

Abstract:

This article explores land exchanges as an integral part of federal natural resources policy in the United States of America. The purpose of this essay is to present a broad historical and political overview of the policies regarding federal land exchanges. Additionally the article will review the acts of official malfeasance that have surrounded federal land exchanges. It is argued that initial land exchanges must be understood in the broader context of the expansionist character of the U.S. as a developing nation, and the later attempts as a way to conserve natural resources. The policies supporting that expansion must be seen through the catalyst of constitutional and statutory law. Land exchanges policy is the product of history and its economic dynamics.

Keywords: Federal Land Exchanges, FLPMA, Equal Value, Policy History

Introduction

Land exchanges are an integral part of federal natural resources policy. Much attention has been given to them, particularly in government reports and legal analysis. However, little has been done to situate them historically. The purpose of this article is to present a broad political overview of the policies regarding federal land exchanges. The article takes on two lenses. First, Initial land exchanges must be understood in the broader context of the expansionist character of the U.S. as a developing nation and the later attempts as a way to conserve natural resources. Second, the policies supporting those expansions must be seen through the catalyst of constitutional and statutory law. Land exchanges policy is the product of history and its economic dynamics. A historical review beginning at the end of the nineteenth century will help clarify the changes and struggles surrounding legislative acts purported to improve the instrument originally called land swap.

A second important purpose of the article is to review the acts of official malfeasance that have surrounded federal land exchanges. This malfeasance has not gone without official remark. The General Accounting Office (GAO) has shown in two recent instances (1987; 2000) that at least two federal agencies have demonstrated serious errors in their appraisal process by failing to garner appropriate value in their exchanges and complete these swaps in the public interest.

Unfortunately these acts of malfeasance are nothing new; they have been going on for more than a hundred years. This reality is typically ignored or receives little attention in government review and critical historical analysis. This essay seeks to review the blundering history of land exchanges and chronicle the malfeasance that accompanied it. It highlights the Bureau of Land Management (BLM) and USDA Forest Service (USFS) practices that "have given more than fair market value for nonfederal land they acquired and accepted less than fair market value for federal land they conveyed because the appraisals used to estimate the lands' values did not always meet federal standards" (GAO, 2000, p. 4).

The article will first explore the growth of conservationist thought during the Roosevelt administration and examine the critiques put forward by its detractors. It will utilize a specific critical analysis that allows interpreting conservationism as a practical tool for future use of natural resources and as an instrument created to drive potential competitors out of business. The essay draws on the concept of the "upper class and corporate-based policy network" (Gonzalez, 2001, p. 23), which has used a form of progressive conservation scheme as a cover towards a wiser use of natural resources. The article's explanation of land exchange is founded on the idea that progressive conservationism has to be interpreted in a theoretical continuum that started with the utilitarian philosophy, and in current use should be viewed as the basis for the proposal to finally dispose of public lands to private developers. It will

conclude by analyzing how as a society, America still accepts the theory of progressive conservationism under the terminology of multiple use and sustained yield.

Theoretical Foundations

In the nineteenth century U.S. public land policy was simply a matter of “acquisition and disposition” of the public domain (Culhane, 1981, p. 2). In 1901 the Bureau of Forestry, formerly known as the Division of Forestry, was transformed into its new role to conserve the forest reserves which were later renamed the federal forests. In 1905 this bureau became the USDA Forest Service and the forest reserves, established by executive order after 1891 under the Department of Interior (DOI), were transferred to this agency. Over the course of the twentieth century different paradigms of interest and conflict arose regarding disposal and recent management of the lands of the public domain. Paul J. Culhane describes the administration of these lands by the Forest Service and the ancestors of the BLM in terms of the dichotomy created by the diverse policies of land management (Culhane, 1981).

This dichotomy was expressed in the debate of conformity-capture. On one side, according to political scientist Herbert Kaufman’s interpretation, “the Forest Service was a highly disciplined professional agency untainted by special interests” (Culhane, 1981, p. 2). Kaufman’s analysis was based on studies conducted in the 1950s, and saw an agency immune to business pressures. His interpretation shows the framework of a highly conformist agency created under the philosophy of progressive-conservation and following in its decision making the principles of scientific management. At the other end of the spectrum Phillip Foss in his 1960 study of the Grazing Service and the General Land Office (GLO) which were eventually combined into the BLM, described them as mediocre entities that were thoroughly influenced by their clientele--the western stockmen--to such an extent that they were considered to be in a state of captivity (Culhane, 1981, p. 2). Foss highlighted the heavy component of interest group liberalism as the leading policy of the newly created federal agency and its predecessors. This was a form of national policymaking that had become the province of organized lobbies, and thus interest group driven since it mistook the conflation of their agendas as the ultimate form of good government. Both the Grazing Service and the GLO functioned not as the administering agencies they were assumed to be, but as bureaucratic land disposal entities. They progressively disposed of the public domain by transferring lands into private hands in a variety of ways including land sales and grants.

In the nineteenth century the philosophy of natural resource management, which is the belief behind the optimal goals and ecological conditions established in legislative or administrative policy regarding federal lands, was one of techno-utilitarianism (Culhane, 1981, p. 3). According to this philosophy “natural resources were inexhaustible and [it was] believed that they should be used to raise individual and collective standards of living” (Culhane, 1981, p. 3). The western frontier was considered limitless, and its natural resources were to be commodified and exchanged in a laissez-faire market under a capitalist economic theory protected by the libertarian principles of the U.S. Constitution (Culhane, 1981, p. 3). These principles served the rapidly industrializing the U.S. as it operated with a quasi-religious belief in its mission. Indeed, “for most of the nineteenth century, a combination of self-aggrandizing Calvinist theology, unswerving faith in science and technology, and the consumer appetites of a rapidly growing Euro-American population combined to utterly transform most of America’s natural environment” (Burton, 2002, p. 58). Toward the end of the nineteenth century Americans began to realize that natural resources were indeed exhaustible and sought to protect them from wasteful abuse. As Culhane (1981) notes, “The conservation position arose [in the latter half of the nineteenth century] as a reaction to the destruction caused by the utilitarian plunder economy” (p. 4).

The new philosophy of that time championed the nobility of stewardship of the land and its resources rather than their profligate waste (Marsh, 1864). This theory was quickly appropriated by the Roosevelt administration and put into practice by the Forest Service under the leadership of Gifford Pinchot. “With the establishment of the National Forest Service . . . and President Roosevelt’s protection of millions of acres of federal land from unregulated resource exploitation, in the early days of the twentieth century the American conservation movement began to come of age” (Burton, 2002, p. 62). According to Culhane (1981), “progressive conservation was based on two principles central to the progressive era as a whole: opposition to the domination of economic affairs by narrow ‘special interests’ (that is, large business firms) and a fundamental belief in rationality and science” (pp. 4-5). On the other hand George Gonzalez (2001) believes that at the time of the passage of the 1891 General Land Law Revision Act, also known as the Forest Reserve Act, which provided the president with the power to set

aside forest reserves, the special (speculative) interests of timber companies appropriated some of the conservationist rhetoric. Timber executives represented in Congress under the guise of watershed protection and forest conservation for the benefit of the many, were in reality serving their own long-term future interests (Gonzalez, 2001, p. 1).

This article argues for an amalgamation of the two explanatory positions in a theory that combines the perspectives of both Culhane and Gonzalez into a plausible account of the alternative political approaches. Culhane's interpretation of the principles of conservation in forestry as exemplified by Gifford Pinchot's practices must be closely scrutinized. The concept of forestry adopted by the conservationist administration of Teddy Roosevelt was a response to the laissez-faire abuse of the public domain so common in the past. Culhane suggests that opposition to natural resource exploitation was a need of that particular era, but conservation advocates were unable to preserve the forests from the timber barons. According to Gonzalez (2001), this constituency was actually represented by Pinchot (p. 25). Under progressive conservation theory, "forests were treated as a crop, and their exploitation managed to provide for a sustainable yield" (Gonzalez, 2001, p. 25). Every time timber shortages occurred on the free-market private forests were depleted. This policy withdrew timber from small competitors, who did not own private forests, and let timber barons take advantage of government subsidized purchases of public forests' wood during the construction boom of the 1950s and 1960s. Gonzalez (2001) is correct when he states that "the basic principle of conservation was 'wise use,' with the emphasis on wise, for the progressive conservationists were reacting to rapacious, short-term, profit-maximizing, utilitarian exploitation ... of the forests" (p. 25).

