from challenges based on narrow interests, they may be held to an equally broad standard on review of their justification for an exchange.

302. *See* 36 C.F.R. § 254.3(b)(1) (2013); 43 C.F.R. § 2200.0-6(b) (2013).

303. *Cf.* Nat'l Coal Ass'n v. Hodel, 825 F.2d 523, 532 (D.C. Cir. 1987) ("having concluded that competitive concerns are at least arguably within the zone of interests of FLPMA, we need not decide whether in fact, § 206's 'public interest' concerns require that the Secretary consider the competitive impact of each coal land exchange."). *But see Nat'l Coal Ass'n*, 675 F.Supp. at 1243 ("The Secretary has discretion, of course, to consider any other factor deemed relevant. However, his mandated obligation ceases when the specifically enumerated factors have been considered.").

304. *See generally* 606 F.Supp. 825 (D. Alaska 1985).

> Without an accurate picture of the environmental consequences of the land exchange, the BLM cannot determine if the "public interest will be well served by making the exchange," and the Secretary cannot determine if the "values and the objectives" which the selected lands "may serve if retained in Federal ownership are not more than the values" of the offered lands.[305]

The Agencies' regulations already prohibit them from proceeding with any land exchange if "[t]he intended use of the conveyed Federal lands" will "significantly"[306] or "substantially conflict with established management objectives on adjacent Federal lands and Indian trust lands."[307] The same logic holds when the adverse impacts are to other public interests, ranging from historic and cultural resources, to recreation, to fiscal prudence, for example. Therefore, a determination that the public interest will be well served by a land exchange may be "fatally flawed" simply because the future use of the federal land remains uncertain.[308] In many instances, this flaw can be remedied by employing use restrictions.[309]

VII. FOREST SERVICE AND BLM OBJECTIONS TO USING RESTRICTIONS

Despite their regulatory mandate and the many significant benefits that use restrictions can provide to both the public and the Agencies themselves, the Forest Service and BLM often have employed a range of arguments to avoid using—or even considering—these tools. The Agencies' arguments against *retaining* partial interests in exchanged land[310] echo their historical objections to *acquiring* such interests, as the GAO described in 1979:

305. Center for Biological Diversity v. U.S. Dep't of the Interior, 623 F.3d 633, 647 (9th Cir. 2010) (quoting FLPMA § 206(a), 43 U.S.C. § 1716(a)).

306. 43 C.F.R. § 2200.0-6(b).

307. 36 C.F.R. § 254.3(b)(2)(ii).

308. *Center for Biological Diversity*, 623 F.3d at 647.

309. *See* discussion *supra* Part VII.A.1; *see also* Mendiboure Ranches, Inc., 90 IBLA 360, 365 (1986) ("In determining whether the transfer of public land would serve the public interest, an obvious corollary thereto is whether an exchange would adversely affect the public interest. Thus, BLM must assess the impact of proposed or anticipated development of the public land once it passes out of Federal ownership, with consideration given to the need for appropriate restrictions."). *But see* Greer Coal., Inc. v. U.S. Forest Serv., No. CV 06-0368-PHX-MHM, 2007 WL 675954, at *6 (D. Ariz. Mar. 1, 2007) (upholding the Forest Service's public interest determination despite finding that the Agency failed to adequately appraise the federal land and evaluate the potential environmental impacts of future development of the federal land).

310. *See, e.g.*, *supra* note 207 and discussion *infra* Part VII.A–B.

> Historically, federal land management agencies have rejected out of hand any strategy other than the acquisition of full title to land . . . . They argue that acquiring partial interests, such as development rights or scenic easements, often costs nearly as much as full acquisition, and restrictions on the use of private land are ineffective and a heavy administrative burden. However, obstacles to the use of alternatives [to fee acquisition] are primarily perceived, rather than demonstrated.[311]

Today, the Agencies have robust and popular programs to acquire conservation easements to protect adjacent federal lands and other resources from adverse impacts of potential development—in part because such acquisitions often are far more economical than fee acquisitions.[312] But the Agencies still argue that use restrictions in the context of land exchanges can reduce the value of the federal land, impose expensive and burdensome monitoring and enforcement responsibilities on the Agencies, intrude on state and local responsibilities, and decrease the willingness of non-federal parties to proceed with an exchange.[313] All of these arguments have limited merit and each may provide a convincing basis for rejecting use restrictions in certain circumstances. However, they neither individually nor cumulatively justify the Agencies' policies that have resulted in the nearly categorical rejection of use restrictions. This Part explores the limits of the Forest Service and BLM objections in an effort to clarify the breadth of potential for using restrictions.

A. Effect on Value

A 1996 Inspector General investigation concluded that a BLM land exchange in Nevada resulted in a loss of approximately $4.2 million to

311. GAO ACQUISITION REPORT, *supra* note 29, at 23; *accord* S. COMM. ON ENERGY AND NATURAL RES., *supra* note 127, at 447 (statement of Michael F. Priesnitz, Vice President, Goff/Priesnitz & Assoc.); SHANDS & HEALY *supra* note 58, at 216. The federal government's early experience with scenic easements were challenging, which may partly explain the Agencies' longstanding reluctance to use such tools. *See, e.g.*, POWELL ON REAL PROPERTY § 34A.02(1) (Michael Allan Wolf ed., 2013).

312. *See, e.g.*, 16 U.S.C. § 2103c (2012); Sabine River Auth. v. U.S. Dep't of the Interior, 951 F.2d 669, 672 (5th Cir. 1992) (noting that the method is more economical "because the government need not buy the property and take title outright; it can accept a non-development easement . . . and thereby achieve the goal of protecting the environmental status quo at a fraction of the cost"); Korngold, *supra* note 29, at 475 (citing a database reporting that the federal government holds over 23,000 conservation easements covering about 4.7 million acres). The Forest Service also has seriously considered conditioning development of private lands served by road easements across National Forest System land with wildfire protection requirements. *See supra* note 9.

313. *See, e.g.*, Furnish Memorandum, *supra* note 154, at 2; Keys Decision, *supra* note 154, at 42,984; Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 812–14 (9th Cir. 1999).

the federal government because the BLM land was devalued by an easement previously issued by the BLM to the City of Las Vegas to construct a flood-control detention basin.[314] Even though the easement should have been limited to only the amount of land the City actually would use for the basin, the City never constructed the basin.[315] A year and a half after the BLM conveyed the land by exchange, the City relinquished 86% of its easement to the private land exchange proponent for the sum of "$400,000 cash and other inducements," the exchange proponent reaped a $3.8 million windfall from selling the newly unencumbered land, and the taxpayers got the short end of the stick.[316] As a result, the Inspector General recommended that the BLM "[d]irect that all easements on Federal lands proposed for disposal be reviewed to verify grantee needs and that actions be taken to remove any easements that are not needed before the Federal lands are exchanged or sold."[317]

This unfortunate episode illustrates the significant impact that easements and other use restrictions can have on the value of land. The Inspector General's recommendation was meant to ensure that agency officials do the obvious—not convey federal lands that are devalued with unnecessary easements. The report does not even address use restrictions reserved for the benefit of the Agency or (as some agency officials have contended)[318] support the Agencies' policies that strongly discourage the use of restrictions as a whole.

In theory, if the federal government is compensated fairly for the market value of use restrictions (and they would be given accurate appraisals), the concerns about their devaluing effect should not be difficult to resolve: if the cost of the restriction is less than, or equal to, the benefits the agency (and the public) would obtain by acquiring other land or interests in land through the exchange, then the restriction should not be rejected on the basis of its devaluing effect. It also should not be categorically rejected on the basis of cost if its public interest value is greater than, or equal to, its market value.

