

Continued Cartographic Chaos, Or A New Paradigm in Public Land Reconfiguration? The Effect of New Laws Authorizing Limited Sales of Public Land

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A recent report by the United States General Accounting Office stated that the federal government's primary means of public land reconfiguration, the land exchange, was so fraught with problems that it recommended Congress discontinue all land exchange programs.¹ At least one Congressional Representative, not apt to mince his words, stated that the Bureau of Land Management and the Forest Service, the two principal land management agencies, "flat got snookered" conducting exchanges.² His comments reflect an all too common perception that something is fundamentally wrong with the way the federal government conducts land reconfiguration.

Partially in response to such criticism, Congress has passed several pieces of legislation aimed at reforming the land reconfiguration process in recent years. The first was the Southern Nevada Public Land Management Act of 1998.³ More recently, the Federal Land Transaction Facilitation Act of 2000 was signed into law.⁴ Both Acts authorize the sale of public land and the

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1. See U.S. GENERAL ACCOUNTING OFFICE, BLM AND FOREST SERVICE: LAND EXCHANGES NEED TO REFLECT APPROPRIATE VALUES AND SERVE THE PUBLIC INTEREST, GAO/RCED-00-73, at 6 (2000), available at <http://www.gao.gov/newitems/rc00073.pdf>.

2. *Auditors: U.S. Loses Millions in Ill-Advised Land Swaps*, available at <http://www.cnn.com/2000/US/07/17/landswap.01/index.html> (July 17, 2000) (quoting George Miller, Representative, D-California).

3. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, 112 Stat. 2343 (current version at 31 U.S.C. § 6901 (2001)).

4. Federal Land Transaction Facilitation Act, Pub. L. No. 106-248, 114 Stat. 613 (codified at 43 U.S.C. § 2301 (2000)).

retention of the proceeds by the land management agencies in order to purchase private land better suited for public conservation and protection. The two Acts differ remarkably in terms of scope and authority. In many ways the sale processes authorized by these Acts appear to solve or avoid many of the problems that have plagued the traditional land exchange process. Therefore, these laws are an important step in the evolution of western land reconfiguration. In other ways, these new laws fail to meet their statutory intent.

Part I of this note will examine how the land disposition laws of the nineteenth century resulted in a fragmented pattern of western land ownership. In addition, it will detail how the land exchange process became the solution. Part II will explore some of the problems and criticisms of the land exchange process, which have lead many to claim that the federal government gets "snookered" conducting land exchanges. Part III will survey the Southern Nevada Public Lands Management Act of 1998 and the Federal Land Transaction Facilitation Act of 2000. This note will compare and contrast the scope and authority of the two laws and point out each Act's relative strengths and weakness. Finally, this note will conclude by submitting that while the two Acts are clearly aimed at encouraging better public land management and reconfiguration, only the Southern Nevada Act will ultimately be successful.

I.

FRAGMENTED WESTERN LAND OWNERSHIP AND THE ROLE OF THE LAND EXCHANGE

As of 1998, the federal government owned more than 29 percent of the United States total landmass, some 654 million acres.⁵ Often called the "public domain" or the "public lands," most of this land is concentrated in 12 western states.⁶ But this represents only a fraction of what the federal government once owned. Beginning in mid-nineteenth century, the official policy of the United States was to dispose of the public lands in order to promote settlement and development of the West. To further this

5. Ryan M. Beaudoin, *Federal Ownership and Management of America's Public Lands Through Land Exchanges*, 4 GREAT PLAINS N. RESOURCES J. 229, 230 (2000).

6. *Id.* at 230 n.2 (ownership percentages: Alaska (47%), Arizona (43%), California (45%), Colorado (36%), Idaho (62%), Montana (27%), Nevada (80%), New Mexico (34%), Oregon (52%), Utah (64%), Washington (28%), and Wyoming (50%)).

policy Congress gave away public lands through various provisions such as the Homestead Act of 1862 and the Desert Lands Act of 1877.⁷ To increase settlement, Congress encouraged the building of railroads throughout the west by passing the Act of July 1, 1862, which helped finance the Union Pacific and Central Pacific railroads.⁸ The Act granted the railroads alternating one square mile sections (640 acres) of public lands along the route.⁹ All told, the federal government granted over 130 million acres of public land to the railroads in this alternating pattern.¹⁰ The railroad grants resulted in the “checkerboard problem,” a pattern of ownership whereby neither a private owner nor the public can gain access to its property without encroaching on the others land.¹¹ Adding to this intermingled pattern of western land ownership were an array of grants made to the states in order to promote public education.¹² Western land ownership was further fragmented by the Mining Act of 1872, which allowed any qualified citizen to file a mineral claim on public lands that they selected and receive a patent giving title to the land.¹³ These and other land disposal laws succeeded in rapidly transferring ownership of a large bulk of land to private citizens and corporations.¹⁴ By the early twentieth century, the federal government had disposed of more than 70 percent of the continental U.S. through these and other haphazard and uncoordinated land disposal laws.¹⁵

The historical consequence of these politically and economically motivated land disposal laws has been a severely fragmented pattern of ownership.¹⁶ In some areas the fragmentation is so extensive that the federal government owns and manages

7. Homestead Act of 1862, ch. 561, 26 Stat. 1097 (repealed 1976); Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (repealed 1977).

8. See Act of July 1, 1862, ch. 120, 12 Stat. 489.

9. See TIM FITZGERALD, POLITICAL ECONOMY RESEARCH CENTER, FEDERAL LAND EXCHANGES: LET'S END THE BARTER 5 (2000), available at <http://www.perc.org/ps18pr.htm>.

10. See *id.* at 4.

11. See *id.* at 5.

12. See *id.*

13. See General Mining Law of 1872, 17 Stat. 91, (current version at 30 U.S.C. §§ 21-42 (2001)).

14. See JANINE BLAELOCH & GEORGE DRAFFAN, WESTERN LAND EXCHANGE PROJECT, COMMONS OR COMMODITY? THE DILEMMA OF FEDERAL LAND EXCHANGES 9 (2000).

15. *Id.*

16. See Fitzgerald, *supra* note 9, at 3.

the land in name only.¹⁷ For instance, in Pueblo County, Colorado, a total of 15,820 acres of Bureau of Land Management ("BLM") public land is divided into 84 parcels having a median size of only 40 acres.¹⁸ The Forest Service estimates that there are nearly 460,000 acres of inholdings (pockets of private land surrounded by public land) within its wilderness areas and national forests. As one noted author put it, "[t]he land ownership maps of the western states resemble general cartographic chaos."¹⁹

This checkerboard pattern of ownership makes management of the public lands difficult and inefficient. Problems often arise when public land abuts privately owned land. This arrangement makes it difficult for the general public to gain access to the public lands for uses such as recreation.²⁰ Often, mining and timber harvesting by owners of private lands adjacent to public land are incompatible with public uses.²¹ Widely dispersed tracts of public land make management of wildlife resources difficult and limit the availability of recreational opportunities.²² Furthermore, because the costs of land management and conservation are high, and the funds currently being allocated are low, the BLM and the Forest Service are unable to economically and efficiently manage the lands for which they are responsible.²³

Land exchanges have long been the preferred method of both the Forest Service and the BLM to solve the problems that result from this fragmented pattern of ownership. From 1989 to 1999, the Forest Service conducted over 1,200 land exchanges with a total value of over \$1 billion.²⁴ In the process, the Forest Service acquired a net total of around 600,000 acres.²⁵ At the same time, the BLM completed nearly 1,300 exchanges and acquired a net total of around 350,000 acres.²⁶ In recent years, the value and size of the land exchanges has increased substantially. Since

17. *Id.* at 4.