On the other hand, if progressive conservation is looked as part of a continuum, its commodification of natural resources is not very distant from the utilitarian theory of exploitation of resources. Both theories are use-oriented as opposed to the practices of environmentalism in the late nineteenth century as exemplified by John Muir and his later disciples. These were the preservationists of the 1960s who believed in a more intrinsic value of nature; the value found in its beauty and wildness.

Land Exchanges in History: The Beginning

The era of conservation of forests on federal lands began in the mid 1870s initially focusing on the goals of preventing floods and reducing the dependency on foreign lumber supplies. In the 1880s the Division of Forestry was created under the Department of Agriculture (USDA).¹ The idea was to transplant European professional forestry into the U.S. forest reserves created in 1891. The Forest Preservation Act of March 3, 1891 (under section 24) authorized the president "to set apart and reserve, in any State or Territory having public land bearing forests ... whether of commercial value or not, as public reservations" (26 Stat. 1095). President Harrison alone reserved over thirteen million acres of forestlands between 1891 and 1894. A few years later in early 1896 the National Forest Commission was created to plan the withdrawal of future forest reserves. By 1897 presidential proclamations of forestland withdrawals covered an estimated 21,279,840 acres of public domain lands (citation?). The Sundry Civil Appropriations Act of June 4, 1897 created the Forest Management Act and the infamous "in lieu" section that allowed land exchanges for the reacquisition of in-holdings (Dana & Fairfax, 1980, p. 1).

The Forest Management Act, also called the national forest Organic Act, was passed by Congress in a temporarily unsuccessful attempt to suspend the presidential proclamations of forest reserves. According to historian Paul W. Gates (1968), this piece of legislation dealt a temporary blow to the conservationists' plans to withdraw public lands from general public disposition and entry, but the Act actually had a more traumatic effect upon lands still in the public domain (p. 568). As Gates (1968) notes, "Most unfortunate was the inclusion in this act of the famous Forest Lieu Section" (p. 570). Originally this provision recognized only the settler's right to exchange lands within forest reserves once a claim had been initiated or finally acquired for other quarter sections situated outside of the reservations. But the conference committee of the two congressional chambers under direction of Rep. John F. Lacey from Iowa replaced the provision with one that extended the right to exchange to other commercial interests, such as the railroads or timber companies (Gates, 1968, p. 570).

Thus this section recognized the right of "settlers or owners of unperfected or patented lands within the reserves to relinquish their tracts and to select in lieu vacant land open to settlement in amount equal to that relinquished" (Gates, 1968, p.570). According to Senator Richard F. Pettigrew², who proposed the first draft of this section, the pro-railroad members of Congress were extremely effective in manipulating the bill in a way to protect the economic interests of their constituency. His bill recognized

the right of settlers to exchange forest reserves lands, while the House modified version included both the rights of settlers and of owners, vis-à-vis railroad landholdings received through presidential grants (Gates, 1968, p. 570). Richard Pettigrew (1970) emphasized how such a powerful constituency defrauded the U.S. government of its precious timber and mineral lands (p. 17). He believed that under the presidential plan of creating forest reserves, there was already the intention to later favor business enterprises. When these reservations included desert lands, "these deserts were probably embraced intentionally so that the railroads could exchange their odd sections of worthless desert land for lands of great value outside of the reservation" (Pettigrew, 1970, p. 18).

Pettigrew (1970) referred to this practice as "Cannonism [a]s the profession of selling the country to the rich so that they may be enabled to grow still richer by the exploitation of the poor" (p. 280). According to him Congressman Joseph Cannon, chairman of the committee on appropriations, was one of the main culprits behind the defrauding lieu section device. A tool expressly designed to protect the claims of pioneering homesteaders had suddenly become the loophole by which unscrupulous businessmen could pillage the resources of western Pacific states such as California, Oregon, and Washington (Pettigrew, 1970, p. 17).

According to Gates (1968), "by permitting owners of near worthless land within the forest reserves to exchange them for equal acreages of the very choicest timberlands outside, Congress was setting up a system that invited wholesale abuse and deprived the government of valuable resources" (p. 586). Stephen Puter, a self-confessed looter of the public domain, referred in his autobiography to other frauds perpetrated in these lands. Describing the abuses of a particular railroad company he claimed, "the whole thing is a low-down means of granting the Northern Pacific extraordinary powers in the selection of lands in lieu of its worthless holdings in two reserves" (Puter, 1908, p. 372). Ultimately, Pettigrew's sardonic comment clearly summarizes a constant element of federal policy history regarding natural resources: "These men became rich because, through their positions of public trust, they were able to betray the Government and the people into the hands of the exploiters" (1970, p. 278).

In 1899 the GLO issued a report commenting on the abuses surrounding the implementation of the in lieu section, identifying specifically the practice of fraudulent claims filed by fictitious homesteaders to acquire title to lands located in the forest reserves. In spite of this report, virtually nothing was done to correct the problem. In fact, that same year Secretary of the Interior Ethan Hitchcock issued a ruling that made matters worse. He ruled that even unsurveyed lands could be exchanged under the in lieu section.³ Secretary Hitchcock even issued a decision whereby "owners of land within the reserves might even strip it of timber and then relinquish it and select other land elsewhere" (Ise, 1920, p. 178). In 1900 the Senate took a stance on the issue of in lieu exchanges and voted unanimously to ask the Secretary of the Interior to introduce legislation that would stop the abuses of the land swap law, yet the new legislation still protected the privileges of the railroads.

Notwithstanding the continuous frauds some positive, if minimal, changes were about to take place. The pressure for change was mounting. On one side, Sen. Pettigrew made a strong argument in Congress that the DOI had decided in its policies to exchange timber rich lands for "worthless lands" held by railroad companies in order to enlarge the value of their grants (U.S. Senate, 1900, p. 6288). He spoke in terms of congressmen acting "against the public welfare" (Pettigrew, 1970, p. 21). In his view, the public interest should have been interpreted as the interests of U.S. citizens, rather than those of "the railroads ... predatory interests who are the real government of the United States" (Pettigrew, 1970, p. 210). Binger Hermann, then commissioner of the GLO, also "was troubled about the forest lieu provision of the Act of 1897 which allowed any owner or bona fide claimant to land within the reserves to relinquish the tract" (Gates, 1968, p. 573). The commissioner strongly believed that such land exchanges should favor agricultural land settlers rather than be subject to fraud and abuse by timber interests. Finally, his support of relinquishment of agricultural lands for in lieu land exchanges received the seal of approval and was adopted by Congress on June 6, 1900 (38 Stat. 614). However, the railroad interests were still being protected under this new piece of legislation (Gates, 1968, p. 573).

Even with Senator Pettigrew's adamant support of the requirement that land exchanges be conducted only with land appraisals, and thus be based on equal value rather than acreage, his counterpart in the House, Representative Joe Cannon, was successful in disabling the effort. He convinced his House colleagues to adopt language that indirectly protected the interests of big business. Cannon "inserted a provision that thereafter railroads could only exchange for surveyed lands" (Pettigrew, 1970, p. 279). But the law did not take effect until October 1, 1900. "Since it did not take effect for nearly four months, there was still time for most of the selections to be made on unsurveyed lands as before"

(Ise, 1920, p. 181). According to contemporary public land scholar and forest policy author John Ise, the pillaging continued under the aegis of the letter of the law (1920, p. 181). The window of opportunity left open for railroad companies allowed them to stake claims on unsurveyed lands, which would be traded later for reserved forestlands.

The new provision limited the exchange of the lieu scrip in a reserve with surveyed lands still in the public domain. But immediately after the passage of the new law in 1901, the land theft continued. As Senator Pettigrew vividly explained, the nature of the fraud was such that it could be conducted within the legal system. The fraudulent device was similar in each instance. "When three settlers in a township petitioned for the survey of the township the Government was bound to make the survey ... [thus] ... railroad thieves would send three men into a township, would have them file three homestead entries ... and then the railroads would locate their scrip upon these lands" (Pettigrew, 1970, pp. 279-80). Senator Pettigrew (1970) came to realize that despite the fact that congressmen had voted to sustain the democratic system, in reality, they were "the tools in the hands of big business that were used to plunder the American people" (p. 24). In practice the land exchange provision was there to help plunder in the interest of capital (Pettigrew, 1970, p. 25).

As a result of the fraud committed under the law, over thirty people were convicted and sentenced to prison for conspiracy to defraud the government including Senator John H. Mitchell and Congressman John N. Williamson. In 1902 Secretary of the Interior Ethan A. Hitchcock began his term by firing the commissioner of the GLO, Binger Hermann, upon learning about the land frauds throughout the West and especially in Oregon. But the corruption extended to a diverse group of people including land officers, attorneys, surveyors, inspectors, and men higher up (Ise, 1920, p. 186). By 1904 many involved in the business of stealing governmental lands were being prosecuted (U.S. Department of Interior [DOI], 1904, p. 21). The official charge was conspiracy to defraud the government of its public domain lands.