In practice, it may not be easy to objectively value either use restrictions or the benefits of acquiring other land, but the challenge is no different than the one the Agencies already manage in determining equal value and the public interest. It also should not be significantly different

314. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 103, at 4–6.
315. *See id.* at 5.
316. *See id.* at 4–5.
317. *Id.* at 12.
318. *See, e.g.*, Furnish Memorandum, *supra* note 154, at 2.

from their analyses of the costs and benefits they undertake through existing programs for purchasing limited interests in land.

In addition, there are many circumstances in which the Agencies can reduce the cost of use restrictions. For example, a temporary restriction on development may adequately protect public interests for a fraction of the cost of a perpetual restriction. Non-federal parties to an exchange may be willing to donate land or interests in land to garner political support, quell objections, secure tax benefits, or simply serve the public interest.[319] When purchasers propose to use or protect the federal lands they receive to avoid or mitigate adverse impacts to the public interest, they should be pressed to donate a legally enforceable interest that reflects their voluntary commitment.

Nevertheless, the Forest Service's internal policies arguably prohibit such donations. In the same 1999 internal policy memorandum that purports to prohibit use restrictions unless they are "required" to comply with applicable law or management plans, the very next paragraph states that "[l]and donations conditioned as part of an exchange proposal are inappropriate since our authorities require that land exchanges are to be completed on equal value basis. Land donations are voluntary conveyances and need to be processed as separate transactions."[320]

It is unclear whether the Forest Service intended its prohibition on land donations as part of exchanges to apply to use restrictions, but it certainly appears to do so since the Agency considers the term "lands" to refer to "any land []or interests in land."[321] Land exchanges are voluntary transactions, and the Agencies have broad authority to subject them to such terms and conditions as they determine are appropriate.[322] As a result, agency officials could provide for a donation to their own or any other interested agency, organization, or individual as a "separate transaction" that is required as a condition of an exchange.[323] In fact, in

319. *See, e.g.*, Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 804 (9th Cir. 1999); Pub. L. No. 109-377, § 5(c)(1) (2006) (providing for a donation of land to the Forest Service in the Pitkin County land exchange).

320. Furnish Memorandum, *supra* note 154, at 2.

321. *See* 36 C.F.R. § 254.2 (2013); *accord* 43 C.F.R. § 2200.0-5(l) (2013).

322. *See, e.g.*, 36 C.F.R. § 254.14(a)(1); *accord* 43 C.F.R. § 2201.7-2(a)(1).

323. *See, e.g.*, 43 U.S.C. § 1715(a) (2012) (authorizing the BLM "to acquire . . . by purchase, exchange, donation, or eminent domain, lands or interests therein"); 7 U.S.C. § 2269 (2012) (authorizing the Secretary of Agriculture to accept gifts of real property); *see also* U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., NEPA # DOI-BLM-ID-T030-2012-0008-EA, DECISION RECORD: KETCHUM LAND EXCHANGE 1–2 (2012) (including a donation as part of a "single-phase assembled land exchange and donation" where donated land was separated from the exchange transaction for equalization purposes), *available at* https://www.blm.gov/epl-front-office/projects/ne

promulgating their regulations, the Agencies explicitly contemplated such transactions.[324]

The Agencies have formally recognized that there are many circumstances in which the public interest would be well served by imposing use restrictions,[325] in some cases despite the costs and in others for no cost. However, the Agencies' policies discourage officials from identifying and taking advantage of those circumstances, and both their interests and the public interest are poorly served as a result.

B. Monitoring and Enforcement

The Forest Service and the BLM have also objected to considering and employing use restrictions on the basis that the "[a]dministration of deed restrictions can be extremely complicated, time consuming, and expensive."[326] In many cases, this is certainly true. For example, the Forest Service is charged with comprehensively regulating development and use of private property within the Sawtooth National Recreation Area.[327] The applicable regulations are far more expansive than most local government land use regulations, and they presumably require significant agency resources to administer.[328]

But in reality, this legitimate argument overstates the case.[329] Some use restrictions require little or no agency monitoring or enforcement.

pa/23352/40655/42755/EX35331_Ketchum_ID_Decision_Record_Final_508.pdf. In apparent contradiction to its earlier direction to avoid donations as conditions of an exchange, a later discussion in the Furnish Memorandum encourages Agency staff to negotiate for a donation of any mineral patents held by the non-federal party to an exchange. *See* Furnish Memorandum, *supra* note 154, at 4.

324. *See* Exchanges-General Procedures, 58 Fed. Reg. 60,904, 60,907 (Nov. 18, 1993) (responding to a suggestion that the Agency should consider "conveying partial interests to third parties in lieu of reservations or restrictions" by stating that "[t]he rule allows alternative methods of protection such as third party participation"); *accord* Land Exchanges, 59 Fed. Reg. 10,854, 10,858 (Mar. 8, 1994).

325. *See* discussion *supra* Part IV.D.

326. Keys Decision, *supra* note 154, at 42,984; *see also* GAO ACQUISITION REPORT, *supra* note 29, at 23, 71.

327. *See* 16 U.S.C. § 460aa-3(a) (2012) ("The Secretary shall make and publish regulations setting standards for the use, subdivision, and development of privately owned property within the boundaries of the recreation area.").

328. *See generally* 36 C.F.R. §§ 292.14–.16 (2013); U.S. FOREST SERV. & THE SAWTOOTH SOC'Y, WHAT YOU SHOULD KNOW ABOUT PRIVATE LANDOWNERSHIP IN THE SAWTOOTH NATIONAL RECREATION AREA (2009), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5211589.pdf. The Forest Service also has some responsibilities in administering zoning and use of private land in the Shasta-Trinity National Recreation Area. *See* 36 C.F.R. §§ 292.11–.13.

329. *See* GAO ACQUISITION REPORT, *supra* note 29, at 22–23, 26–27, 62–63, 156.

Grantees are likely to be hesitant to ignore a clear use restriction imposed by the United States, for they likely would find it difficult to sell their property for value if they did.[330] Moreover, it often is the case that neighbors and other stakeholders would monitor compliance informally.[331] After all, they were likely the parties lobbying for the restrictions in the first place. For example, although the Forest Service initially refused to retain an easement to protect the historically and culturally significant trail in the *Muckleshoot* case "because it concluded that it was too expensive and impractical to monitor Weyerhaeuser's land practices," can it be doubted that the Muckleshoot Indian Tribe would have aggressively done so independently?[332]

The Agencies also have options to formally partner with other agencies or organizations to monitor and enforce use restrictions. Both agencies have broad authority to enter into cooperative agreements with third parties that could support monitoring and enforcement of use restrictions,[333] and they have a variety of successful programs designed to acquire, monitor, and enforce conservation easements through partners.[334] In some cases, creative agency officials have successfully used their authorities to partner with third parties to monitor and enforce

330. For example, the Agencies have issued countless deeds with restrictions that are mandated by federal laws such as the Recreation and Public Purposes Act and the Sisk Act, including many for intense and sensitive uses such as landfills and water treatment facilities. While grantees will sometimes come to Congress to lift such restrictions, it appears that there have been no reports of systematic noncompliance despite a lack of agency oversight and monitoring. *Cf.* Peterson v. U.S. Dep't of the Interior, 899 F.2d 799, 803–06 (9th Cir. 1990) (recounting the complex and troubled history of acreage limitations imposed by federal reclamation law); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1092, U.S. FISH AND WILDLIFE SERVICE: ADDITIONAL FLEXIBILITY NEEDED TO DEAL WITH FARMLANDS RECEIVED FROM THE DEPARTMENT OF AGRICULTURE 21–25 (2007), *available at* http://www.gao.gov/assets/270/266901.pdf (describing lack of monitoring, compliance, and enforcement of conservation easements held by the U.S. Fish and Wildlife Service); Land Trust Exchange, *Report on 1985 National Survey of Government and Non-Profit Easement Programs*, 4 J. LAND TR. EXCHANGE 1, 9, 13 (1985) [hereinafter "*National Survey*"] ("The U.S. Fish and Wildlife Service reports an average of 93 violations per year among its 21,000 easements" covering 1.2 million acres of non-federal land).