18. *Id.*

19. George Cameron Goggins, *Overcoming The Unfortunate Legacies of Western Public Land Law*, 29 LAND AND WATER L. REV. 381, 382 (1993).

20. See Fitzgerald, *supra* note 9, at 3.

21. See Blaeloch, *supra* note 14, at 10.

22. See *id.*

23. See generally Ian Rosenthal, *The Case for Interstate Land Exchanges*, 15 VA. ENVTL. L.J. 357, 368 (1995-96).

24. GAO report, *supra* note 1, at 11.

25. *Id.*

26. *Id.* Currently, the BLM does not track the dollar value of the exchanges it completes.

1996, there have been more than nine exchanges valued at over \$10 million with a few of those being valued at more than \$50 million.²⁷ By some estimates, the federal government is now trading more than \$130 million worth of land annually.²⁸ In fact, exchanges are so common now that one critic stated that “land swaps are in vogue”²⁹

At least part of the recent increased emphasis on land exchanges can be attributed to the policies of President Clinton’s Administration and former Secretary of the Interior Bruce Babbitt.³⁰ The Clinton Administration’s emphasis on land exchanges was seen as politically advantageous. On one hand, the former President could point to this aggressive land exchange policy as an indication of his firm commitment to conservation. On the other hand, by emphasizing exchanges and not outright purchases, the Clinton Administration was able to avoid being seen as intent on running roughshod over private property interests in the name of conservation.³¹ Furthermore, the Clinton Administration began to view and use land exchanges for a much wider variety of purposes.³² Exchanges, the Administration believed, could be utilized to protect endangered species habitat, to facilitate urban expansion, or in some instances limit urban expansion, and were especially useful for protecting environmentally sensitive lands.³³

Exchanges became the preferred method of public land reconfiguration due, in large part, to the lack of practicable alternatives. In theory, there should be a glut of federal funds earmarked for land acquisition due to the success of the Land and Water Conservation Fund.³⁴ The Land and Water Conservation Fund generates upwards of \$900 million annually through federal leases of offshore oil and gas rights.³⁵ The monies in the fund are supposed to be used to purchase inholdings and other

27. Blaeloch, *supra* note 14, at 15.

28. *Id.* at 7.

29. John H. Cushman, *U.S. Using Swaps to Protect Land Exchanges Broadening Federal Efforts in Sensitive Areas*, N.Y. TIMES, Sept. 30, 1996, at A1 (quoting Phil Hockner, Mineral Policy Center).

30. *See id.*

31. *See id.*

32. *See* Blaeloch, *supra* note 14, at 13.

33. *See id.*

34. 16 U.S.C. §§ 4601-09 (2000) (funds can be used for the acquisition of land, water, or interests in lands or water as the statute proscribes).

35. *See* Janine Blaeloch, *Land Trades Fraught With Problems*, SEATTLE POST-INTELLIGENCER, July 25, 2000, at B5.

environmentally sensitive lands. In reality however, Congress has made a habit of raiding the Fund for other appropriations.³⁶ As a result, typically less than \$200 million is allocated for land acquisition.³⁷ Most of that money is quickly spent purchasing in-holdings within the nation's National Park System. As a result, any solution to the fragmentation problem involving the federal government entering into an aggressive policy of land acquisition has effectively been closed.³⁸

Congressional authority for public land reconfiguration comes from the Property Clause of the United States Constitution, which states that, "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States."³⁹ One of the first statutes authoring land management agencies to engage in land exchanges was the Weeks Law of 1911.⁴⁰ The Weeks Law authorized the Secretary of Agriculture to exchange lands on behalf of the United States in order to protect navigable streams or to further the production of timber.⁴¹ In doing so, the law set forth many of the land exchange restrictions seen in more contemporary exchange statutes. These include limiting the exchanges to lands within the same state, and requiring "equal value" and public notice.⁴² Following the Weeks Law, was the General Exchange Act of 1922, which broadened the Secretary of Agriculture's authority to make exchanges.⁴³ The General Exchange Act allowed for exchanges of National Forest land for private land when "the public interest [would] be benefited."⁴⁴

In 1934, Congress enacted the Taylor Grazing Act.⁴⁵ Until its repeal in 1976, section 8 of the Taylor Grazing Act was the pri-

36. See Danny Westneat et al., *Trading Away the West: Low on Money, Feds Rely on Barter System*, SEATTLE TIMES, October 1, 1998, A15.

37. See *id.*

38. See *id.*

39. U.S. Const. art. IV, § 3, cl. 2.

40. 16 U.S.C. § 516 (2001).

41. See 16 U.S.C. § 515 (2001). In pertinent part, the law reads: "The Secretary of Agriculture is hereby authorized to examine, locate and purchase such forested, cut-over, or denuded lands within the watershed of navigable streams as in his judgment may be necessary to the regulation of the flow of the navigable streams or for the production of timber."

42. See 16 U.S.C. § 516 (2001).

43. See 16 U.S.C. § 485 (2001).

44. *Id.*

45. 43 U.S.C. § 315 (2001).

mary land exchange provision used by the BLM.⁴⁶ The Act specified that exchanges must benefit the “public interest” and that the exchange be of “equal value.”⁴⁷ In addition, the Act required that the public be given notice of the contemplated exchange, and that the lands to be exchanged to be within the same grazing district.⁴⁸ As adopted, section 8 of the Act was intended to authorize exchanges for the benefit of grazing interests alone.⁴⁹ However, as the BLM began to adopt multiple use management practices, section 8 of the Act was interpreted as more of an omnibus exchange provision not limited to strictly grazing interests.⁵⁰

The modern statutory authority for conducting land exchanges comes from the Federal Land Policy and Management Act of 1976 (“FLPMA”).⁵¹ FLPMA signaled the official end of the federal government’s policy of disposing of public lands, and the beginning of a new era emphasizing retention and management. The Act states that “[t]he Congress declares that it is the policy of the United States that . . . the public lands be retained in Federal ownership.”⁵² Despite this retention mandate, Congress by an amendment to FLPMA further declared that “land exchanges are an important tool . . . to consolidate federal land . . . for purposes of more efficient management.”⁵³ Indeed, FLPMA autho-

46. Section 8 of the Taylor Grazing Act was repealed by the Federal Land and Policy Act of 1976. 43 U.S.C. §§ 1701-84 (2001).

47. See Taylor Grazing Act of 1934, 73 Pub. L. No. 482, 48 Stat. 1269, § 8 (current version at 43 U.S.C. § 315 (2001)).

48. See generally Frederick R. Anderson, *Public Land Exchanges, Sales, and Purchases Under the Federal Land Policy and Management Act of 1976*, 1979 UTAH L. REV. 657, 663 (1979).

49. See *id.*

50. See *La Rue v. Udall*, 324 F.2d 428 (D.C. Cir. 1963). In *La Rue*, a cattle rancher challenged the Bureau of Land Management’s broad interpretation of section 8’s “public interest” language. The plaintiff claimed that the provision only authorized exchanges when the public interest in grazing on the public range would be benefited. The court upheld the BLM’s interpretation of the statute stating that, “if Congress had intended to restrict the meaning of those words . . . we think it would have said so.” *Id.* at 430. Following the *LaRue* decision the Taylor Grazing Act, section 8’s power became firmly cemented as the primary legislation authorizing BLM land exchanges.