Following reports from the Secretary of the Interior denouncing the effects of the in lieu section, President Roosevelt appointed a Public Lands Commission in 1903 to deal with, among other issues, a resolution to the management of the forest reserves. This commission recommended the complete repeal of the in lieu section, or at least the adoption of exchanges of lands of equal value and acreage.⁴ But the onslaught of in lieu swaps continued (Draffan & Blaeloch, 2000). Ise (1920), repeating the words of the 1903 annual report by the Secretary of the Interior commented that "the Forest Lieu Act ... was manifestly unfair to the government. It permitted an exchange in which it was certain that the government would lose" (p. 176). These practices went on until March 3, 1905 when Congress finally put an end to in lieu land swaps of public domain territory.

One of the men convicted for his involvement in several schemes commented that the time had finally come for action since "all big corporations in the country could afford to kill the law, because it had outlived its usefulness, and the next move was to make a grandstand play before the country and pretend to bow to the people's will, and incidentally shut the stable door after the horse was gone" (Puter, 1908, p. 374). In reality the stable door had been left ajar by Congress. A clause in the 1905 act validated the land exchange contracts entered into by the federal government just prior to the passage of the statute. Ise makes clear the general consensus of the time was that "the exchanges made in connection with [this clause] were nothing that the government should proud of ... but it was hardly to be expected that the government should bargain with private parties and not get cheated more or less" (1920, p. 183). The San Francisco Mountains Forest Reserve in Arizona and its checkerboard style of land subdivision became the example for these new fraudulent exchanges (Ise, 1920, p. 183).⁵

Gifford Pinchot, America's first professionally trained forester, was notably absent during the time of the fraudulent appropriation. He rose to national prominence as a conservationist under the patronage of President Theodore Roosevelt. After studying at Yale University, he furthered his forestry education in France. In 1898 Pinchot was appointed chief of the USDA Division of Forestry in recognition of his advanced training in forestry and the newly discovered need to protect American forests. But his involvement in blocking the exploitation of in lieu land exchanges was limited. In his memoirs he rejoiced when "the pernicious lieu-land exchange was laid away for good and all. That was progress of the first water" (Pinchot, 1947, p. 258). He also commented that the framers of the in lieu section meant "that any lumber company, mining company, railroad company, cattle outfit, or any other large owners could get rid of their cut-over land, their worked-out claims, the valueless portions of their land grants, or any other land they had no use for, and take in exchange an equal area" (Pinchot, 1947, p. 118). He admitted that was the purpose, yet he never acted against it. Because of this, Pinchot became the object of political attacks by members of Congress. "Representative Humphrey ... criticized Pinchot for not having protested

against the operation of the Forest Lieu Act, and several western men accused him of being in large measure responsible for the frauds arising under that act" (Ise, 1920, p. 293).

Throughout this period the DOI in its complacency was ineffective at impeding the process of land grabbing, and fueled the general disregard for the original charge to conserve the forest reserves.⁶ By the time the in lieu section was repealed on March 3, 1905, "unscrupulous land speculators successfully urged the creation of reserves simply because they contained worthless lands claimed by the speculators, which were there then traded for clear title to valuable properties on the unreserved public domain" (Dana & Fairfax, 1980, p. 64). The USDA, newly responsible for the forest reserves, was successful in lobbying against the exchange provision. But by this time railroad and timber companies had already significantly fattened their territorial assets. As Ise (1920) pointedly observes, "the Forest Lieu Act ... had served as the means whereby individuals and corporations exchanged about 3,000,000 acres of land, much of it waste and cut-over land within the forest reserves, for valuable government land outside" (p. 182).

The manipulation of the in lieu system, together with the legislative requirement of equal acreage, showed the importance of a new player in the story--the cruiser--who is more familiar today as the appraiser (Puter, 1908, para. 389). A knowledgeable man of the era reported that "very much depends on the honesty of a cruiser, as may be assumed. He has it in his power to do either the contemplated purchaser of the tract or the one who sells an irreparable injury by any dishonest methods" (Puter, 1908, p. 389). The same author reported the dangerous consequences for the public domain when dishonest cruisers were employed by federal agencies. He claimed that "a crooked cruiser is capable of swindling his employer out of thousands of dollars without becoming involved in criminal liability, because, if cornered he can set up as a defense that subsequent estimates exposing his dishonest efforts are the result of a difference of opinion between experts" (Puter, 1908, p. 389).

The policy designed to foster agricultural settling of the western lands began a bitter controversy over the use of those lands. As President Roosevelt summarized in a letter to the Public Lands Convention held in Denver during June 1907, the country has "incurred the violent hostility of the individuals and corporations seeking by fraud...to acquire and monopolize great tracts of the public domain to the exclusion of the settlers" (as cited in Puter, 1908, p. 461). At the same time, the net result of the passage of the in lieu section of the 1897 Act, which was purportedly designed to exchange settlers' lands within the forest reserves, was nothing more than the legal implementation of "illegal, fraudulent methods... to get possession of the valuable timber of the public domain, to skin the land, and to abandon it when impoverished well nigh to the point of worthlessness" (Puter, 1908, p. 461). An editorial in the *Portland Oregonian* of June 21, 1907 was a testament to this dishonorable period of mismanagement of the public domain. The editor criticized the anti-conservationist agenda of the time and condemned "the abuses which were permitted...which enabled large corporations to exchange their worthless lands for good and still retain their good lands within a reserve" (as cited in Puter, 1908, p. 464).

Forestlands Exchanges in the 1920s

Between 1911 and 1925 Congress passed several pieces of legislation that helped the consolidation of federal forests throughout the country in support of the conservationist ideology. As Dana and Fairfax (1980) describe it, "the most significant forestry legislation ever written, the Weeks Act passed on March 1, 1911. This critical law authorized purchase of national forests in the East" (p. 101). The importance of this piece of legislation was in the authority given to the secretary of agriculture "to recommend the acquisition of lands which were, in his judgment, necessary for regulating the flow of navigable streams and to purchase such lands" (Dana & Fairfax, 1980, p. 113; 36 Stat. 961).

The Weeks Act conferred new powers on the secretary of agriculture. The secretary had since 1905 enjoyed supervision and control of the forest reserves through the Forest Service. Now, the Weeks Act authorized the secretary "to organize acquired lands to be administered as national forests" (Dana & Fairfax, 1980, p. 113; 36 Stat. 961). The Act essentially implemented the conservationist design to extend the idea of forest reservations to other parts of the country, especially the east and south. The power to purchase these lands was conferred upon the National Forest Reservation Commission, made up of three members of the government and four members of Congress. The secretary of agriculture received a mandate to make the selection of forestlands to be purchased. Over the next two years the government purchased more than 1.5 million acres of land.

The exchange power for the acquisition of these lands was not conferred by Congress on the executive branch until 1925, with the Weeks Exchange Act. The "Act of March 3 authorized the exchange

of land ... for land within the exterior boundaries of national forests acquired under the Weeks Act of 1911 or the Clarke-McNary Act of 1924, on an equal-value basis" (Dana & Fairfax, 1980, p. 383). The Clarke-McNary Act had previously extended the powers of the secretary of agriculture to purchase lands both for stream flow protection and timber production (43 Stat. 653). A year later, the Weeks Exchange Act extended the authority to complete administrative land swaps to the secretary of agriculture for those in-holdings created by purchases under the Weeks Act.

With the 1922 General Exchange Act (GEA), Congress finally legislated around the power of the USDA to swap lands for in-holdings of equal value. The "General Exchange Act authorized the Secretary of Agriculture (through the secretary of the interior) to exchange surveyed, nonmineral land ... in national forests established from the public domain for privately owned ... land of equal value within national forests in the same state" (Dana & Fairfax, 1980, p. 381). The GEA was modeled after the in lieu section, but this time the requirement of equal acreage was replaced with an equal value standard. The idea was still to expand forestry, but the element of forest consolidation became the driving force for the congressional initiative.