331. *Cf.* Korngold, *supra* note 29, at 481 ("[N]eighbors whose property values are benefited by the governmental easement may view the easement as an entitlement. This will cause them to seek its enforcement and resist any compromise." (footnote omitted)).

332. Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 808 (9th Cir. 1999). *See generally* Hanson & Panagia, *supra* note 202.

333. *See, e.g.*, 43 U.S.C. § 1733 (2012) (cooperative enforcement); *id.* § 1737 (cooperative investigations and protection); *id.* § 1738 (contracts for resource protection).

334. For example, the Forest Service's Forest Legacy Program acquires conservation easements with federal funding, but the easements are held, monitored, and enforced through state initiatives. The Department of the Interior also has a variety of relevant cooperative conservation programs, such as the Landowner Incentive Program, the Cooperative Endangered Species Conservation Fund, and the Partners for Fish and Wildlife Program.

use restrictions for exchanged land. For example, in one of the rare cases in which the agencies sought to strategically employ use restrictions in an exchange, the Forest Service developed covenants that could be administered, monitored, and enforced by the Forest Service, Park Service, a local tribe, and certain community organizations to ensure that a developer would "utilize water recycling, efficient construction, solar power, reduced energy consumption, and other sustainable development principles" on the conveyed federal land.[335] However, the Agencies have no formal policies or programs directed at facilitating such partnerships.

The cost and administrative burden of agency monitoring and enforcement is an important concern that must be balanced against the public interest values that use restrictions can provide.[336] However, the Agencies too frequently have dismissed restrictions on the basis of cost without any consideration or analysis at all.[337] Instead, agency officials should evaluate the monitoring and enforcement costs of potential use restrictions, as well as available alternatives for reducing such costs, on a case-by-case basis.[338]

C. Responsibility of State and Local Government

The Forest Service and the BLM also have objected to use restrictions on the basis that regulating private land use is not their responsibility. For example, the Deputy Under Secretary of Agriculture issued the following list of rationales:

> [(1)] The Forest Service has long taken the position that zoning and regulation of uses on private land are within the responsibility of state and

335. Sierra Club v. Dombeck, 161 F. Supp. 2d 1052, 1061, 1069 & n.5 (D. Ariz. 2001), *appeal dismissed* 55 Fed.Appx. 411 (9th Cir. 2002). Despite "limited deficiencies" in the Forest Service's NEPA compliance, the Forest Service ultimately abandoned the exchange in the face of "insurmountable obstacles." *See* City of Williams v. Dombeck, 151 F. Supp. 2d 9, 27 (D.D.C. 2001). In Mesa County Land Conservancy v. Allen, the land conservancy successfully enforced the terms of a conservation easement on private land that the United States (through the Farmers Home Administration) had executed and then donated to the land trust. *Id.*, No. 11CA1416, 2012 WL 2044781 (Colo. Ct. App. June 7, 2012). Other creative tools also are available for reducing monitoring and enforcement costs, such as requiring the landowner to periodically self-certify compliance with the use restrictions or by including permanent markings on the property (such as plaques on historic properties).

336. *See* Sutley, *supra* note 236, at 3 ("Agencies should not commit to mitigation, however, unless they . . . expect there will be necessary resources available to perform or ensure the performance of mitigation."); *see also* Echeverria, *supra* note 29, at 19–20; *National Survey*, *supra* note 330, at 13, 20.

337. *See, e.g.*, *Muckleshoot*, 177 F.3d at 812–14.

338. *See infra* Part VIII.C.

> local governments[; (2) l]ocal authorities are in the best position to determine appropriate uses of private land[; (3) t]he Forest Service has neither the legal authority nor the responsibility to substitute deed restrictions for local zoning controls[; and (4) l]ocal governments have traditionally agreed and insisted that such decisions be left to them.[339]

Each of the four unqualified arguments is unpersuasive in justifying a broad rejection of use restrictions. The following sections address each argument in turn.

1. Zoning and Regulation of Private Land Are Not Exclusively the Responsibility of State and Local Governments

The fact that the Forest Service has long taken the position that zoning and regulation of uses on private land are within the responsibility of state and local governments is either faulty logic or an unfortunate reflection of historic agency policy. There is no doubt that regulation of private land is primarily a responsibility of state and local governments. However, that by no means relieves the Agencies of their responsibilities to include use restrictions in federal land exchanges when state and local government regulation is inadequate to protect public interests.[340] Moreover, as components of property transactions between two landowners, federal use restrictions are not regulations that necessarily interfere with local powers. If agency tradition is to the contrary, it should be abandoned.

2. Local Authorities Are Not in the Only Position to Best Determine Appropriate Uses of Private Land

It is true that local authorities often are in a better position than federal agencies to determine appropriate uses of private land. Some communities have excellent zoning and other land use regulations that capably protect private interests and promote both the interests of the local community and those of the general public and federal government. Many private owners also voluntarily use their land in ways that protect

339. Keys Decision, *supra* note 154, at 42,984. The Keys Decision was formally issued as a decision notice by Anne Keys, Deputy Under Secretary for Natural Resources and Environment, U.S. Dep't of Agriculture on June 15, 2000, and was submitted to the Federal Register by Sally Collins, Associate Deputy Chief of the Forest Service, on June 26, 2000. *Id*. at 42,982.

340. *See* discussion *supra* Parts IV–V; *see also* note 348, *infra*.

those interests.[341] In such cases, use restrictions that otherwise might be necessary, may not be appropriate.

Unfortunately, that is not always the case.[342] Some individuals and local communities do disregard the broader public interest in protecting wetlands, wildlife habitat, air quality, and water quality, which is why the federal government has responded with laws aiming to protect those and other national and regional interests in local and private land use.[343] Some disregard the impacts that local land use can have on adjacent federal land, and some state and local governments simply do not have the authority or the capacity to regulate local land use adequately.[344] Even where state and local governments have the desire and adequate authority, they are hampered by the uncertainty of federal land management and disposal decisions.[345]

In such cases, the Agencies should not simply abdicate responsibility. Rather they should follow through on that responsibility to protect the public interest by exercising their authority to employ use restrictions when necessary.

3. The Agencies Have Both the Legal Authority and Responsibility to Use Restrictions

The Forest Service has argued it "has neither the legal authority nor responsibility to substitute deed restrictions for local zoning controls."[346] But there simply is no question that the Forest Service and the BLM do, in fact, have broad use restriction authority.[347] Moreover, in comparison to methods such as condemnation or unilateral regulation,[348] land

341. *See* Barton H. Thompson, Jr., *Conservation Options: Toward a Greater Private Role*, 21 VA. ENVTL. L.J. 245, 254–55 (2001).

342. *See* BABBITT, *supra* note 119, at 5 ("Why demonize land developers when the real problem is the pervasive failure of state and local governments to control sprawl through meaningful land use regulations? . . . Local governments generally have neither the political will nor the expertise nor the financial resources to stand up to well-financed developers . . . ."); GAO ACQUISITION REPORT, *supra* note 29, at 30 ("In some cases, State and local governments are willing to establish and enforce effective land use controls. In other cases, a major Federal role may be necessary to assure the protection and preservation of nationally significant areas.").