51. 43 U.S.C. §§ 1701-84 (2001).

52. *Id.* § 1701.

53. The Federal Land Exchange Facilitation Act of 1988 amended FLPMA by adding § 1716(d) – (h) in an attempt streamline and facilitate land exchanges. Pub. L. No. 100-409, 102 Stat. 1086 (1998).

izes land exchanges and, to a more limited extent, outright sales.⁵⁴

The FLPMA land exchange provisions require that exchanges only be conducted when "the public interest will be well served by making the exchange."⁵⁵ In making this public interest determination, the Act stipulates that the agency must consider such things as the need for "better Federal land management" and "the needs of the State and local people."⁵⁶ In addition the agency should consider the need for "community expansion," "recreation areas," and the needs of "fish and wildlife."⁵⁷ The FLPMA also requires that the lands to be exchanged be of equal value or approximate equal value.⁵⁸ If the lands to be exchanged are not of equal value the Act allows for equalization payments provided such payments do not exceed 25 percent of the total value of the lands the government is exchanging.⁵⁹ The procedural requirements for conducting such exchanges with either the BLM or the Forest Service are set out in elaborate detail in agency regulations.⁶⁰

II.

CRITICISMS OF THE LAND EXCHANGES PROCESS

Despite the apparent benefits of conducting land exchanges and even a declaration by Congress that land exchanges are a valuable tool for managing the public domain, many people criticize the land exchange process. These critics claim that the land management agencies often get "snookered" conducting exchanges, that tax-payers get a "bad deal," and that land exchanges are a "nightmare." The critics of the land exchange process come from all sides of the political spectrum. Fiscal conservatives lament that the land exchanges process wastes public money and scarce resources. Idealistic environmental groups decry the lack of agency planning and environmental protection and complain that exchanges create loopholes from which important management decisions can be made with relatively little ex-

54. See 43 U.S.C. § 1713.

55. 43 U.S.C. § 1716(a) and 43 U.S.C. § 1713.

56. *Id.* § 1716(b).

57. *Id.*

58. See *id.*

59. See *id.*

60. See 36 C.F.R. § 254.1-17 (2001) (Forest Service land exchange procedures); 43 C.F.R. §§ 2200.0-2-2711.3 (2001) (Bureau of Land Management land exchange procedures).

The critics say these problems are the result of the fundamental weakness of the barter system. Without an objective standard of value, parties with different tracts of land have a difficult time determining whether a trade is "fair."⁶⁹ Indeed, the General Accounting Office in its report acknowledged that "land exchanges are an inherently difficult way to acquire land."⁷⁰

B. *The "Public Interest" Determination*

The land exchange process is also routinely criticized for failing to serve the "public interest." This public interest determination requires that the land management agencies make a finding that the benefits of acquiring the private land exceed the benefits of retaining the federal land.⁷¹ According to the General Accounting Office, the land management agencies often fail to make such a showing.⁷² For example, when the BLM in Elko, Nevada, decided it was time to relocate their offices they selected a former bowling alley.⁷³ The BLM initiated a trade with the alley's owner.⁷⁴ BLM personnel then told the owner to select a parcel from a map of BLM holdings in Nevada. He selected a 25 acre parcel in the burgeoning Las Vegas valley.⁷⁵ While the Elko property is now used as a parking lot by the BLM, the former bowling alley owner is reportedly holding a purchase option on the Las Vegas property for over \$9 million.⁷⁶ That exchange occurred despite the fact that the agency's own policy stated that exchanges should not be used in order to acquire administrative facilities.⁷⁷

The Huckleberry exchange conducted by the Forest Service in Washington is also often cited by critics as an example of an exchange that was completed in the absence of a clear public inter-

69. See Fitzgerald, *supra* note 18, at 8.

70. GAO report, *supra* note 1, at 19.

71. See generally 43 U.S.C. § 1716(a); see also 43 C.F.R. §§ 2200.0-0.6(b) (2001) (BLM regulation stating: "The authorized officer may complete an exchange only after a determination is made that the public interest will be well served"). The BLM regulation also sets out a general list of things that should be considered in the public interest determination, such as "needs of local residents," "better management of federal lands," "protection of fish and wildlife." See also 36 C.F.R. § 254.3(b)(1) (2001) (Forest Service's equivalent regulation).

72. See GAO report, *supra* note 1, at 20.

73. *The Land Swap From Hell*, LAS VEGAS REV.-J., June 7, 1999, at B6.

74. *Id.*

75. *Id.*

76. *Id.*

77. See GAO report, *supra* note 1, at 22.

amination.⁶¹ More pragmatic environmental groups laud the goals and objectives of land exchanges, but express concern that the process can be easily abused.⁶² Big business, on the other hand, grumbles over the slow tempo with which exchanges proceed, and often claims that the exchange process has become too difficult to navigate. The land exchange process has so many vocal critics that Pat Shea, the former Director of the BLM, once stated that “the most frightening part of [his] job [was] land exchanges.”⁶³

A. Determining Fair Market Value Through Appraisals

Critics claim that one of the key deficiencies of the land exchange process is that the BLM and the Forest Service do not always ensure that the land being exchanged is appropriately valued. In fact, an audit by the General Accounting Office found that in many instances the agencies assigned more than fair market value to the private land acquired, while accepting less than the estimated fair market value for the federal land to be exchanged.⁶⁴ For example, an audit found that in three exchanges conducted in Nevada, the Forest Service had overvalued the non-federal lands by a total of \$8.8 million.⁶⁵ The Forest Service Inspector General explained that this was the result of appraisals that did not meet the federal appraisal standards and were not supported by credible evidence.⁶⁶ The General Accounting Office also cited an unidentified exchange in Nevada, in which after completing an exchange with the BLM valued at \$763,000, the private party turned around and sold the 70 acre property the same day for \$4.6 million.⁶⁷ In each of these examples, valuation problems occurred despite the fact that the FLPMA and agency regulations require that fair market value be determined through appraisals using Uniform Appraisal Standards.⁶⁸

61. See Cushman, *supra* note 28.

62. See, e.g., Blaeloch, *supra* note 14, at 27-29.

63. *Id.* at cover page.

64. GAO report, *supra* note 1, at 16.

65. *Id.* at 17.

66. *Id.*; see also 43 C.F.R. §§ 2201.3-1-.3-4 (2001) (BLM regulations including provisions setting out appraiser qualifications, guidelines for determining market value and “highest and best use,” and appraisal report standards); 36 C.F.R. § 254.3 (2001) (Forest Service’s similar regulations).

67. *Id.* at 19.

68. See 36 C.F.R. § 254.9 (2001) (Forest Service appraisal standards); 43 C.F.R. §§ 2201.3-3 (2001) (BLM appraisal standards).

est. The Forest Service exchanged seven square miles of public land, described by one Forest Service botanist as “an island of diversity . . . and important to protect,” for nearly 50 square miles of recently clear-cut land owned by timber industry giant Weyerhaeuser.⁷⁸ The land the Forest Service received was described as being “punctuated with stands of strange, stunted trees on fire-scorched earth.”⁷⁹ Similarly, in the Red Rock exchange in Nevada, the BLM exchanged over 700 acres of federal land for nearly five times that amount in private land.⁸⁰ The BLM reasoned that the land to be acquired was needed to protect habitat for endangered fish, yet at the same time, existing BLM land in the same area was identified as available for disposal.⁸¹ Exchanges such as these have caused many groups to question the benefits of exchanging private land as retaining the public land.