An Act to Consolidate National Forest Lands, also known as the GEA of March 20, 1922, had become truly necessary to solve the problem of private in-holdings within national forests created by the checkerboard system.⁷ The first attempt had failed miserably in the period between 1897 and 1905. However the repeal of the in lieu land section still did not solve the in-holding quagmire. Consequently between 1905 and 1922 Congress legislated each land exchange. It became clear though that due to the cumbersome process of the land exchange approval before the full Congress, an administrative agency would have better control of the minutiae of land swaps and thus could better handle this task. As the Public Land Law Review Commission [PLLRC] (1970) reported in its study, the "impractical [congressional] procedure was one of the motivating factors in the eventual enactment of the 1922 general authority" (p. 203).

Notwithstanding the impracticality of the legislative tool, those congressmen who had survived the scandals of the in lieu land section had still fresh in their minds the issue of fraudulent exchanges. Yet in congressional hearings held in 1920 the issue debated by the legislature was "whether the [Forest] Service would sacrifice the interests of the government if given the discretion lodged in the general exchange act" (PLLRC, 1970, p. 203).⁸ Eventually, however, the smooth operation of the bureaucracy necessitated the delegation of exchange powers to a federal agency. The battle over whether to confer discretionary authority on the executive branch in order to expedite the consolidation of forest lands was won by the Forest Service with the passage of the GEA.

The power of the Forest Service to swap lands was not unlimited. It was delegated only control over the exchange of national forest lands. Although the General Exchange Act appeared to permit exchange of national forest lands of any type, the U.S. attorney general harbored a different idea (PLLRC, 1970, p. 204). In an opinion issued on March 21, 1924 he "held that the General Exchange Act was intended to apply only to public land forests and not to acquired national forest lands" (as cited in PLLRC, 1970, p. 234). Therefore he excluded from the coverage of the act those lands acquired under the provisions of the Weeks Act of 1911. This opinion prompted the secretary of agriculture to request specific legislation that would confer on the Forest Service the power to engage in swaps for parcels of lands in-held in national forests acquired through the Weeks Act. A year later, his wish became law with the passage of the Weeks Exchange Act of 1925.

Both the GEA and the Weeks Exchange Act require that the lands transferred by the Forest Service and the lands surrendered by the private party be located in the same state. In addition, as explained above, both statutes require that the lands exchanged be of equal value. Both pieces of legislation also required that not only should any forest service exchange be finalized according to the public interest, but such swaps should also lead to the acquisition of lands mainly valuable for forest purposes.

There is a safeguard against fraud included in the Weeks Exchange Act that is not present in the GEA. All of the exchanges proposed under the Act of March 3, 1925 need the approval of the National Forest Reservation Commission, a body composed of three members of the executive cabinet and four members of Congress, whose duty is to safeguard the public interest in the exchange. Unlike the Weeks Act exchanges, "the Secretary of Agriculture is lodged with sole discretion to make this determination" of public interest in the land swaps conducted under the GEA (PLLRC, 1970, p. 214). The House Committee on Agriculture introduced this important safeguard in order to protect those governmental interests

abused by the fraudulent schemes surrounding the unfortunate implementation of the in lieu section between 1897 and 1905.

Taylor Grazing Act of 1934

The era of disposition of the public domain ended in 1934 with the passage of the Taylor Grazing Act, named after Representative Edward T. Taylor of Colorado, who sponsored the original House bill (48 Stat. 1272). With this statute Congress enacted a new policy of retention and management of those lands that remained in the public domain as unentered and under the administration of the Grazing Service, a newly created agency. Thus the process of conservation of federal lands that began in the late nineteenth century with the creation of forest reserves continued. In 1946 a new agency took charge of the management of these lands—the Bureau of Land Management (BLM). This Bureau would be created out of the ashes of the GLO and the Grazing Service—both predecessors as the BLM was an outfit of the DOI.⁹

The public domain lands of the early 1930s were mainly lands left unoccupied by homesteaders, but rather used by the livestock industry and subdivided into major grazing districts. Thus Secretary of the Interior Harold L. Ickes supported a bill that would conserve the lands by supporting their development, improvement, and use but at the same time halting any further damage to the range due to its overgrazing (Dana & Fairfax, 1980, p. 161). The purpose of the Taylor Grazing Act was to immediately curtail free access to the public domain and regulate the management of the newly reserved federal lands. But right away the DOI was faced with a challenge from the livestock industry. According to Dana and Fairfax (1980), “those operators who had come to dominate the industry in a period of might makes right were not inclined to give up ‘their’ land or prerogatives under a federal regulatory scheme” (p. 162). The elites of the grazing and livestock business were successful in their ability to define the statute’s implementation to their own advantage (Dana & Fairfax, 1980, p. 163).¹⁰ Not only in terms of doctrine, but also in jurisprudence, the idea was that land exchanges should be interpreted according to the nature of the statute. Thus, since “this is a grazing act ... [the] purpose is to provide for orderly administration of the public domain and to stabilize the livestock industry” (Moran, 1964, p. 28).¹¹

The prompt implementation of these purposes led first the Grazing Service and then the BLM (after 1946) to become captives of the local industry grazing districts.¹² After about twenty years of Congress tinkering with the idea of delegating land exchange powers to the DOI, legislation was passed that “provided the Secretary with general power to exchange lands under his jurisdiction for either state or private lands, principally to serve rangeland needs” (Anderson, 1976, p. 661). Thus, section 8 of the Act, which allowed the exchange of federal for private lands that carried a public use value,¹³ was reinterpreted by the federal government as a mandate to create compact grazing districts (43 U.S.C. § 315(g), 1970).¹⁴ As previously recommended in 1932 by the forester of the United States, the mechanism of exchange would allow the same kind of conservation for future use at the grazing district level that had been implemented by the Forest Service (U.S. House, 1932, p. 1719).

The hearings held before the House of Representatives in 1933 discussed, “the possibility that the [bill’s] provisions would permit the perpetration of fraud on the government, that is, the exchange of poorer land for better land achieved by misrepresenting the condition or value of the land to the government” (PLLRC, 1970, p. 7). But the House Committee on Public Lands kept the original language of the bill, which required the exchange to be conducted on an equal value basis. Missing was any discussion or interpretation of guidelines for appraisal of the private land to be acquired into the public domain. As a matter of fact, at the time of the House debate in 1934 only Rep. White (Idaho) touched upon the exchange feature of this bill (PLLRC, 1970, pp. 7-8).¹⁵ He raised the possibility that under the letter of the bill the swapping of valueless lands for valuable holdings required equal value exchanges. Rep. White thought fraud might occur each time a private party may “have secret information as to the ... value of the land” (U.S. House, 1934, p. 6361). According to him, calculated speculation could lead to defrauding the government as long as the public interest was invoked by the private party proposing the trade (U.S. House, 1934, para. 6361). Indeed, in both the Senate and the House the terminology used stressed the necessity of a “mutual benefit” or “mutual advantage” for the parties to the exchange, without clearly defining the public interest.

In 1936 an amendment to the Taylor Grazing Act authorized the Secretary of Interior to exchange for private lands lying inside or outside the boundaries of a grazing district as long as the “public interest” would benefit (Act of June 26, 1936, Ch. 842 § 3, 49 Stat. 1976, (repealed 1976)). No definition of public

interest was provided in the text. According to R. Lauren Moran (1964), a legal scholar, in practice the decision as to whether or not a land exchange was in the public interest was discretionary for each land office and such “determination will, of course, be affected by considerations related to land and range management and grazing and the livestock industry” (p. 50).

As far as valuation of the lands selected or offered the element of value in the transaction was limited to equality as a standard of application, but without any interpretive tools or hermeneutical means other than the wording “fair market value” (PLLRC, 1970, p. 2). The Secretary of the Interior, in his 1960 annual report, recognized that under the language of section 8 the practice of land exchanges implemented by the BLM had allowed the private acquisition of public lands at prices below market value.¹⁶ This allowed speculators to obtain “windfall profits” just before the bureau launched its anti-speculation policy in a two decade delay (DOI, 1960, p. 241). Up to 1960 public lands had been acquired at prices below market value because the BLM kept on approving swaps of lands “in areas where the real estate market [wa]s so unstable or uncertain that values [could] not be established with confidence” (DOI, 1960, p. 241).¹⁷ In addition, speculators obtained windfall profits when the BLM approved exchanges even when “a marked dissimilarity in location or character of the offered and selected lands” was present (DOI, 1960, p. 241). In accordance with the Secretary of Interior’s report, “marked dissimilarity works against equating of values” (DOI, 1960, p. 241).