343. *See generally, e.g.*, United States v. North Dakota, 460 U.S. 300, 309–10 (1983).

344. *See, e.g.*, Coggins, *supra* note 74, at 19; Sax, *supra* note 75, at 240, 267; GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 3 (explaining how large landowners in Montana can veto local zoning changes that would affect the use of their land).

345. *See* SHANDS, *supra* note 72, at 49–52, 60.

346. Keys Decision, *supra* note 154, at 42,984.

347. *See* discussion *supra* Part IV (reviewing FLPMA authority).

348. Land exchange use restrictions are part of a consensual property transaction and therefore raise no significant questions regarding the scope of federal power to unilaterally regulate private

exchange use restrictions can provide a more flexible and easily defensible method for protecting the public interest.[349]

As for the Agencies' responsibility to impose use restrictions that may substitute for local zoning controls, in such cases they should consider whether the local regulations are sufficiently durable to protect the public interest.[350] It often is the case, however, that the application of local regulation to a parcel of federal land that is to be conveyed is unclear. Because local government authority to impose regulations on federal land is limited,[351] they often do not bother to determine how that land would be regulated if it were conveyed.

FLPMA calls for intergovernmental cooperation to produce an efficient and effective approach to regulation of exchanged federal land.[352] But FLPMA's land exchange provisions also were specifically

land use. *See supra* note 113 and accompanying text; *see also* Mark S. Squillace, *Common Law Protection for our National Parks*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 87 (David J. Simon ed., 1988); Coggins, *supra* note 74, at 15–19; Ragsdale, *supra* note 11, at 36–43; Sax, *supra* note 75, at 250–55. Furthermore, the United States' power to regulate the use of private lands is significant under the Property and Commerce Clauses. *See, e.g.*, Camfield v. United States, 167 U.S. 518, 526 (1897) (ruling that, under the Property Clause, Congress has "the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection"), *cited with approval in* Kleppe v. New Mexico, 426 U.S. 529, 546 (1976); United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."); Nat'l Ass'n Home of Builders v. Babbitt, 130 F.3d 1041, 1046 (D.C. Cir. 1997) (ruling that regulation under the ESA of activities on non-federal land that could harm the Delhi Sands Flower-Loving Fly and its habitat was permissible under the Commerce Clause).

349. *See* Ragsdale, *supra* note 11, at 19 ("The use of the land exchange mechanism could permit the federal government to exercise similar influence over the nature, quality, extent, and pace of land development, without the costs and disruptions of eminent domain, and without the serious constitutional questions surrounding downzoning in the face of developmental pressures."); *cf.* Echeverria, *supra* note 29, at 20-22 (exploring the costs and benefits of the "cooperative conservation" aspects of conservation easements). *See generally* Korngold, *supra* note 29.

350. *Cf.* Lockhart v. Kenops, 927 F.2d 1028, 1033 (8th Cir. 1991) ("After reviewing the zoning regulations, which require that sewer systems comply with detailed design and specification requirements and be approved by the city engineer, we find that the Forest Service's conclusion that the zoning regulations will prevent any significant impact on the environment was not arbitrary and capricious.").

351. *See, e.g.*, Cal. Coastal Comm'n v. Granite Rock, 480 U.S. 572, 593 (1987) ("Federal land use statutes and regulations, while arguably expressing an intent to pre-empt state land use planning, distinguish environmental regulation from land use planning.").

352. To the extent that the application of local zoning can be anticipated, imposing a potentially duplicative restriction likely will result in little or no cost to the Agencies, since the appraised value of the federal land already would take into account the likely land use regulation and local government generally would satisfy any monitoring and enforcement responsibilities. In such cases, rather than simply rejecting restrictions as unnecessary, the Agencies and local governments should

built on the premise that state and local zoning would not always adequately protect the public interest.[353] Its charge to ensure that "the public interest will be well served" by each land exchange does not admit of exceptions.[354]

4. Local Governments Often Support Use Restrictions and Do Not Hold Veto Authority When They Do Not

The argument that use restrictions should be rejected because local governments have traditionally opposed them similarly is unpersuasive. This argument simply misstates the facts. While state and local governments have traditionally opposed federal efforts to impose broad regulations on local land uses, in many cases they have been strongly supportive of incorporating use restrictions into land exchange conveyances.[355] As much as the Agencies might wish otherwise, state and local governments generally do not want the burden or expense of mitigating the adverse environmental, social, or economic impacts that a land exchange can impose on a local community.[356]

To the extent local governments oppose the imposition of use restrictions, their views should be seriously considered, but they should not be determinative.[357] Complete deference to state and local

consider that they already effectively have secured a belt and they might want to get the free (or at least cheap) pair of suspenders with it.

353. *See* discussion *supra* Part IV.A-C.

354. 43 U.S.C. § 1716(a) (2012).

355. *See, e.g.*, Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 809 (9th Cir. 1999) (State Historic Preservation Officer suggesting an easement or covenant to protect historic resources); Nat'l Wildlife Fed'n, 82 IBLA 303, 314 n.7 (1984) (relating that the Governor recommended that BLM include protection for habitat on federal land to be exchanged). State and local government concerns traditionally have been with federal programs that are far more intrusive on their land use regulation authority than a restriction on land use mutually agreed to by two landowners exchanging deeds. *Cf.* United States v. North Dakota, 460 U.S. 300, 304–08 (1983) (describing the history of cooperation and conflict between the Fish and Wildlife Service and the State over federal conservation easements).

356. *See* Lodge Tower Condo. Ass'n v. Lodge Props., Inc., 880 F. Supp. 1370, 1384 (D. Colo. 1995), *aff'd*, 85 F.3d 476 (10th Cir. 1996) (expressing doubt that the "federal agencies would be able to impose on local entities the burden or expense of mitigating any significant environmental impact" resulting from an exchange); City of Williams v. Dombeck, 151 F. Supp. 2d 9, 9, 11 (D.D.C. 2001) (suit by two nearby cities and a regional council of governments seeking to enjoin a land exchange based on the impacts of future development on water availability).

357. *See, e.g.*, Cal. Coastal Comm'n v. Granite Rock, 480 U.S. 572, 596 (1987) (Powell, J., concurring in part and dissenting in part) ("Significantly, the FLPMA only requires the Secretary to listen to the States, not obey them."); Nat'l Wildlife Fed'n, 82 IBLA 303, 314 n.7 (1984) (noting that while FLPMA requires the Agencies to notify state governments of a proposed exchange, "[n]either the statute nor the regulation . . . contains any mandate that BLM conform its proposal to the preference of the State government"). Section 208 of FLPMA prohibits the BLM from making

governments is only appropriate when, and to the extent that, state and local governments effectively provide for not only the interests of the local community (including private landowners), but also those of the federal government (including its policies to promote the interests of the broader public).

D. Deterrent Effect on Non-Federal Parties

The Agencies have also argued that use restrictions can diminish a non-federal party's willingness to proceed with an exchange.[358] Although sometimes true, this is a woefully inadequate argument for the nearly wholesale rejection of the use restriction tool. Fundamentally, the Agencies are obligated to either impose a use restriction or abandon an exchange if the non-federal party will not accept a restriction that is necessary to ensure that "the public interest will be well served by making that exchange."[359]

Again, the problem is that the Agencies too often dismiss the use restriction option out-of-hand. For example, in the *Muckleshoot* case, the Forest Service rejected an alternative that included a deed restriction on the future logging practices of the timber company "on the grounds that it would decrease Weyerhaeuser's incentive to trade."[360] The court pointed out, however, that nothing in the record indicated that the Forest Service ever attempted to negotiate the matter[361] and the company "conceded at oral argument that the imposition of deed restrictions was a viable alternative" to the exchange agreement that the Forest Service negotiated.[362]

Moreover, an exchange proponent's simple preference for a clean patent should not excuse the Agencies from their obligations to the public interest. Especially when exchange proponents informally indicate that they intend to use or protect their acquired federal lands to

"conveyances of public lands containing terms and conditions which would, at the time of conveyance, constitute a violation of any law or regulation pursuant to State and local land use plans, or programs." 43 U.S.C. § 1718.