Another problem with the public interest determination cited by critics is that the public does not receive adequate notice of proposed exchanges or an opportunity to review and comment on them. This problem persists despite the fact that the land exchange procedures of both the BLM and the Forest Service require that “notice of exchange proposals” be published in local newspapers and a comment period be provided.⁸² Critics charge that notice is only given after the parties have initiated an agreement to conduct an exchange.⁸³ In addition, the appraisals on which the exchanges are based remain confidential until after the exchange has been completed.⁸⁴ As one commentator put it, “[t]he formal request for public comment becomes little more than a minister’s call for objections at a wedding.”⁸⁵

78. Deborah Nelson et al., *Trading Away the West: How the Public is Losing Trees, Land and Money Weyerhaeuser Gets Forested Land, But What Do Taxpayers End Up With?*, SEATTLE TIMES, Sept. 27, 1998, at A1.

79. *Id.*

80. GAO report, *supra* note 1, at 20.

81. *Id.*

82. See 36 C.F.R. § 254.8 (2001) (Forest Service notice of exchange proposal); 43 C.F.R. § 2201.2 (2001) (BLM notice of exchange proposal).

83. See 36 C.F.R. § 254.4 (2001) (Forest Service regulation outlining the process for an agreement to initiate an exchange), and 43 C.F.R. § 2201.7-2 (2001) (BLM exchange agreement procedures).

84. See Fitzgerald, *supra* note 9, at 10.

85. Deborah Nelson et al., *Trading Away the West: How the Public is Losing Trees, Land and Money Weyerhaeuser Gets Forested Land, But What Do Taxpayers End Up With?*, SEATTLE TIMES, Sept. 27, 1998, at A1.

C. *The Ease With Which the Exchange Process Can Be Manipulated*

Critics also claim that the land exchange process is routinely and easily manipulated by a wide variety of special interest groups. One of the newest forms of manipulation involves "leveraged exchanges," or what some are referring to as "green-mail."⁸⁶ This practice has flourished recently because funds for purchasing inholdings through the Land and Water Conservation Fund are at an all time low, while, at the same time, the private market for inholdings within national forests and other protected areas has exploded.⁸⁷ For instance, in 1989, Tom Chapman bought a 240 acre inholding in the Gunnison National Forest, a world-renowned hurting area in western Colorado, for \$1,000 per acre.⁸⁸ With building permits in hand, he threatened to build a million dollar log cabin on a prominent ridge top visible for miles around, unless the Forest Service bought him out for \$5,500 an acre.⁸⁹ When the Forest Service balked, he began ferrying in construction supplies via helicopter.⁹⁰ Because the cash-poor Forest Service was unable to meet that price, Chapman was able to instead broker an exchange for 105 acres of public land near the booming ski town of Telluride.⁹¹ After taking title to the Telluride property, which the government estimated to be worth \$640,000, he quickly sold it for over \$4 million.

Critics charge that because the federal land management agencies are limited to conducting only exchanges and not sales, they are unwittingly contributing to the phenomena of leveraged exchanges and "eco-speculation."⁹² Since Congress continues to fail to properly fund the purchase of inholdings, the only way for owners of inholdings to prod the land management agencies into dealing with them is to create a credible threat.⁹³ As one Forest Service manager put it, "inholdings are ticking time bombs."⁹⁴

86. Blaeloch, *supra* note 14, at 22.

87. See Jim Simon et al., *Trading Away The West: Private Owners Play Game of Backcountry Speculation and Win Big Profits, Prime Land From Feds*, SEATTLE TIMES, Sept. 28, 1998, at A6.

88. See *id.*; see also Blaeloch *supra* note 14, at 23.

89. See Jim Simon et al., *Trading Away The West: Private Owners Play Game of Backcountry Speculation and Win Big Profits, Prime Land From Feds*, SEATTLE TIMES, Sept. 28, 1998, at A6.

90. See *id.*

91. See *id.*

92. *Id.*

93. See *id.*

94. *Id.*

Critics also bemoan the participation of third parties in facilitating public-private exchanges.⁹⁵ Some groups, such as the American Land Conservancy, have become adept at using the land exchange system for their own gain. These groups often obtain private lands and then broker a trade to the federal government. They do this by buying or taking out options on land the federal government wants and then offering it in trade for land the government is willing to dispose of.⁹⁶ In some cases, the use of third-party facilitators can help exchange proponents cut through agency bureaucracy.⁹⁷ At times, these groups can turn as much as a 25% profit on exchanges valued in the millions of dollars.⁹⁸ Often, the BLM and the Forest Service enter exclusive agreements with third party facilitators and agree to conduct exchanges exclusively with them if, in return, the group pledges to find private land suitable for a trade.⁹⁹ Some wonder whether the lands selected by these groups will facilitate public land reconfiguration, or whether they are just assembled together in order to reach "equal value" to complete the exchange.¹⁰⁰ Third party facilitation, the critics assert, more often than not leads to the land management agency losing control of the exchange process and perverts the public interest determination.

The critics also believe that the organizational structure of the BLM and Forest Service create incentives for land exchanges to proceed whether or not the exchange has merit.¹⁰¹ For instance, in a proposed land exchange in Arizona involving the Phelps Dodge mining company, it was revealed that Phelps Dodge was paying the salaries of the BLM staff charged with reviewing the environmental impact statements that needed approval for the exchange to proceed.¹⁰² According to the BLM the reason for splitting consultation costs with the exchanging party, including employee salaries, rests on the notion that the parties to the ex-

95. See Blaeloch, *supra* note 14, at 28-29.

96. Eric Nalder et al., *American Land Conservancy and Others Who Arrange Deals Can Profit At Taxpayer's Expense*, SEATTLE TIMES, Sept. 29, 1998, at A8.

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.*

101. See Blaeloch, *supra* note 14, at 22.

102. Deborah Nelson et al., *Trading Away the West: Mining Company Has Close Ties With Government in Proposed Land Exchange*, SEATTLE TIMES, Sept. 27, 1998, A16.

change should "bear their owns costs."¹⁰³ The critics claim that when agency employees' jobs depend on completing the exchange, the exchange will undoubtedly be approved.¹⁰⁴

D. *The Complexity of the Land Exchange Process*

Even those groups that benefit from land exchanges are critical of the process and charge that the process is an unduly complicated and lengthy.¹⁰⁵ It is not uncommon for land exchanges to take anywhere from two to ten years to complete.¹⁰⁶ Sometimes, lawsuits filed by various groups that dispute the transaction can drag the process out even longer.¹⁰⁷

The length of the process is usually the result of statutorily mandated environmental assessment requirements. All land exchanges conducted by the BLM and the Forest Service are subject to the requirements of the National Environmental Policy Act ("NEPA").¹⁰⁸ NEPA requires that the federal government utilize an interdisciplinary approach in decisions that "may have an impact on man's environment."¹⁰⁹ NEPA forces all federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action" and ensure that they "utilize ecological information in the planning and development of resources-oriented projects" in an Environmental Impact Statement.¹¹⁰ Because land exchanges often are "major Federal actions" which "significantly" affect the "quality of the human environment," an Environmental Impact Statement usually must be prepared.¹¹¹ Some types of land exchanges have been categorically excluded from the requirement of either an Environmental Impact Statement or the less stringent requirement of an

103. *Id.*; see also 43 C.F.R. §2201.1-3 (providing that if the public interest is served, the agreement to initiate an exchange can provide that one of the parties may assume all or part of the costs).