In response to the new anti-speculation policy, in 1964 a law analyst stressed the importance of standardization in order to leave public officials ample discretion in the accomplishment of their daily duties. Moran (1964) highlighted the “increasing need for closer contact between the administering officials and the representatives of private interests and an understanding by each of the problems of the other” (p. 50). Moran knew that no exchange procedure may succeed without such cooperation, and modern demands required that ultimately lands be developed. Over a decade later the mineral development industry complained about the problems created by federal officials who were too reluctant to participate in land exchanges with private parties. According to one author, “this stems from a fear that if the applicant ends up with a better deal in the trade than the government, charges of fraud or malfeasance could be brought against them ... All parties who seek to effect an exchange for Federal lands must recognize this as a serious problem” (Eliason, 1976, p. 629).

As far as the requirement of completing a land exchange in the public interest, the interpretation of this most peculiar element of section 8 of the Taylor Grazing Act had become standard practice in DOI directives and regulations for the implementation of this statute. In 1934 solicitor General Nathan Margold issued an opinion in which he interpreted the implementation of the public interest in the exchange section of the Act as “strictly limited to procuring exchanges for the implementation of grazing policy” (as cited in PLLRC, 1970, p. 19). While in 1960 the Secretary of Interior in the departmental anti-speculation policy hinted at implementing land swaps in furtherance of resource conservation purposes, a definite change of direction was still in the making. Only in 1963 did the DOI reverse its previous interpretation to allow any land exchanges that would “further any land management policy without regard to whether it was tied to grazing or range stabilization purposes” (PLLRC, 1970, p. 19; *LaRue v. Udall*, 324 F.2d 428, 1963).

Further modifications of national policies relative to public land management took place after the passage of the 1964 federal Classification and Multiple Use Act (CMUA), in order to enlarge the possible list of uses of public domain lands. While the 1964 statute reaffirmed the recognized policy of retention and management of federal lands in the Taylor Grazing Act, the bill also required the BLM to adopt a multiple use paradigm in its designation of administered lands. A year later the agency issued regulations conforming to the dictates of the law. It acknowledged that “all present and potential uses and users of the lands will be taken into consideration. All other things being equal, land classifications will attempt to achieve maximum future uses and minimum disturbance to or dislocation of existing users” (43 C.F.R. § 2410, 1969).

Also in 1964 changes were made in the BLM Manual to reflect the multiple use idea recognized by federal legislation. The manual recognized different uses such as: range administration, public recreation development, forest management, and watershed protection (Bureau of Land Management Manual, 1964, part 2.15.20). By legal fiat all these different uses had become part of the management program of the BLM, thus land exchanges could be pursued to better accomplish them.

Shortly after in 1968 the Secretary of Interior tried to streamline the land exchange process by amending the federal regulations, and concretizing the objectives of management of public domain lands.²⁰ While still recognizing the discretionary process of the land exchanges with private parties, he

highlighted each different purpose of the land swap process. Simultaneously, the Secretary expanded the understanding of land value and exchange purposes. The regulations listed uses such as consolidation of governmental land-holdings, establishment of land ownership in order to reach an efficient administration of federal lands, protection of community and business interests linked to uses of public lands, and implementation of the multiple use principle. Federal lands could “be used or disposed of in such a way as to promote their multiple use, sustained yield and highest and best usage” (PLLRC, 1970, p. 53).

The 1964 PLLRC

On September 19, 1964 Congress passed a bill that created the Public Land Law Review Commission (PLLRC). The PLLRC was to study and analyze the purpose and function of existing public lands laws in order to recommend any modifications to current laws, regulations, policies, and practices to better administrate the public domain. Among other recommendations, the Commission suggested modifications to statutes regarding “the exchange of the public lands ... necessary to assure that the public lands of the United States shall be retained and managed, or disposed of in a manner to provide the maximum benefit for the general public” (PLLRC, 1970, p. 2). After an extensive analysis, the PLLRC adopted and released a report prepared by private contractors that described several problem areas with the acquisition and exchange of federal lands.

The first problem, according to the report, was that “Congress ... ha[d] simply been unable to decide what limits to place on the delegation of its acquisition authority in order to protect the public interest” (PLLRC, 1970, S-17). The Commission recommended that Congress should circumscribe the administrative agencies’ authority to use land swaps to cases in which the acquisition would facilitate the better management of federal lands.

The second problem related to an extensive lack of uniformity in processes within several agencies for the acquisition of federal lands by exchange. The PLLRC viewed the flexibility or discretion in acquisition procedures more as a problem than a virtue. The Commission felt that treating the private parties involved in land exchanges with federal agencies uniformly and fairly was of the utmost importance. Thus, it recommended a standardization of acquisition practices to avoid federal officials ever using their position of power in dealing with private parties during the negotiations leading to acquisition of private lands (PLLRC, 1970, para. S-17). In this instance it should be pointed out how the Commission’s Advisory Council, composed of federal agencies officials and representatives of major citizen groups, failed to represent any environmental organizations. The Council was replete with numerous representatives of business groups interested in the development of resources found on federal lands.

The third problem the PLLRC found was that “techniques and procedures for effectuating ... exchanges ... [failed] to meet such matters as escalating costs and fair protection to individual property rights” (PLLRC, 1970, S-17). In this instance the review Commission thought that private property owners were getting slighted rather than the government being defrauded in land trades. It is worthwhile to remember that the Commission was established by conservative, pro-private property, pro-industry representative Colorado congressman Wayne Aspinall. He specifically hoped the result of the Commission’s work would be to facilitate more private development on public lands (Sturgeon, 2002, p. 153).

In response to the review findings, the Commission evaluated each of the private contractors’ suggestions citing a number of possible remedies for the above mentioned problems. One suggestion was that Congress establish an independent committee that would be charged with oversight of land exchanges by any federal agency. Another alternative would defer to judicial action “any impasse as the valuation of lands which are the subject or object of an exchange” (PLLRC, 1970, S-19). A third alternative dealt with the issue of lack of uniformity by proposing a single system of acquisition by exchange of lands to be implemented by all federal agencies. Each of the alternatives proposed to the commission carried potential disadvantages. For instance, the proposal to defer the valuation of lands to the courts system would create “all the disadvantages in time and money ... of a regular condemnation proceeding” (PLLRC, 1970, p. 455). In another instance if federal real property were appraised before any negotiations took place, the federal agency would lose any power of negotiation, thus obliterating any chance where private “property can be acquired at less than the appraisal value” (PLLRC, 1970, p. 461). In a twist of irony, the PLLRC considered disadvantageous any practice that would subvert fairness in dealings between the Government and its citizens. Indeed, the Commission recommended “that representatives of the Government should never sue their positions of power to take advantage of those

with whom they have dealings. This is essential when they seek to negotiate the acquisition of land". (PLLRC, 1970, p. 273).

The real concerns for the authors of the report to the Commission stemmed from the evaluation of the practices of different federal agencies. But while the PLLRC interpreted the failure of standardization of acquisition procedures as a hindrance to the fair treatment of its citizenry, thus hinting at furthering the protection of private parties' interests in dealing with federal agencies, the report authors had meant somewhat the opposite in the draft study. They were puzzled in particular by the specific facts surrounding the different land exchanges conducted by the BLM. They studied two different land swaps as case studies. In the first, the review office in Denver had overridden an appraisal previously accepted by the local office in Phoenix. Afterwards, each newly proposed appraisal of the same federal parcel of land was rejected. An independent appraiser was eventually contracted by the Land Office in Phoenix and his appraisal showed a difference of over \$1 million between the offered and the selected land's price.²¹ The private party then tried to pressure the appraiser into accepting the original appraisal of the selected lands by filing a complaint against him with the local chapter of his licensing board. On February 12, 1969 the Chief of the Branch of Land Appeals of the BLM's Office of Appeals and Hearings dictated the final outcome of this exchange proposal by rejecting it due to a different value of the offered and selected lands (PLLRC, 1970, p. 197).

A more troublesome case involved divergent appraisals of selected lands under the jurisdiction of both the BLM and the National Park Service (NPS) in a proposed exchange with a private party. In this instance, the discrepancy between the appraisal by the BLM and that by the NPS was over \$1.5 million, and the final loss had the land swap been completed would have been borne by the government. In this instance the PLLRC adopted the conclusion raised by the report that the deficiencies of the BLM cruise system were to be blamed for the faulty overvaluation in the bureau's appraisal. In its response the "BLM attributed the discrepancy in its cruises to inexperienced cruisers" (PLLRC, 1970, p. 339).²² Because of these negative findings the report submitted to the PLLRC suggested serious alternatives to the system of land exchanges, yet the Commission still failed to establish a new inter-departmental office in charge of evaluating each agency's appraisal technique, as previously requested by the 1968 DOI Office of Survey and Review (OSR) report. Instead, reacting to a proposal of the Department of Justice, the Commission endorsed the creation of an Interagency Land Acquisition Conference to further the standardization of appraisal procedures among governmental agencies.