358. *See, e.g.*, *Muckleshoot*, 177 F.3d at 812–14.

359. 43 U.S.C. § 1716(a) (2012); *see also* Nat'l Wildlife Fed'n, 87 IBLA 271, 281 (1985) ("The analysis must begin with identification of the values of the land in question. Do they need protection? Is a restriction in the deed the only way to protect them? BLM's decision on whether to impose the easement cannot be dictated by the landowner.").

360. *Muckleshoot*, 177 F.3d at 813.

361. *See id.*

362. *Id.* at 814; *see also id.* at 813; *cf.* Plum Creek Timber Co. v. Lyng, 1989 WL 46737, at *1–2 (9th Cir. 1989) (reviewing a land exchange in which the Forest Service reserved the right to cut timber for the period covered by outstanding timber sale contracts on the land it conveyed).

avoid or mitigate adverse impacts to the public interest, if they object to a use restriction that would ensure they follow through with their stated intentions, then either their objection or their intentions should be disregarded when evaluating the exchange.[363] If pressed and a proponent still refuses to agree to a restriction, then the Agencies must evaluate other options, including whether to abandon the exchange.

VIII. RECOMMENDATIONS

This Article has endeavored to demonstrate: (1) that the Forest Service and BLM have both the authority and responsibility to include use restrictions when necessary to ensure that "the public interest will be well served" by land exchanges; (2) that the Agencies can use such restrictions to their strategic advantage in navigating the land exchange process; and (3) that current policies discouraging such restrictions are misguided.

If the Agencies are to reconsider those policies, they must also consider replacement policies.[364] Good policy would balance the standardization that helps to ensure legal compliance and protect from abuse with the flexibility that provides efficiency and effectiveness. This Part discusses ideas for considering the new policies that would guide agency staff in their consideration and use of restrictions.

A. Guiding Principles: Congressional Intent

Beyond requiring that "the public interest will be well served" by exchanges and referencing a number of considerations for doing so, Section 206 of FLPMA does not directly provide specific guidance on when the Agencies should use restrictions.[365] However, there are other guides to congressional intent in FLPMA, its legislative history, and other relevant enactments. Those sources indicate that Congress has followed a policy of balancing the importance of cooperation with state and local governments with the independent federal authority to restrict the future use of conveyed federal land. Both Forest Service regulations

363. *See, e.g.*, *supra* Part VI.A.1 (discussing the Lyneta Ranch Exchange, Mendiboure Ranches, Inc., 90 IBLA 360 (1986)).

364. In doing so, officials should consider some of the broad advantages and disadvantages of using restrictions instead of regulation—at least where regulation may be a viable alternative. *See supra* note 29.

365. *See* 43 U.S.C. § 1716(a) (2012).

and BLM regulations broadly reflect that balance,[366] but their internal guidance and practices generally do not.

New guidance should require agency officials to not just "notify" relevant state, local, and tribal officials during the exchange process,[367] but also to actively investigate and consider applicable land use regulations and to seek to coordinate any use restrictions with those governments and their regulations.[368]

Accordingly, the Agencies should consider new guidance providing that, for each land exchange proposal, agency staff should: (1) include in any land exchange deed, patent, or agreement, such terms, covenants, conditions, and reservations as are necessary to protect the public interest;[369] (2) in determining whether to include use restrictions,

366. For example, at the same time the regulations require the imposition of use restrictions when necessary to protect the public interest, they provide that conveyances shall be subject to "all laws, regulations, and zoning authorities of State and local governing bodies" (36 C.F.R. § 254.3(h) (2013); 43 C.F.R. § 2200.0-6(i) (2013)); that agency officials "shall give full consideration to the opportunity . . . to meet the needs of State and local residents and their economies" (36 C.F.R. § 254.3(b)(1); 43 C.F.R. § 2200.0-6(b)); and that agency officials shall notify relevant state and local governments during the exchange process (36 C.F.R. §§ 254.8(a), 254.13(a)(2); 43 C.F.R. §§ 2200.0-6(m), 2201.2(a), 2201.7-1(a)(2), 2201.9(c)).

367. *See* 43 U.S.C. § 1720.

368. While agency officials generally do coordinate with interested state, local, and tribal officials when conducting land exchanges, their regulations for doing so—especially in the context of use restrictions—do not adequately reflect applicable law or their best practices. For example, the BLM's exchange regulations include a subsection entitled "Coordination with State and Local Governments," but it only requires the Agency to "notify" them prior to completing an exchange. 43 C.F.R. § 2200.0-6(m). *But see* 43 U.S.C. § 1712(c)(9) (providing that the BLM shall, "to the extent consistent with the laws governing the administration of the public lands, coordinate" both planning and "management activities" with state, local, and tribal governments and "shall provide for meaningful public involvement of State and local government officials . . . in . . . land use decisions for public lands"); 43 C.F.R. § 46.155 (providing that the BLM "must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities."); Exec. Order No. 13,352, 3 C.F.R. 210 ("Facilitation of Cooperative Conservation"). The Forest Service's exchange regulations do not mention "coordination" or "cooperation." *See* 36 C.F.R. pt. 254.A. *But cf.* 16 U.S.C. § 1604(a) (requiring Forest Service's land management planning process to be "coordinated with the land and resource management planning processes of State and local governments"); 36 C.F.R. § 219.4(b). Neither Section 206 of FLPMA nor the Agencies' exchange regulations specifically address notification or coordination with tribal governments, although other applicable laws, regulations, and policies do. While exchanges with tribal governments are uncommon and may raise unique issues, tribal governments may have significant interests in land exchanges to which they are not a party and must be notified and consulted in such cases. *See, e.g.*, 43 U.S.C. § 1712(b), (c)(9); 36 C.F.R. § 219.4(b)(3); 40 C.F.R. § 1501.7.

369. *See, e.g.*, *supra* Part V.A–C; *cf.* 43 U.S.C. § 1718. Some land exchange watchdogs have advocated going further, recommending a blanket mandate where the "[f]ederal agencies shall impose federal management standards on public lands exchanged to any entity." DRAFFAN &

coordinate with state, local, and tribal governments and consider the scope, flexibility, and durability of their land use regulations; and (3) seek to complement state, local, and tribal land use regulations, consistent with the public interest.[370]

B. Consideration: Early and Often

Agency officials should consider use restrictions early in the land exchange development process and should reevaluate them as the process proceeds. In the past, agency officials typically have considered such restrictions—if at all—only when objections are raised and often late in the process. When courts or reviewing officials require a reevaluation of use restriction options late in the process, agency officials are faced with potentially significant costs of renegotiation, reevaluation, and reappraisal. Such costs provide a significant disincentive for agency officials to fairly evaluate whether use restrictions would best serve the public interest.