104. See Deborah Nelson et al., *Trading Away the West: Mining Company Has Close Ties With Government in Proposed Land Exchange*, SEATTLE TIMES, Sept. 27, 1998, A16.

105. See Fitzgerald, *supra* note 9, at 11.

106. See *id.*

107. See *id.*

108. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-61 (2001). However, Congress can expressly exempt federal land exchanges from the NEPA requirements.

109. *Id.* § 4332(a).

110. *Id.* §§ 4343(e), (h).

111. See Beaudoin, *supra* note 5, at 8.

Environmental Assessment (“EA”).¹¹² The NEPA requirements are intended to benefit the process by forcing the parties involved in a land exchange to investigate the consequences the exchange will have on all the parties involved.¹¹³

The Endangered Species Act (“ESA”) also mandates environmental assessment requirements that can delay proposed exchanges.¹¹⁴ The ESA provides that every federal agency must “insure that any action authorized” or “funded,” “is not likely to jeopardize the continued existence of any endangered species or threatened species.”¹¹⁵ As a result, agencies must give consideration to the species found on the land involved before any exchange can proceed.¹¹⁶ If the United States Fish and Wildlife Service signals that a threatened or endangered species may be located on the land, the agency must prepare a “biological assessment.”¹¹⁷ This then leads to a “consultation” with the United States Fish and Wildlife Service.¹¹⁸ If it is determined that the land exchange will “jeopardize” the endangered species habitat, the agency must detail “reasonable and prudent alternatives” that do not jeopardize the threatened or endangered species.¹¹⁹ Thus, the ESA provides an intense level of environmental scrutiny over proposed land exchanges, which often results in lengthy delays.

112. See *The Citizen's Guide to Federal Land Exchanges: A Manual for Public Lands Advocates* (unpublished manuscript) (on file with author), citing 40 C.F.R. § 1507.3 setting forth the categorical exclusions set out by the Forest Service: (1) Exchanges of similar grazing land with a rancher-permittee to reduce property lines, (2) Exchanges of timberland that has comparable species, volumes, aspects, and other factors, (3) Exchanges of small, relatively uniform or similar land to resolve property line problems, (4) Exchanges with State or local governments, companies, or other landowners that have similar resource management policies and practices, (5) Uncontroversial exchanges that have no apparent public interest, (6) Mineral-for-mineral exchanges within areas with no known mineral potential where the result is to merge the surface and subsurface estates, (7) Exchanges that congress directs, (8) Exchanges that the federal courts direct, (9) Exchanges that clearly show environmental improvement, (10) Exchanges that, based on previous experience, have limited context and intensity and produce little or no environmental effects, individually or cumulatively, to either the biological or physical components of the human environment. The Manual states that the BLM has made similar exclusions found in a Department of Interior Manual that currently is not obtainable. Such exclusions would seem to fit almost every exchange.

113. See Beaudoin, *supra* note 5, at 10.

114. See Endangered Species Act, 16 U.S.C. §§ 1531-43 (2001).

115. *Id.* § 1536(a)(2).

116. See Beaudoin, *supra* note 5, at 10.

117. *Id.*

118. Beaudoin, *supra*, note 5, at 10; see also 16 U.S.C. § 1536(b)(4)(A) (2001).

119. Beudoin, *supra*, note 5, at 10.

III.

AN ANSWER: NEW LAWS AND LIMITED
SALE PROVISIONS

Until recently, the idea that the federal land management agencies might sell off less desirable public lands in order to raise capital to buy environmentally sensitive land better suited for conservation would have been scoffed at as simply impracticable. While both the BLM and the Forest Service have had limited authority through the FLPMA to sell lands in the public domain, these provisions were not utilized for several reasons.¹²⁰ First, the FLPMA states that it is the official policy of the federal government to retain ownership of the public lands. As a result, sales that result in a net loss of public lands violated that mandate.¹²¹ Second, land management agencies lacked any incentive to engage in land sales since the proceeds from the sales were not retained by the agency, but instead returned to the Department of Treasury for general government use.¹²² Finally, much of the American public was thought to be adverse to large-scale public land sales, because of the perception that sales are contrary to the federal government's role as custodian of the public domain.¹²³

Arguably, two new pieces of legislation now make sales of excess public land practicable by authoring limited sale procedures. The first is the Southern Nevada Public Lands Management Act of 1998 ("SNPLMA"). Perhaps more than anything the SNPLMA was the result of sheer necessity. The federal government owns more than 80 percent of the land in Nevada.¹²⁴ Las Vegas is literally, an island in a sea of federal land. In 1994, the growth rate for Clark County, which encompasses all of the Las Vegas metropolitan area, was 9.6 percent.¹²⁵ The tremendous growth of the gaming industry from 1994 to 1995 and the opening of several large resort-casinos resulted in the annual addition of nearly 20,000 jobs to the local economy.¹²⁶ In order to meet the

120. *Id.*; see also 43 U.S.C. § 1713 (2001).

121. Rosenthal, *supra* note 22, at 366. This requirement probably only applies in the aggregate.

122. *See id.*

123. *Id.*

124. GEORGE CAMERON GOGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCE LAW* 13 (4th ed. 2001).

125. S. REP. NO. 291, 1998 WL 538193 (1998).

126. *See id.*

land demand for residential housing, local governments and developers had to look to the federal government.

To some extent, the SNPLMA was modeled on the Santini-Burton Act.¹²⁷ That Act allowed the BLM to sell a limited amount of urban land within the Las Vegas valley and retain the proceeds to purchase private, environmentally sensitive lands in the Lake Tahoe Basin.¹²⁸ Under the Santini-Burton Act, the BLM could sell no more than seven hundred acres per calendar year.¹²⁹ As a result, most land reconfiguration in Las Vegas still had to proceed through the land exchange process, with its inherent limitations and slow pace. In order to meet the demand for growth, several local politicians began to explore the idea of expanding the sale procedures of the Santini-Burton Act. The Nevada Public Lands Task Force was established, and eventually, then-Congressman John Ensign (R-Nev.) introduced the SNPLMA to Congress in January of 1997. After some initial political haggling the Act was passed in 1998.¹³⁰

The second and most recent law to authorize sales of excess public land is the Federal Land Transaction Facilitation Act of 2000 ("FLTFA"). The FLTFA and the Valles Caldera Preservation Act were passed as separate titles to the same bill sponsored by several members of the New Mexico congressional delegation.¹³¹ Title I of the bill, the Valles Caldera Preservation Act, was the primary thrust of the legislation. That title authorized the federal purchase of the Baca Ranch in Northern New Mexico in order to protect and preserve an enormous volcanic caldera and its surrounding ecosystem. Title II of the FLTFA was probably added, at least in part, because those legislators that supported purchasing the Baca Ranch believed that by including a provision that encouraged the sale of federal land, the bill would have an improved chance of passage. The FLTFA authorizes the sale of public lands identified by the BLM as surplus, and the resulting proceeds to be used to purchase and protect certain pri-

127. Santini-Burton Act of 1980, Pub. L. No. 96-586, 94 Stat. 3381.

128. *See id.*

129. *Id.* § 2(b).