The New Era of Land Exchanges: FLPMA

In 1976, Congress passed the Federal Land Policy Management Act (FLPMA), which re-established the policy of federal land retention and multiple-use management of the public domain under the control of the BLM (Pub. L. No. 94-579, 90 Stat. 2743, U.S.C. § 1701 et seq.). By legislative fiat on October 21, 1976 the public domain was officially renamed "public lands" and the BLM was authorized to manage these retained assets.²³ Finally, the agency found through this new legislation both a mission and an organic act. The mandate was for the BLM to "manage the public lands on a [sic] multiple use-sustained yield basis" (Dana & Fairfax, 1980, p. 340).

At the same time and in the same legislation Congress included the Forest Service, giving it new authority both in terms of land acquisitions (art. 205) and exchanges (art. 206) (36 C.F.R. Part 254).²⁴ Here Congress was acting on one suggestion from the PLLRC on uniformity of procedures for acquisition and exchange of federal lands. Through this legislation the two agencies in charge of the public lands conservation came to share the same procedures for both land acquisitions and swaps. According to the PLLRC (1970) "land exchange authority should [have] be[en] used primarily to block up existing Federal holdings" (p. 270) only to further better land management on public lands. But in practice, natural resource lawyers saw at the time that "pursuing exchanges purely for land consolidation benefits ma[de] little sense for the BLM" (Quarles & Lindquist, 1984, p. 414). Pressure to offer private lands for land swaps with the government grew.

Section 206 of FLPMA still allowed some disposition of public lands when it provided that "a tract of public land or interests therein may be disposed of by exchanges by the Secretary under this Act" (43 U.S.C. 1716). It required that both the offered and the selected lands be of equal value. Appraisal became necessary in order to verify the equality in value and that appraisal had to conform to the Department of Justice Uniform Appraisal Standards for Federal Land Acquisitions (DOJ UASFLA). In addition, the regulations passed by the Forest Service and the BLM required a review of the appraisal by the lead state

appraiser or the state director at the agency's state office (C.F.R. § 2201.3-4; 36 C.F.R. § 254.9(d)). This required the drafting of a review report, analyzing, and approving or adjusting the market value appraisal according to the highest and best use of the selected land.

According to the claims of some legal scholars, "the federal government, in turn, has employed complex exchange evaluation procedures, involving numerous subjective and often undisclosed assumptions, which critics suggest frequently overstate federal land values and understate the market value of private lands" (Quarles & Lindquist, 1984, p. 373).²⁵ The law recognizes only the "standard of the market value" (43 C.F.R. § 2200.0-5(n); 36 C.F.R. § 254.2)²⁶ of the lands and this value "must be based upon a determination of the 'highest and best use' of the property. 'Highest and best use' is defined as the 'most probable use' of the property, based on market evidence as of the date of valuation" (Kitchens Jones, 1996, p. 21). But, in instances where the valuation is done in the absence of market information, it can be treacherous trying to come up with the fair market value (FMV). As Anderson (1976) believed, the "final determination of FMV may largely be the result of the talent of parties to a transaction to juggle hypotheses, exaggerate the significance of scarce data, and infer value from prospecting and other development expenditures ... all combin[ing] to undermine the FMV" (pp. 686-87). In a few words, all those operations were antithetical to a common calculation of the FMV and could mislead rather than help in a final determination of land values.

According to Frank Gregg (1982), director of the BLM under the Carter Administration, "further problems are created by differences of opinion and professional appraisers' findings regarding the value of specific tracts. Differences in valuation methodologies ... and allocating the costs of the time-consuming value determinations further complicate the process" (p. 518). The former director, however, failed to mention that deliberate undervaluation of public lands could be the problem in the actual appraisal as pointed out by a 1956 DOI committee and a 1968 OSR report (DOI, 1960, p. 4). €

Ironically, Steven Quarles and Thomas Lundquist (1984), two legal practitioners who worked for the Endangered Species Coordinating Council (ESCC), a coalition of more than 200 natural resources pro-development companies, commented that they were "aware of only one case in which the assertion has been made that equal value was not received in an exchange. ... [In that instance] environmental plaintiffs raised equal value concerns in an effort to halt a Forest Service exchange that would have aided the proposed Big Sky recreational development in Montana" (p. 380).²⁷ Their position that Forest Service or public domain lands in general may have been undervalued only once during federal land exchanges transactions has been contradicted by data collected since the Oregon land fraud trial of 1903 up to recent investigations in 1987 and 2000 by the GAO (1987, p. 1). In addition, both the practice of federal judicial and administrative jurisprudence of devolving challenges of equal value to these agencies' discretion rather than reaching the trial, does not exclude the happening of these instances of undervaluation.

Notwithstanding the importance of appraisal and valuation of lands purported to be exchanged in federal land swaps, FLPMA was also important for its attempt to tie the land transaction to the furthering of a public interest. According to Dana and Fairfax the provisions of FLPMA must be interpreted in the context of other statutes such as the National Forest Management Act (NFMA) and the Multiple Use Sustained Yield Act (MUSYA). In this new framework "all real estate transactions must be evaluated in the land use planning process and must protect the multiple-use value of the land" (Dana & Fairfax, 1980, p. 340). But they are also especially skeptical of the implementation of the BLM mandate as far as it concerns "the public interest" in multiple-use, especially when the law requires that the public interest be "well served". The author of the law may have had some special interest in semantics, but it fails to even specify how and to what degree an interest is well served. Section 1716 (a) provides that in order to determine the public interest of a land exchange either the secretary of interior or agriculture "shall give full consideration to better federal land management and the needs of state and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife".²⁸

Ultimately, it is a matter of interpretation of the law, and the federal court system has usually given a *carte blanche* to the secretaries and their determination of the public interest. But the problem is that in practice the public interest has been subordinated to the interests of private traders, who propose trades in furtherance of any factor enumerated by statute or regulation. In fact, according to a district court in Colorado "Section 1716(a) requires merely that the agency consider and weigh the factors which are listed. ... It does not give the factors any particular priority, nor does it require the agency to do so" (*Lodge Tower Condominium Ass'n v. Lodge Properties, Inc.*, 880 F. Supp. 1370, 1380 (1995)).

Notwithstanding these obstacles, a policy analyst in 1979 accurately foretold a dramatic change in the posture and practices of the BLM. He stated, "the planning philosophy mandated by FLPMA propels the agency toward a holistic view of land use in entire regions of the West where the government is a major land-owner ... the BLM may gradually assume a more ... skeptical view toward proposed activities of its private and local government neighbors" (Anderson, 1976, p. 695). The chief minority counsel of the Senate Committee on Energy and Natural Resources in 1981, on the other hand, believed that BLM management would carry out its exchange powers dutifully and in a fashion that would satisfy all the interests involved in the land swaps. His contention was that ultimately "public land managers can make exchanges work to the benefit of all land owners and the general public" (U.S. Senate, 1981, p. 323).

The history of land exchanges demonstrates that there are dangers stemming from loose wording such as 'public interest' (Brown, 2000, p. 15). The legislation provides that both parties involved in a land exchange can "mutually agree" to absorb the entire costs relative to exchange (43 U.S.C. § 1716(f)(2)). This would include "the cost of appraisals and other reports that are contracted out, including the environmental assessment or impact statement, for both the offered and selected lands" (Kitchens Jones, 1996, p. 22-15). The danger of loose wording is apparent in the developing practices of each federal agency that would look favorably on the willingness of a private party to conduct an exchange and pay for the expenses ensuing from the transaction. Furthermore, the danger has concretized into a common practice for private parties to participate more and more in the appraisal process of the selected land. For example, a pro-development lawyer recommend to her clients that they become proactive in conveying information and sharing conclusions with the federal appraiser. She suggests that "these efforts should be undertaken with the attitude of assisting the agency in making a sound decision on the exchange; the proponent must not be perceived by staff as trying to unduly influence or interfere with their responsibilities" (Kitchens Jones, 1996, p. 22-30).

Notwithstanding these cautionary words by legal practitioners, a study conducted and published by the GAO in 1987 found that both the BLM and the Forest Service in several instances had failed to attain equal value in federal land exchanges with private parties (p. 3). These findings sounded a wake-up call for the agencies involved, and to Congress, which had delegated its swapping powers to branches of the executive through FLPMA. Yet the land developers request for more land trades in western states continued, and the yearly number of such land swaps kept on increasing (GAO, 1987, p. 8).