By considering use restrictions early, the Agencies can maximize the benefits that use restrictions provide in complying with NEPA and other applicable laws. Early consideration also can improve public participation and understanding of a proposed exchange and will help to avoid misunderstandings of federal responsibilities by the non-federal and other interested parties. Periodic reconsideration will encourage officials to adjust their evaluation of use restrictions as more information becomes available during the development of the exchange.[371]

Accordingly, the Agencies should consider new guidance providing that, for each land exchange proposal, agency staff should: (1) consider including use restrictions early in the development of the proposal; (2)

BLAELOCH, *supra* note 95, at 73. A more flexible approach that maintains appropriate discretion is necessary to maximize the important benefits that can be achieved through land exchanges.

370. The BLM has directed that each land exchange "decision must include a land use plan(s) conformance determination supporting the disposal of the Federal land and acquisition of the non-Federal land. It is often appropriate to also summarize from the environmental documentation how the decision interfaces with state and local land use plans." BLM HANDBOOK, *supra* note 148, at ch. 9.B.4. Both Agencies rejected a comment proposing to add to their regulations a requirement for a consistency review *by* state government. *See* 58 Fed. Reg. 60,904, 60,908 (Nov. 18, 1993); 59 Fed. Reg. 10,854, 10,859 (Mar. 8, 1994).

371. In promulgating its current regulations, the BLM specifically rejected a suggestion "that the regulations should permit only those reservations to be placed on the Federal land that were specified in the agreement to initiate," stating that "[t]he agreement to initiate is the point to recognize known title issues. However, after an agreement to initiate is entered, additional rights and reservations may be identified and, therefore, should be recognized." 58 Fed. Reg. 60,904, 60,916 (Nov. 18, 1993).

discuss the potential use of restrictions with the non-federal party, state and local governments, and potential third party facilitators early in the development of the proposal; (3) discuss the potential use of restrictions with the interested public in the scoping process; and (4) reevaluate the need for use restrictions as more information becomes available.

C. Evaluation: On a Case-by-Case Basis

Unfortunately, there is no simple formula to determine what kind of use restrictions, if any, should be included in a conveyance. Their costs and benefits to the public interest must be fairly evaluated depending on the specific circumstances of each land exchange.[372]

Accordingly, the Agencies should consider new guidance providing that, for each land exchange proposal, agency staff should: (1) evaluate on a case-by-case basis what form of use restrictions are appropriate to include, if any; and (2) balance the various costs and benefits of such restrictions, including market and non-market costs and benefits to the public interest and considering the factors discussed immediately below in Part VIII.D.

D. Key Issues: Impacts on Federal Lands and Resources of National or Regional Significance

Agency officials have a broad mandate to protect the public interest. While use restrictions are appropriate in some circumstances to ensure that local community interests are served, the Agencies' responsibilities are particularly significant when the conveyance could adversely impact other federal lands (their own and those of other federal agencies).[373] The BLM's regulations, mandate that "the authorized officer must find that . . . [t]he intended use of the conveyed Federal lands will not . . .

372. *Cf.* Real Estate—Acquisition—Encumbrance Determination by Secretary of Agriculture, 15 Comp. Gen. 910, 911 (1936) (holding that a statute authorizing the Secretary of Agriculture to acquire lands subject to rights-of-way, easements, and reservations that would not interfere with the use of the land "contemplates that such determination shall be made in each particular case and that there shall be stated the facts upon which the conclusion is based").

373. *See, e.g.*, D. Michael Harvey, *The Federal Land Policy and Management Act: The Bureau of Land Management's Role in Park Protection*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 127, 127 (David J. Simon ed., 1988) ("[M]any potential park threats arise from development activities on adjacent BLM lands . . . through private acquisition of those lands by sale or exchange."). Even landowners who do not have a duty to manage their land in the public interest would be considered short-sighted for conveying a portion of their land without carefully considering the impact of the conveyance on the remainder of their land. The Agencies responsibilities are similarly significant in the context of their trust responsibility concerning Indian lands.

significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands" before proceeding with any land exchange.[374] The Forest Service's regulations similarly prohibit exchanges that will "substantially conflict" with existing management objectives.[375]

However, guidance would be helpful to encourage agency officials to consider the broad range of management objectives for adjacent federal land.[376] It should also address adverse effects that may not immediately result in a substantial conflict with federal land management objectives, but nevertheless could develop into a conflict in the near or distant future.[377] Guidance also would be useful to encourage agency officials to look beyond a land exchange proponent's stated intentions of use and to consider other potential private uses that might be made of the federal land after it is conveyed.

For example, the Agencies (especially the Forest Service) should determine whether local land use regulations adequately address wildfire risk by regulating development in the WUI. As has been discussed

374. 43 C.F.R. § 2200.0-6(b) (2013).

375. 36 C.F.R. § 254.3(b)(2) (2013).

376. *See* SHANDS, *supra* note 72, at 62 ("Field-level managers are not provided with adequate direction relating to their responsibilities in protecting the federal resources in their charge from adjacent-lands activities."). Guidance also would be helpful to clarify the geographic breadth of the Agencies' responsibilities. For example, in 1999, the Interior Board of Land Appeals considered an exchange that would have paved the way for the country's largest landfill. The proposed landfill would have been tucked near the boundary of Joshua Tree National Park ("JTNP"), with the BLM land identified for conveyance within a quarter section of the park boundary and the actual landfill about 1.5 miles from—and surrounded on three sides by—JTNP. *See* Donna Charpied, 150 IBLA 314, 316–17 (1999), *see also* Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 1783 (2011). Although the BLM and National Park Service went to considerable lengths to mitigate the impacts of the exchange on JTNP, the Board stated that the "BLM is not required by regulation to find that the intended use of the selected public lands as a landfill does not significantly conflict with established management objectives on JTNP" because the thin strip of land between the park and the BLM land identified for conveyance. *Donna Charpied*, 150 IBLA at 336, *rev'd on other grounds* 606 F.3d 1058. The Board's statement apparently is based on a misunderstanding of the meaning of the word "adjacent," which, unlike the word "adjoining," means "[l]ying near or close to, but not necessarily touching." BLACK'S LAW DICTIONARY 46 (9th ed. 2009); *see, e.g.*, United States v. St. Anthony R.R., 192 U.S. 524, 539 (1904) (finding in context that "land within 2 miles, we assume all would agree, are so adjacent," while lands twenty miles away would not qualify as "adjacent").

377. In promulgating their current regulations, the Agencies indicated that they require consideration of only those management objectives that already are "established" at the time of considering an exchange. *See* 58 Fed. Reg. 60,904, 60,905 (Nov. 18, 1993); 59 Fed. Reg. 10,854, 10,856 (Mar. 8, 1994). Their regulations reflect that intent by referring to "established management objectives," but the regulations do not prohibit consideration of potential future directions in land management. *See* 36 C.F.R. § 254.3(b)(2); 43 C.F.R. § 2200.0-6(b).

above,[378] uncontrolled development of the WUI has an enormous budgetary impact on all of the programs carried out by the Agencies and has a significant adverse impact on their ability to achieve their missions. Where local land use regulations are inadequate, the Agencies may need to fill the void.[379] Moreover, in such cases of strong federal interests, the Agencies should consider a layering strategy that reinforces local regulations.[380] After all, local land use regulation can change, as can enforcement capacity and policy.[381]

Accordingly, the Agencies should consider new guidance providing that, for each land exchange proposal, agency staff should: (1) evaluate whether use restrictions would reduce impacts on adjacent federal or Indian lands, including through consultation with other federal agencies and Indian tribes that could be adversely affected by future uses of exchanged federal land; (2) evaluate whether use restrictions could reduce impacts on adjacent federal or Indian lands from both intended and other reasonably foreseeable uses of the exchanged federal land; and (3) specifically evaluate the use of restrictions to reduce potential adverse impacts on federal or Indian lands from increased wildfire suppression and forest restoration costs,[382] the spread of invasive species,[383] the loss

378. *See* discussion *supra* Part I.