130. *See* Jon Ralston, *Brazenness Knows No Bounds*, LAS VEGAS SUN, July 9, 2000. According to Ralston, Nevada Senator Harry Reid prevented the Southern Nevada Public Lands Management Act from being voted on by the entire Senate in 1997, thus killing the bill that year in order to prevent one of the bill's chief sponsors, John Ensign, from scoring a major legislative victory prior to an election year. In 1998 after Ensign had been defeated Reid came out to support of the bill.

131. *See* Federal Land Transaction Facilitation Act of 2000, Pub. L. 106-248, 114 Stat. 615 (current version at 43 U.S.C. § 2302 (2001)).

vate lands with exceptional natural resource value.¹³² Testimony before the Senate Committee on Energy and Natural Resources indicates that the FLTFA was intended to expand the concept of limited public land sales for use in other areas of the country, much like the Southern Nevada Act did for public land in Nevada.¹³³

A. *Lands Eligible for Sale Under the Acts*

Lands eligible for sale under the SNPLMA are limited to those within a defined perimeter surrounding the Las Vegas Valley.¹³⁴ Sales conducted pursuant to the SNPLMA are specifically excluded from the land planning and sale requirements of the FLPMA, which normally requires that the land be identified for sale under an approved land use plan.¹³⁵ Thus, sales within the southern Nevada area are not limited to those lands that the Secretary of the Interior, through the FLPMA land use planning process, has determined are eligible for disposal because they are “difficult and uneconomic to manage” or because disposal “will serve important public objectives.”¹³⁶ Instead the SNPLMA states that: “[t]he Secretary shall coordinate land disposal activities with the unit of local government in whose jurisdiction such lands are located” and any disposal activity must be “consistent with local land use planning and zoning.”¹³⁷

This “joint selection” process is a key provision of the Southern Nevada Act because it provides for extensive local input and control over which parcels are sold. In order to facilitate joint selection as directed by the Act, federal and local officials have formed the “Joint Selection Committee.”¹³⁸ While finalized guidelines are not yet in place, some of the proposed considerations that the Joint Selection Committee might review when deciding what federal land is best for disposal include: the impacts

132. See President’s Statement on Signing the Valles Caldera Preservation Act, 30 WEEKLY COMP. PRES. DOC. 1678 (July 31, 2000), 2000 WL 13131317.

133. See S. REP. NO. 267, 2000 WL 391563 at *39-40 (testimony of Larry Finter, Assistant Director of the BLM).

134. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, § 4(a) (“[L]and within the boundary of the area under the jurisdiction of the Director of the Bureau of Land Management in Clark County, Nevada, as generally depicted on the map entitled ‘Las Vegas Valley, Nevada, Land Disposal Map’”).

135. Southern Nevada Public Land Management Act of 1998 § 4(a).

136. 43 U.S.C. § 1713(a) (2001).

137. Southern Nevada Public Land Management Act of 1998 § 4(d)(1).

138. See City of Henderson, *Annexation, Bureau of Land Management*, available at <http://www.cityofhenderson.com/whatsnew/html> (last visited January 26, 2001).

of land disposal, the ability of local governments to provide new infrastructure, consistency with existing land use plans, the environmental impacts of land disposal, and existing zoning regulation.¹³⁹ When the Joint Selection Committee has approved the parcels selected for sale, the proposed sales are listed in the local newspaper and in the Federal Register.¹⁴⁰ Sales are then subject to the competitive bidding requirements of the FLPMA.¹⁴¹ More importantly, the joint selection process creates inter-government coordination and ensures that local interest will be taken into account on important issues such as managing Southern Nevada's breakneck growth. In providing for extensive local input and decision-making in this fashion, the Act avoids one of the primary criticisms of the land exchange process.

In contrast, under the FLTFA, *all* lands that have been identified for disposal by the Secretary of Interior or Secretary of Agriculture through the FLPMA land use planning process at the time of enactment of the FLTFA, are eligible for sale under its provisions.¹⁴² Unlike the SNPLMA, the FLTFA sale provisions are not limited to any one state or region, thus the scope of the Act's authority is much broader.¹⁴³

The FLTFA sale authority contains two requirements that may limit its effectiveness. First, in order for the public land to be eligible for the sale, the Secretary of the Interior, must have determined that the land is suitable for sale by way of the FLPMA land planning process.¹⁴⁴ Thus, sales are limited to those lands that meet FLPMA's requirements of being "difficult and uneconomic to manage" or the disposal of which "will serve important public objectives."¹⁴⁵ Second, the sale authority is further limited to lands that have been determined to be eligible for sale through FLPMA land use plans at the time of the FLTFA enactment.¹⁴⁶ Testimony before Congress indicates that in some areas, land use

139. *See id.*

140. Bureau of Land Management, *Lands Sales and Disposals, Land and Reality*, <http://www.blm.gov/nhp/what/lands/realty/sales.htm> (last visited January 26, 2001).

141. *See* 43 U.S.C. § 1713(f) (2001).

142. *See* Federal Land Transaction Facilitation Act of 2000, Pub. L. No. 106-248 § 205(a).

143. *See id.* § 207(b)(2). However, the Act does not apply to land covered under the Southern Nevada Public Lands Management Act.

144. *Id.* § 205(a).

145. *See* 43 U.S.C. § 1713 (2001).

146. Federal Land Transaction Facilitation Act of 2000, Pub. L. No. 106-248, at § 205(a).

plans are sorely out of date.¹⁴⁷ In some cases, land identified for disposal in existing land use plans would probably be recommended for retention based on new environmental considerations.¹⁴⁸ In addition, other than the public comment period that was provided for under the FLPMA land use planning process, the FLTFA does not specify a means for direct public involvement and participation in deciding which public lands are to be disposed of.¹⁴⁹ Many environmental and government watchdog groups can rightly be expected to cry foul if, under the FLTFA, public land currently thought of as worthy of conservation is sold based on ten year old land use plans without providing an opportunity for public comment. Finally, as with the SNPLMA, sales must proceed under the FLPMA competitive bidding requirements.¹⁵⁰

Despite their respective disposal limitations, both Acts signify a major change in land reconfiguration policy. In theory, outright sales eliminate the “fair market value” and “appraisal” problems that all too often have plagued the exchange process. With sales through competitive bidding, appraisals no longer are used as a proxy for determining fair-market value.¹⁵¹ Instead, by definition, the government will receive what the market will bear for the land. The price garnered in competitive sales on the open market represents real values placed on the property by people and not by abstract estimates.¹⁵² In fact, in its report, the General Accounting Office found that BLM land exchanges were very costly to the federal government, in terms of lost income, specifically because they did not take advantage of the competitive market.¹⁵³

B. *Procedural and Substantive Limitations on the Sales*

Sales conducted under the SNPLMA are subject to all FLPMA requirements and limitations, except as previously mentioned with respect to the land use and sale provisions.¹⁵⁴ But, it

147. S. Rep. 267, 2000 WL 391563, at * 39-40 (testimony of Larry Finter, Assistant Director of the BLM).

148. *See id.*

149. *See* 43 U.S.C. § 1712 (a) (2001).

150. *See id.* § 1713(f) (2001).

151. *See* Fitzgerald, *supra* note 9, at 20.

152. *See id.*

153. *See* GAO report, *supra* note 1, at 30.