Federal Land Exchanges Facilitation Act (FLEFA) in 1988

"In fact, exchanges became so popular that in 1988 their proponents pushed through a bill to streamline the process. They complained that land exchanges took too long, that the Forest Service and BLM had vastly different processes ... and that there was no way to settle differences over appraisal values" (Bama, 1999, p. 27). In 1988 Congress passed the FLEFA, which introduced a system of bargaining and arbitration for land swap disputes (Pub. L. No. 100-409, 102 Stat. 1086). According to Congress, the act was passed "to facilitate and expedite land exchanges ... by streamlining and improving the procedures for such exchanges" (59 Fed. Reg. 10,854, (1994)). The statute acknowledged the importance of land swaps for the consolidation of federal landholdings in order to achieve better management, protect natural and recreational resources, and promote the multiple-use principle in the utilization of public lands. But several voices rose in unison against the possible misuse of the instrument of land exchanges and the foundation of this new bill: the mandated agency facilitation and expediency in the completion of land swaps through an arbitration process aimed at solving divergent land appraisals. Among others, Rep. Ron Marlenee, a conservative pro-privatization congressman from Montana, opposed the passage of the bill. During the congressional hearing Rep. Marlenee made it his personal crusade to protect the everyday recreationist's and/or hunter's use of federal lands. Not only did he highlight the risk of possibly trading out of federal ownership those very same lands, but also, he made it known that such a bill raised several issues concerning the possibility of misusing federal lands to compensate private parties, which had assumed the administrative costs of the swap. Rep. Marlenee's ultimate fear was the untimely "giving away or selling off federal lands to a vested few, those who are involved in the exchange, rather than identifying land and opening it up to sale to the general public" (U.S. House, 1986, p. 20608).

The amendments enacted by FLEFA set up a process of arbitration and negotiation if the two exchanging parties could not agree on the valuation of the lands being appraised. It also allowed the parties to make adjustments in the valuation of the lands to compensate each party for the costs incurred

in the transaction when those expenses were borne by the other party. But the practice adopted by the BLM in the implementation of the general mandate of FLEFA proved that its "alternative approach" was deleterious for the federal coffers in terms of value loss (The Appraisal Foundation [TAF], 2002).²⁹ In fact, due to the peculiar organizational structure of the bureau the agency subjected its appraisal review to its own agency realty division, which is the office in the bureau that promotes with private developers the exchange of federally owned lands. Thus, it was no wonder that the realty division would rubberstamp appraisals of undervalued federal lands and then would transfer them to land development speculators (Draffan & Blaeloch, 2000).

On October 2, 1991 the USDA, in accordance with the FLEFA mandate, issued a draft rule that set forth implementation procedures for federal land exchanges. On March 8, 1994 the final rule was issued. This final rule was intended to specify issues such as the determination of public interest in a land exchange together with special procedures relative to bargaining and arbitration. According to the final rule, the Forest Service officer is to reach a determination that the public interest is served by giving "full consideration to the opportunity to achieve better management of Federal lands and resources, to meet the needs of State and local residents and their economies" (36 C.F.R. § 254.3(b)(1)). Differently from previous land exchange regulations, the officer must now also consider important objectives such as fish and wildlife habitats, cultural resources, watersheds, aesthetic values, consolidation of lands for proper management and development, and promotion of multiple-use values. The achievement of these objectives requires that the officer base his or her decision on factors that entail not only economic considerations. In addition, the same innovative Forest Service regulations require that the officer now must document his or her findings in the administrative record (36 C.F.R. § 254.3(b)(3)).

The final rule adopted specific requirements regarding land appraisers. The appraiser must be "an individual agreeable to all parties and approved by the authorized officer, who is competent, reputable, impartial, and has training and experience in appraising property similar to the property involved in the appraisal assignment" (36 C.F.R. § 254.9(a)(1)). In addition, the regulations require that each appraiser meet certain state regulatory standards as set forth by Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), in order to equalize each state's requirements for the profession.

The regulations require that the appraiser estimate the value of the land by its "highest and best use" (59 Fed. Reg. 10,871; 36 C.F.R. § 254.9(b)(1)(i)). This is defined as "the most probable and legal use of a property, based on market evidence, as of the date of valuation" (59 Fed. Reg. 10,868; 36 C.F.R. § 254.2). Once the appraiser reaches his or her conclusions, they become part of the appraisal report. In addition, the appraiser has to certify that he or she "has no present or prospective interest in the properties appraised, and has not received any compensation contingent upon the conclusions of the report" (Blando, 1994, p. 332). A qualified review appraiser then evaluates the report in order to ascertain whether it is "complete, logical, consistent, and supported by market analysis" (36 C.F.R. § 254.9(d)(2)(i)). The review appraisers are required to set forth their conclusions in a review report.

After FLEFA

The last decade of the twentieth century saw attempts by the Clinton administration to embrace the concepts highlighted by FLPMA and bring back a consolidation of public lands with the dismantling of the checkerboard pattern. But when this was done according to environmental preservationist purposes it immediately evoked the ire of private developers, business at large, and its many constituencies and spokespersons (Leshy, 2001, para. 220). Suddenly, President Clinton's policies were causing the business lobbyists to go on the offensive and state publicly that "the administration's process is at odds with the FLPMA model for environmental evaluation and public interest consideration" (Feldman, 1997, p. 2-39). This ire was sparked by the proposed acquisition of environmentally sensitive private lands in exchange for public lands to be later identified. The argument was that land exchanges should not be initiated to solve controversies linked to habitat protection, but should instead be more "traditional". This position reflects the standpoint of an ideological objection to the government pursuing land protection initiatives, favoring instead the traditional privately proposed trades. Accordingly, only a "traditional" land swap would give the chance to reach "a truly open, collaborative decision-making process" (Feldman, 1997, p. 2-40), where, of course, resource development takes priority over environmental factors.

The crux of the matter is the different interpretation of natural resources that private interests give to the statutory mandated "public interest" (Blaeloch, 2001). Private interests that pursued resource

production saw the Clinton administration as failing at prioritizing interests. The critique was that “the exchanges dedicate large land areas, at great public expense, to a single set of dominant uses by precluding all resource development activity” (Feldman, 1997, p. 2-41). Local interests were outraged that the federal government would get entangled with exchanges “involving very large amounts of land with debatable benefits to the public” (Kitchens Jones, 1996, p. 22-4). In this regard, pro-development lawyers have clearly defined the gist of the controversy: “land exchanges present the only viable means of acquiring the federal land, and thus, eliminating the federal government, from the midst of a private development project” (Feldman, 1997, p. 2-6).

In this scenario it is easy to understand how private business might receive preferential treatment from federal agencies (Draffan & Blaeloch, 2000). After all, as Kitchens, a pro-development lawyer, concludes in her review of federal land exchanges, the secret of success is in “maintaining the interest and support of the federal land management agency. When the agency and the proponent cooperate and coordinate their efforts, a land exchange represents a win-win situation for all parties” (as cited in Feldman, 1997, p. 2-51). An uninformed reader might misinterpret this passage by Kitchens as just a person stating the obvious, yet a more critical gaze at her verbiage might prove otherwise and help us discover what lies behind the obscure content. She is restating the same terminology and arguments proposed a year earlier by Dave Cavanaugh (1999), the then Senior Specialist for the BLM appraisal process (p. 10). The same Cavanaugh who had just launched an alternative approach to BLM land exchanges, and whose activities were investigated promptly leading to the removal from his position by the Office of the Inspector General.

In this regard, the political scientist, Cass Sunstein, describes how the Framers of the U.S. Constitution helped us create a government, which would supposedly safeguard our nation against the evil of “self-interested representation by government officials”. They envisioned this “underlying evil: the distribution of resources or opportunities to one group... [as] a violation of the impartiality requirement – a naked preference” (Sunstein, 1993, p. 25). These naked preferences, reflective of interest group politics, cajoled motivated agency officials into developing dependable working relationship with proactive private parties. Without securing the keys to the castle first, how could the distribution of resources to one person or group be preserved in violation of the impartiality requirement?

Conclusion

In chronicling the history of federal land exchanges this essay has followed the peculiar methods of public land disposal used by the government since the end of the nineteenth century. It confirms the fears expressed in environmental activist literature (Draffan & Blaeloch, 2000) that historically the use of federal land swaps has been and continues to be a disaster (GAO, 2000),³⁰ and that policy formulation has influenced the land swap system to benefit economic over all other interests.