379. In 2009, Congress directed the Forest Service to pursue a number of land exchanges in the Mount Hood National Forest in Oregon. In addition to requiring that the exchanges be subject to any Forest Service terms and conditions and a specific conservation and other easements, the law required the Forest Service to include deed restrictions to ensure that any development conformed with "nationally recognized codes for development in the wildland-urban interface and wildfire hazard mitigation." Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, subtit. C, § 106(d), 123 Stat. 991, 1022 (2009).

380. *See, e.g.*, Memorandum of Office of the Under Sec'y of Defense, Policy on Land Use Controls Associated with Environmental Restoration Activities 3–4 (Jan. 17, 2001), http://www.denix.osd.mil/references/upload/DoD-LUC_policyguidance.pdf ("The most effective method for implementing LUCs [i.e. land use controls to prevent or reduce risks to human health and the environment from real property being transferred out of federal control] is through a layering strategy or system of mutually reinforcing LUCs."); *see also supra* note 352 and accompanying text (noting that such layered use restrictions likely will not result in significant costs to the Agencies).

381. For example, the Town of Breckenridge, Colorado, is nestled within the White River National Forest, surrounded by a beetle-killed forest ecosystem that is naturally subject to infrequent but severe stand-replacing wildfires. "The Town adopted a mandatory Defensible Space Ordinance in June of 2009. A group of citizens submitted a petition for referendum to repeal that ordinance. Rather than put the ordinance to a vote by the people, the Council decided to repeal the ordinance. A voluntary Defensible Space Ordinance was adopted shortly afterwards in August of 2009." *Forest Management and Forest Health—Defensible Space*, TOWN OF BRECKENRIDGE COLORADO, http://www.townofbreckenridge.com/index.aspx?page=738 (last visited June 20, 2013).

382. Where local governments do not regulate development in the WUI through the use of a WUI code or similar building codes, access planning, defensible space, and development limitations to reduce the risks from wildfires, the Agencies should consider use restrictions designed to avoid future federal wildfire suppression costs and increased costs for federal hazardous fuel reduction and

of open space,[384] the restriction or expansion of access to federal lands,[385] watershed degradation, and climate change.

The Agencies' responsibilities also are heightened when other resources of national or regional significance may be adversely affected, as those resources are more likely to not be adequately protected by state and local governments and may benefit from a consistent federal approach.[386] For example, executive orders currently require the Agencies to evaluate and, if necessary, include restrictions to protect wetlands and floodplains.[387]

Accordingly, the Agencies should consider new guidance providing that, for each land exchange proposal, agency staff should evaluate whether use restrictions would reduce adverse impacts on resources or undertakings of national or regional importance, including: (1) wildlife habitat; (2) endangered, threatened, and sensitive species;[388] (3)

restoration treatments in the area. *See, e.g.*, HEADWATERS ECONOMICS, *supra* note 9, at 8; *cf. Four Threats—Quick Facts: Wildland Urban Interface*, U.S. FOREST SERV., http://www.fs.fed.us/projects/four-threats/facts/fire-fuels.shtml (last visited June 20, 2013) ("Homes and businesses found in WUIs are the most vulnerable to wildfires. Residents in the WUI are advised to take steps to prevent fires from engulfing their properties.").

383. "The Chief of the USDA Forest Service has identified invasive species as one of the four critical threats to our Nation's ecosystems. In response to this national threat, we have evaluated the role of the Forest Service . . . . We are aware of our significant role in addressing invasive species threats at the local, state, and national levels, as well as internationally." *Invasive Species Program*, U.S. FOREST SERV., http://www.fs.fed.us/invasivespecies/index.shtml (last visited June 20, 2013).

384. "'The loss of open space is an urgent and important problem, and the Forest Service clearly has a role in helping balance growth and development with open space conservation.' . . . Development of open space affects the Forest Service's ability to manage the National Forests and Grasslands, as well as our ability to help private landowners and communities manage their land for public and private benefits." *Four Threats: Loss of Open Space*, U.S. FOREST SERV., http://www.fs.fed.us/projects/four-threats/index.shtml (last visited June 20, 2013) (quoting Abigail R. Kimbell, Chief, U.S. Forest Serv.). Maintaining and improving open space by acquiring non-federal land is already an important goal of many land exchanges. The Agencies should ensure that they consider the impacts of disposal on their overall open space strategies and goals.

385. The Agencies already actively consider the need to maintain access to federal lands when exchanging land. *See, e.g.*, *supra* note 153 and accompanying text. They also should consider the potential of such easements to exacerbate—and of use restrictions to reduce—the problems of unmanaged recreation. "Decreasing availability of open space outside of public land along with the surge in the use of OHVs is likely to increase the demand for OHV use on NFS lands." *Four Threats—Quick Facts*, U.S. FOREST SERV., http://www.fs.fed.us/projects/four-threats/facts/unmanaged-recreation.shtml (last visited June 20, 2013) (describing how public and private lands will be affected by the increasing use of off-highway vehicles).

386. *See supra* text accompanying notes 125, 130; *see also* 43 U.S.C. § 1701(a)(1) (2012) (declaring congressional policy that "the public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest").

387. *See supra* note 151.

388. *See generally* Keiter, *supra* note 74.

landscape-scale restoration plans and goals;[389] (4) climate change adaptation and mitigation efforts; (5) air quality; and (6) water quality and quantity.

E. Costs: Fiscal Cost Reduction

The Agencies should seek to reduce the cost of incorporating, monitoring, and enforcing restrictions, consistent with best serving the public interest. They must use restrictions efficiently. There are a number of tried-and-true methods for doing so. For example, restricting a use for a period of years (instead of perpetually) often will reduce the market cost of the restriction significantly, can reduce monitoring, enforcement, and modification costs, may address concerns of the non-federal party to an exchange, and may provide adequate time for mitigation or local regulation. Third party partnerships also can help to avoid or reduce monitoring and enforcement costs.[390] Additional legislative authority to monitor and enforce use restrictions may be helpful.[391]

Accordingly, the Agencies should consider new guidance providing that agency staff should (1) evaluate means to reduce the cost of use restrictions while still ensuring that the public interest is well served for each land exchange proposal; and (2) consider whether additional legislative authority would improve the effectiveness and efficiency of monitoring and enforcing use restrictions.

F. Adaptive Management: Modifications to Use Restrictions

The Agencies should develop guidance for modifying use restrictions that are not efficiently promoting the public interest and for revoking restrictions that are not and will not be useful.[392] An active and well-governed program for modifying and revoking restrictions is an important complement to a more active and flexible approach to using them. Such a program need not always provide for significant

389. *See* NAT'L RESEARCH COUNCIL, *supra* note 31, at 203–04; U.S. DEP'T OF AGRIC., FOREST SERV., FISCAL YEAR 2014 BUDGET JUSTIFICATION 5–54 (2013) [hereinafter "2014 BUDGET JUSTIFICATION"] (stating that the land exchange program "supports landscape scale management by consolidating ownership patterns, creating more contiguous habitat and managing benefits to the public and wildlife"); *cf.* Echeverria, *supra* note 29, at 16–17 (discussing why voluntary approaches are less effective than regulatory approaches in the context of landscape-scale conservation).

390. *See supra* Part VII.B.

391. For example, expanded authority to convey use restrictions to third parties or to secure funding for federal monitoring may be useful.

392. *See* Korngold, *supra* note 29, at 486–87.

monitoring responsibilities, as the owners of the conveyed federal land can be expected to initiate the effort when it is in their interest.