154. *See* Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, at § 4(a) (“Disposal – Notwithstanding the land use planning process re-

is still possible to initiate an exchange of public land within the Las Vegas area under the FLPMA land exchange process.¹⁵⁵ Although, according to at least one Nevada BLM official, the unofficial and unwritten agency policy is that the BLM is no longer willing to engage in land exchanges within the area covered by the SNPLMA.¹⁵⁶ In addition, sales are limited to United States citizens and corporations, and the United States retains title to the mineral interests in the land conveyed.¹⁵⁷

Similarly, the FLTFA makes explicit that nothing in the Act “precludes, preempts or limits” the authority of land management agencies to conduct exchanges under the FLPMA exchange provisions.¹⁵⁸ The FLTFA does not contain an explicit reservation of mineral interests, like the SNPLMA. However, under the FLTFA, mineral interest are reserved by way of the FLPMA, which states that, “all conveyances of title issued by the Secretary . . . shall reserve to the United States all mineral in the lands.”¹⁵⁹

Perhaps more significantly, land sales under both Acts are still subject to the substantive and procedural environmental regulations applicable to exchanges. Under the SNPLMA, land sales remain subject to all “other applicable law.”¹⁶⁰ Likewise, FLTFA states that: “Nothing in this title provides an exemption from any limitation on the acquisition of land . . . under any federal law in effect on the date of the enactment of this Act.”¹⁶¹ Because land sales under both Acts will arguably constitute “major federal actions,” under NEPA regulations, an Environmental Impact Statement or Environmental Assessment will be needed to complete the sales.¹⁶² In fact, the BLM’s current practice is to issue an

quirements on Sections 202 and 203 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1711 and 1712), the Secretary in accordance with this Act, the Federal Land Policy and Management Act of 1976 . . .”).

155. See 43 U.S.C. § 1716 (2001).

156. See Interview with Michael Dwyer, Bureau of Land Management Project Director, Southern Nevada Public Land Management Act Project Office, in Las Vegas Nevada (Nov. 7, 2001).

157. See 43 U.S.C. § 1719 (2001).

158. Federal Land Transaction Facilitation Act of 2000, Pub. L. No. 106-248, at § 206 (c).

159. 43 U.S.C. § 1719(a) (2001).

160. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, at § 4(a).

161. Federal Land Transaction Facilitation Act of 2000 § 207(a).

162. 42 U.S.C. § 4332 (2001); *but see* 40 C.F.R. § 1500.4(a) (stating that where the agency makes a finding of no significant effect on the human environment, it is therefore exempt from the formalities associated with an Environmental Impact Statement).

Environmental Assessment for every proposed land sale.¹⁶³ Furthermore, when such sales are “likely to jeopardize the continued existence of any endangered species or threatened species,” the substantive provisions of the Endangered Species Act become applicable.¹⁶⁴

One of the most pervasive trends in federal public policy over the past thirty years has been toward an ever-increasing emphasis on environmental protection and preservation.¹⁶⁵ By ensuring that the requirements of the NEPA and the ESA are applicable to sales conducted under these new Acts, Congress has sent a clear signal that the established norms of environmental protection will not be forsaken in order to better facilitate federal land management and reconfiguration. While these safeguards would not necessarily quiet the fears of those groups that believe that environmental constraints on the public land reconfiguration processes were too lax to begin with, at least they will not further undermine the trust and confidence that the public has in the land management agencies as “custodians” of the public domain. Of course, requiring sales under these Acts to conform to NEPA and ESA procedural and substantive limitations does not endear them to the timber and mining industries whose chief complaint of the land exchange process was the delay these requirements caused.

C. *How The Proceeds Are Distributed*

Both the SNPLMA and the FLTFA provide for retention of the land sale proceeds by the land management agencies. Instead of requiring that the proceeds be returned to the Treasury Department for general government use, both Acts authorize special accounts to be established that allow the land management agencies to retain the vast majority of the funds in order to acquire land more worthy of protection and conservation.

Under the SNPLMA, eighty-five percent of the proceeds are deposited in a “special account in the Treasury of the United

163. Interview with Michael F. Dwyer, Bureau of Land Management, Project Manager, Southern Nevada Public Land Management Act Project Office, in Las Vegas, Nevada (Nov. 7, 2001). According to Mr. Dwyer, when the BLM set the boundary for the Southern Nevada Act, an Environmental Impact Statement was completed. When a sale is proposed, the agency then issues an Environmental Assessment for each individual sale.

164. 16 U.S.C. § 1536 (2001).

165. See Brock Evans, ALI-ABA Course of Study Materials, *New Directions For Federal Lands*, SF34 ALI-ABA 355 (Oct. 2000).

States.”¹⁶⁶ The remaining fifteen percent is distributed to the State of Nevada general education program (five percent) and the Southern Nevada Water Authority (ten percent) for “water treatment and transmission facilities.”¹⁶⁷

The SNPLMA additionally grants authority to the Secretary of the Interior to transfer title to Clark County, Nevada all public land that resides within a designated area near McCarran International Airport.¹⁶⁸ Such a transfer is intended to provide for an “airport enviros overlay district” in an effort to meet federal airport noise compatibility standards.¹⁶⁹ On March 30, 1999, then Secretary of the Interior Bruce Babbitt exercised this conveyance power and transferred title to 5,300 acres of federal land to Clark County.¹⁷⁰ In accordance with the Act, the County is allowed to sell or lease the former BLM land at market value. From these sales, 85 percent of the proceeds will be deposited in the “special account” with the United States Treasury to be used to purchase environmentally sensitive lands. The proceeds from about half of the sales of public land transferred to the county also falls within the areas covered by the Santini-Burton Act. As a result, these proceeds will be used “by the Secretary of Agriculture to acquire environmentally sensitive land in the Lake Tahoe Basin.”¹⁷¹ The remainder of the proceeds from the County controlled sales will go to the State of Nevada general education program (five percent) and the Clark County Department of Aviation (ten percent).¹⁷²

Unlike the area-specific SNPLMA, the FLTFA bestows all proceeds from sales and exchanges conducted pursuant to its authority into a “separate account in the Treasury of the United States to be known as the Federal Land Disposal Account.”¹⁷³ The FLTFA also contains a self-termination provision. That provision provides that the authority to make sales pursuant to the Act “shall terminate 10 years after the date of the enactment of

166. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, at § 4(e)(1)(c).

167. *Id.*

168. *See* Southern Nevada Public Land Management Act of 1998 § 4(g).

169. *See id.*

170. Keith Rogers, *County Grows Under Law's First Use*, LAS VEGAS REV.-J., Mar. 31, 1999.

171. Southern Nevada Public Land Management Act of 1998 § 4(g)(4).

172. *Id.*

173. Federal Land Transaction Facilitation Act of 2000, Pub. L. No. 106-248, at § 202(a).

the Act.”¹⁷⁴ There is no “sunset” or self-termination provision in the SNPLMA.