A review of the historical literature confirms that the public interest of the community at large has taken a backseat to private interests, which support the private economic development of public lands. Unless administrative or judicial courts start giving a legal recognition to the ideology that satisfactions of private interests are the public’s interest, and/or advocate the prioritization of economic development over environmental protection, several competing interests should be considered as the base of the agencies’ decision making. Recent studies conducted by investigative federal agencies have, indeed, confirmed the negative trend (according to Gonzalez’s key of interpretation) started by the conservationist policies of the Roosevelt administration (GAO, 2000). But those very same policies have been subject to criticism also by conservative rhetoric. Such policies enacted by Congress since 1897 and directed at the reacquisition of land in-holdings, have been mis-implemented and have mainly failed their intent to re-build a more manageable public domain according to some conservative authors (Feldman, 1997; Kitchens Jones 1996). Is the solution to the problems linked to the existence of these controversial lands a fire sale of them, more specifically national forestlands, as advocated by Professor Robert Nelson (1995)?

Unlike this market efficient solution, the author suggest that answers could be found by searching the souls of misbehaving individuals. What if the culprit of this centennial controversy should be traced in the lubricant that motivates human greed? Let us not forget that corruption has always been present and has involved acts by government officers, lawyers, appraisers, reviewers, and politicians (Blaeloch, 1997). A century ago people were charged with conspiracy to defraud the government of its public domain, while today a less environmentally protective administration only threatens to conduct criminal investigations (i.e., in 2003, the San Rafael Swell land exchange).

Throughout all, serious legal issues have remained unresolved. The term “public interest” has remained undefined. In the 1930s the term meant “mutual benefit” or “mutual advantage”. Almost seventy years later, statutory law still provides no precise definition. This unclear language has fostered complaints by both private and environmental interests. Depending on the party complaining, the federal agency is tagged as either reluctant in perfecting land exchanges (Feldman, 1997), or too cozy with the natural resources development industry (Brown, 2000).

In its 1970 report the PLLRC suggested that judicial action be one of the means used by government agencies to find the proper valuation of the lands involved in land exchanges. Over forty years later this suggestion still has not been passed into law. Notwithstanding the slow and unresponsive approach of both the executive and legislative branches of the government to the commission's suggestions, some courts, specifically the Ninth Circuit Court, are finally adopting a proactive stance that follows those suggestions. There is still a long way to go before this new tool of judicial challenge and action will help sort out all the claims based on the flawed organizational structure of the federal agency or the corruption of individual agency officers, both surviving elements of the historical nature of our federal land management outfits.

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Notes

¹Although the charge to manage the forest reserves first went to the DOI in 1905, those responsibilities were transferred to the USDA and the Forest Service when this agency was created out of the already existing Bureau of Forestry.

²Richard F. Pettigrew served as a U.S. senator for the newly created state of South Dakota from 1889 until 1891. In his 1922 autobiography he attacked his former Republican colleagues claiming the Republican party was in the hands of trusts and corporations, running a political platform authored by gamblers and shylocks.

³Secretary Hitchcock overruled the decision made a year earlier by his predecessor Secretary Bliss, who had ruled against the selection of unsurveyed parcels in land exchanges.

⁴According to Pinchot, in a recommendation on March 7, 1904 the Commission transmitted to Congress the proposal to block the exchange of forest reserve lands under the in lieu section. The second recommendation followed on February 13, 1905.

⁵The checkerboard land pattern is a constant reminder of the nineteenth century land grants, especially the railroad land grants, used by the federal government to develop its public domain lands in the western territories. This pattern has created inholdings, parcels of lands owned by the government surrounded by private ownership or vice versa, following the decision of the federal government to retain some of its lands. The whole problem of intermingled private and public land holdings, checkerboard lands, pre-dates the first act of Congress establishing a policy of federal land retention, the 1891 Forest Reserve Act.

⁶The Transfer Act of February 5, 1905 transferred management responsibility for the forest reserves to the Department of Agriculture.

⁷This pattern consists of square-mile blocks of land. During the Western expansion railroad companies would receive some of these blocks in exchange for their promise to construct railways in the west. While some parts of these lands were transferred to private individuals for agricultural use, others were sold to timber companies for logging. The final result was an alternating design of private square-mile sections of land intermingled with property the federal government had originally retained.

⁸According to the General Exchange Act, “the Secretary of Agriculture is authorized in his discretion to accept on behalf of the United States title to any lands within the exterior boundaries of the national forests which, in his opinion, are chiefly valuable for national-forest purposes...in exchange...” 16 U.S.C. 485 (March 20, 1922, ch. 105, § 1, 42 Stat. 465).

⁹The Executive Reorganization No. 3 of June 6, 1946 successfully merged the two agencies into the Bureau of Land Management.

¹⁰On this point, see William Rowley, US Forest Service Grazing and Rangelands, 152. The author confirms the “desire to have the new agency more under the control of stockmen.”

¹¹For case law on the subject see *Hatahley v. United States*, 351 U.S. 173 (1956); *Chournos v. United States*, 193 F.2d 321 (10th Cir. 1951); *Red Canyon Sheep Co. v. Ickes*, 9 F. 2d 308 (D.C. Cir. 1938).

¹²In 1950, Marion Clawson, director of the BLM said, “It is doubtful if today any public land policy could be adopted which was unitedly and strongly opposed by the range livestock industry.” Marion Clawson, *The Western Range Livestock Industry: The Management of public lands in the United States* (New York, 1979), 11, pp. 381-82.

¹³Section 8 recognizes the discretionary power of the Secretary of Interior to exchange lands with private parties after the determination is made that the land swap is in the public interest, the value of the lands selected and offered is equal and the lands are both in the same state or no distant more than 50 miles from the adjoining state.

¹⁴The section allowed equal value land swaps each time “public interests will be benefitted [sic] thereby.” 43 U.S.C. § 315(g) (1970).

¹⁵See in particular 78 Cong. Rec. 6361 (1934) (emphasis added).

¹⁶A report issued by the DOI Office of Survey and Review in 1956 had just exposed the failures of the appraisal process within the different agencies of the department.

¹⁷Herein lays the conundrum embodied in land exchanges. Equality of exchanges is determined on market rates but the process is complicated by private interests, which, often successfully, seek to inflate their land values.

²⁰The same year the DOI Office of Survey and Review had published a scathing report on the appraisal practices of the departmental agencies and suggested the creation of a separate office that would oversee land swap evaluations.

²¹According to regulatory terminology, while offered lands are private selected lands belong to the public domain.

²²The BLM still referred to the obsolete GLO terminology of cruises and cruisers, which are today synonymous with appraisal reports and appraisers.

²³Public lands are defined as any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the BLM. See 43 U.S.C. § 1702(e).

²⁴The regulations to implement FLPMA in Forest Service exchanges were codified under 36 C.F.R. Part 254. The Forest Service’s statutory and management mandate had been entirely redefined in the 1974 Resources Planning Act and the 1976 National Forest Management Act.

²⁵Quarles and Lundquist, “Federal land exchanges and mineral development,” 373. No data are offered in support of this statement.

²⁶Both the regulations for the Forest Service and the BLM define market value as “the most probable price in cash ... that lands or interests in lands should bring in a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence.” See 43 C.F.R. § 2200.0-5(n); 36 C.F.R. § 254.2.

²⁷Quarles and Lundquist, “Federal land exchanges and mineral development,” 380. The authors are referring to the claims surrounding the *National Forest Preservation Group v. Butz*, 485 F. 2d 408 (9 Cir. 1973).

²⁸Both the Forest Service and the BLM act under regulations that prescribe the securing of public objectives such as: protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands; expansion of communities and promotion of multiple-use values. See 43 C.F.R. § 2200.0-6(b); 36 C.F.R. § 254.3(b).

²⁹The Appraisal Foundation, *Evaluation of the appraisal organizations of the Department of Interior Bureau of Land Management: Including a special evaluation of an alternative approach used in St. George, Utah.* (Washington D.C., 2002). Regulations concerning the BLM implementing FLEFA were passed in 1993 and were codified at 43 C.F.R. Part 2200.

³⁰The GAO found that both “agencies have given more than fair market value for nonfederal land they acquired and accepted less than fair market value for federal lands they conveyed” in violation of the public interest at large. GAO, 2000, p. 4.

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Giancarlo Panagia gpanagia@iupui.edu, a SJD candidate at Indiana University at Indianapolis, School of Law. He completed his Ph.D. in Justice Studies at Arizona State University under the supervision of Dr. Randel Hanson. His current dissertation concerns the national economic costs of BLM and Forest Service land exchanges with private developers. The author is a member of the Virginia State Bar.