Accordingly, the Agencies should establish a system for and provide guidance on modifying and revoking use restrictions. Preliminarily, the BLM and Forest Service each need a database to record and track activity regarding the use restrictions they hold on land they have conveyed. Guidance should provide for the periodic monitoring and review of such use restrictions to improve their efficiency and effectiveness, and such activity should be recorded in the database. As with the initial decision to impose a use restriction, agency officials should determine that the public interest will be well served by making any modification. When such opportunities are identified, agency officials should seek to recoup the fair value for any modification that would reduce the value of the restriction.[393]

G. Land Management Planning: Incorporation of Use Restrictions into the Process

The Agencies generally identify lands that are suitable for disposal through their land management planning processes.[394] However, they do not adequately consider the potential effect of use restrictions when identifying those lands. In fact, the BLM reportedly has a policy "that if a tract of land is found to have public benefits which would require the imposition of some type of deed restriction, such tracts would not be disposed of, except in very limited circumstances."[395] However, a more active approach to including use restrictions may provide additional opportunities to convey federal land that has marginal value to the Agencies' missions, and an expanded pool of land that is appropriate for disposal by exchange will expand the opportunities to acquire important land in return.

Accordingly, the Agencies should consider new guidance providing that agency staff should consider the potential for use restrictions when

393. Particularly in the case of the Forest Service, which has very limited authority to convey federal interests in land other than by exchange, securing additional authority to modify or revoke restrictions may be useful.

394. *See* 36 C.F.R. § 254.3(f) (2013); 43 C.F.R. § 2200.0-6(g) (2013); *see also* U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., H-1601-1, LAND USE PLANNING HANDBOOK app. C at 20 (Mar. 11, 2005), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/planning/planning_general.Par.65225.File.dat/blm_lup_handbook.pdf; FOREST SERVICE HANDBOOK, *supra* note 114, at 1909.12 § 13.13g (Jan. 31, 2006). The Forest Service also develops specific landownership adjustment plans or strategies in some circumstances.

395. Nat'l Wildlife Fed'n, 87 IBLA 271, 282 n.10 (1985).

identifying land that is suitable for disposal by exchange during the development of land management plans. For example, an isolated tract of BLM land that is difficult and inefficient for the Agency to manage should not be entirely eliminated from consideration for disposal by exchange merely because it includes historic resources of significant public interest. If a use restriction would protect those resources and secure the public benefit, including that tract in the pool of potential land that could be exchanged may best serve the public interest.

The basic analysis of the public interest in disposition during the land management planning process would essentially be the same as when the Agencies are presented with a proposal from a non-federal land exchange proponent who has identified a desirable federal parcel not identified in the relevant land management plan. However, in the context of developing a comprehensive land management plan, the analysis would be driven more strongly by the Agencies and the public, and it may more broadly consider the public interest in managing the federal estate as a result.

Given the historical abuses of the public interest that have sometimes infected federal land disposal decisions, such an approach may raise concerns about expanding the pool of federal land identified for disposal. As a result, a limited initial approach—such as for the exchange of disconnected tracts only—may be prudent. In any approach, it would be important to specifically identify at the outset the public interests that might have to be protected through use restrictions when identifying such lands for disposal by exchange.

H. Budget: Reexamine Landownership Management Budgets

The Agencies landownership management budgets are not adequate to support their land exchange needs. For example, despite its expanding needs, the Forest Service's land exchange budget has been cut by nearly one-third over the last decade.[396] It is no wonder that Congress and land

396. *Compare* U.S. DEP'T OF AGRIC., FOREST SERV., FY 2005 FOREST SERVICE BUDGET JUSTIFICATION 8-56 (2004) (stating that over $18 million was appropriated in fiscal year 2003 for the "Adjust Land Ownership" activity, which funds land exchange activities), *with* U.S. DEP'T OF AGRIC., FOREST SERV., FISCAL YEAR 2013 PRESIDENT'S BUDGET: BUDGET JUSTIFICATION 5-42 (2012) (stating that under $13 million was appropriated to fund land exchange activities in fiscal year 2012). This substantially understates the magnitude of the effective budget decrease, as the figures are not adjusted for uncontrollable cost increases. Relevant data from the Forest Service's budget justifications is available for only six of the ten relevant years, but the uncontrollable cost increases average more than $257,000 per year, resulting in an estimated effective cut of nearly 50%.

exchange proponents have grown increasingly frustrated with the Agencies' difficulties considering and processing land exchanges.

Land exchanges are critical to achieving the missions of the Forest Service and BLM, especially with the increasing costs of wildfire suppression, the loss of open space, the impacts of climate change, the focus on landscape-scale restoration, and shrinking budgets. A more active and flexible approach to use restrictions can help make land exchanges more efficient and effective, and may help to reinvigorate a program that has in many ways been abandoned. But to realize the potential of use restrictions and land exchanges, the budget must be adequate to get their programs back up and running. Accordingly, the Agencies, the Office of Management and Budget, and Congress should reevaluate the level of funding for carrying out land exchange programs.

I. Executive Orders: An Effective and Consistent Approach

While congressional authorization and encouragement has not resulted in effective use of restrictions by the BLM and the Forest Service, executive orders have. As a result, the Agencies routinely analyze the impacts of exchanges on floodplains and wetlands, and they include use restrictions to minimize any adverse impacts on those resources because they are required to do so by executive orders.[397] The executive orders not only provide consistent and relatively clear direction to the Agencies, but they also establish consistent and clear expectations for non-federal proponents of land exchanges who might otherwise balk at use restrictions that appear to be less firmly grounded in policy.

Many of the public interests that should be considered and promoted through use restrictions in land exchanges are not a subject of federal concern and regulation to the same extent as wetlands and floodplains. As a result, establishing overarching federal policy by executive order for use restrictions in land exchanges (or federal land disposals generally) is not likely to be either necessary or effective. It may, however, be a necessary and effective approach for setting policy with regard to those public interests that require a strong federal protective role that can be clearly delineated through the use of restrictions, such as some of those described above in Part VIII.D.

The President, considering the evaluation of the Agencies and the Council for Environmental Quality, should consider issuing one or more

The President's fiscal year 2014 budget proposes to cut the fiscal year 2013 level by more than 17%. *See* 2014 BUDGET JUSTIFICATION, *supra* note 389, at 5-51.

397. *See supra* note 151.

executive orders to establish clear policies for minimizing the adverse impacts to public interests that are directly or indirectly caused by the disposal of federal land by exchange. The existing executive orders that protect wetlands and floodplains provide a useful guide.[398]

IX. CONCLUSION

Use restrictions can be a powerful tool to promote the interests of the public and the Agencies themselves, but they can also be a burden if they are not employed strategically. Their indiscriminant use would be as detrimental as their indiscriminant rejection. But their potential is too significant for the Agencies to ignore any longer.

In 2013, federal land managers face a new reality of unprecedented threats to the natural resources they manage. The blunt approaches developed for customary considerations are not up to the challenges of climate change, increasing uses of the public lands, and the growth of the WUI, for example. Furthermore, after decades of land exchange scandals, the Agencies no longer can afford to ignore the tools they have to promote the public interest. And with increasingly tight budgets, they must use those tools to promote efficiency.

Thus far, the Agencies' statutory and regulatory directives have failed to overcome their reluctance to broadly consider the public interest in including use restrictions when they convey public lands. Judicial enforcement has attracted their attention, but not their interest. With so much for the Agencies themselves to gain, however, there is hope that twenty years from now fewer entries will have been added to the volumes of lost opportunities for federal land exchanges.

398. *Id.*