D. *How the Proceeds Can Be Expended*

Both the SNPLMA and the FLTFA were passed with the intention that the proceeds retained by the agencies would be used to purchase private land worthy of public protection and to facilitate more effective land management. Under the SNPLMA, proceeds may be expended in any of five possible ways.¹⁷⁵ First, the proceeds may be expended for “the acquisition of environmentally sensitive lands in the State of Nevada . . . with priority given to lands located within Clark County.”¹⁷⁶ Second, the proceeds can be used for capital improvements at the various BLM administered public land areas near Las Vegas, including the Lake Mead National Recreation Area, Red Rock Canyon National Conservation Area, and the Desert National Wildlife Refuge.¹⁷⁷ However, not more than 25 percent of the proceeds in any one year may be used for such capital improvement.¹⁷⁸ Third, the proceeds may be used for “the development of a multispecies habitat conservation plan in Clark County.”¹⁷⁹ Fourth, the proceeds may be dedicated to the development of “parks and trails and natural area” within Clark County in cooperation with a local government.¹⁸⁰ Finally, a portion of the proceeds may be used to reimburse the BLM for the costs incurred in “arranging sales and exchange under this Act.”¹⁸¹

Under the FLTFA, proceeds from the sales may be expended for two purposes. First, to purchase “lands or interests . . . that are . . . adjacent to federally designated areas and contain exceptional resources.”¹⁸² Exceptional resources are defined as resources of “scientific, natural, historic, cultural, or recreational value . . . and for which there is a compelling need for protection.”¹⁸³ In addition, in order to qualify as an exceptional re-

174. *Id.* § 205(d).

175. *See* Southern Nevada Public Land Management Act of 1998 § 4(e)(3)(A).

176. *Id.* § 4(e)(3)(A)(i).

177. *See id.* § 4(e)(3)(A)(ii).

178. *Id.* § 4(e)(3)(c).

179. *Id.* § 4(e)(3)(A)(iii).

180. *Id.*

181. *Id.*

182. Federal Land Transaction Facilitation Act of 2000, Pub. L. No. 106-248, at § 206(c)(A)(ii).

183. *Id.* § 203(1).

source, the scientific, historic, cultural, or recreation value must be documented by a Federal, State, or local government authority. Second, the Act provides that not less than 80 percent of the funds allocated “shall be used to acquire inholdings.”¹⁸⁴ Furthermore, the Act allows for no more than twenty percent of the proceeds to be used for administrative expenses necessary to conduct the sales.¹⁸⁵ Finally, the FLTFA requires that eighty percent of the funds be expended within the State from which they were generated.¹⁸⁶

The acquisition provisions of both the SNPLMA and the FLTFA have their weaknesses. The SNPLMA contains a very broad definition of “environmentally sensitive lands.” Indeed, the act states that “environmentally sensitive lands” are those that, in the judgment of the Secretary of the Interior or the Secretary of Agriculture, the acquisition of which would “promote the preservation of natural, scientific, aesthetic, historical, cultural, watershed, wildlife, and other values contributing to public enjoyment and biological diversity.”¹⁸⁷ In addition, according to the Act, “environmentally sensitive lands” are those that, in the judgment of the Secretaries, “enhance recreational opportunities and public access,” “provide the opportunity to achieve better management of public land through consolidation of Federal ownership” and/or which “otherwise serve the public interest.”¹⁸⁸ As a result, some might say that this definition provides the BLM with too much discretion in determining which lands are truly “environmentally sensitive.”

In addition, nothing in the SNPLMA says that the money has to be spent at all. The Act simply says that the proceeds “may” be expended.¹⁸⁹ Perhaps the lack of a statutory requirement that the proceeds be spent is a concession to the fact that Nevada, at over eighty percent, is already the state with the highest percentage of federal landholdings. Furthermore, the decision of whether to purchase environmentally sensitive land is left to the Secretary of the Interior.¹⁹⁰ The recent confirmation of Secretary of the Interior Gale Norton may increase the likelihood that

184. *Id.* § 206.

185. *See id.*

186. *Id.*

187. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, at § 5(a)(1)(A).

188. *Id.* § 5(a)(1)(B)-(D).

189. *See* Southern Nevada Public Land Management Act of 1998 § 4(e)(3)(A).

190. *See id.*

the proceeds will simply go unused and remain in the Federal Treasury. Norton, a noted conservative, has long been a private property rights advocate who may not favor federal land acquisition efforts. In addition, if the primary purpose of the SNPLMA is to facilitate public land reconfiguration, allowing twenty-five percent of the proceeds to be spent on capital improvements at local federal recreation areas may not be the best use of the proceeds. On the other hand, if the primary purpose of the Act is to facilitate better management of existing public lands, then allowing twenty-five percent of the proceeds to be expended for capital improvements seems reasonable.

Finally, a danger exists that the revolving fund the SNPLMA sets up will make the Nevada BLM dependent on land sales in the future for continued funding. In fact, while many BLM state and regional offices have recently seen their budgets significantly cut, the Nevada BLM has managed to escape the cuts unscathed.¹⁹¹ Eventually, long-term federal interests may be harmed if the Nevada BLM becomes to dependent upon land sales for continued funding. At least one BLM official, however, doubts such a result is likely, because the SNPLMA requires the BLM to "consult" with state and local governments "concerning the necessity of making the acquisition[s]."¹⁹² As a result, the BLM, in cooperation with other federal land management agencies, has developed the Federal Partners Implementation Agreement.¹⁹³ The primary objective of the agreement is to involve local governments and other interested parties in formulating recommendations to the Secretary of the Interior regarding what acquisitions should be made with the proceeds and which acquisitions would best maximize the public benefit.¹⁹⁴ The agreement outlines a process that the agency will use to make acquisition recommendations, includes provisions allowing for public comment, and provides for evaluations of proposed acquisitions through objective criteria. The BLM is confident that this

191. See Christine Dorsey, *Federal Spending: Southern Nevada Dodges BLM Cuts*, LAS VEGAS REV.-J., Apr. 10, 2001.

192. Interview with Michael F. Dwyer, Bureau of Land Management, Project Manager, Southern Nevada Public Land Management Act Project Office, in Las Vegas, Nevada (Nov., 7, 2001); see also Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-263, at § 5(a)(3).

193. See Federal Partners Implementation Agreement, Southern Nevada Public Land Management Act, available at <http://www.nv.blm.gov/plma/Pagreement.pdf> (last visited Nov. 10, 2001).

194. See *id.*

process will ensure Nevada's long-term conservation record is not sacrificed for short-term administrative gains.

The acquisition provision of the FLTFA also has its share of shortcomings. It contains a steadfast emphasis on the purchase of inholdings. While the purchase of inholdings is essential for the effective management and reconfiguration of the public lands, too much of an emphasis on inholdings may limit the Act's effectiveness. In fact, testimony before the Senate Committee on Energy and Natural Resources indicates that the BLM was strongly opposed to placing such an emphasis on the acquisition of inholdings.¹⁹⁵

In addition, the FLTFA's definition of "exceptional resources" is confusing. There are no definitions similar to "exceptional resources" in any other statute regulating public lands. As the Assistant Director of the BLM pointed out in testimony before the Senate Committee on Energy and Natural Resources, the inclusion of the words "adjacent to federally designated areas" is probably unduly restrictive and may thwart the Act's intent of protecting environmentally sensitive lands. Further, the exceptional resources definition does not include consideration of fish and wildlife resources. If the intent of the Act is to enable federal land management agencies to improve their "resource management abilities" as the Act's findings suggest, then the exceptional resources definition is too narrow.

Interestingly, the FLTFA, in contrast to the SNPLMA, provides that proceeds from sales under its authority "shall" be used to purchase inholdings and lands with exceptional resources.¹⁹⁶ Yet, the Act does not provide guidelines on how soon proceeds from the sales must be expended to make purchases. The Act states that upon termination of its authority, the Federal Land Disposal Account shall be closed and any remaining proceeds transferred to the Land and Water Conservation Fund.¹⁹⁷ Why this termination provision was included is not clear, especially given that the proceeds must be expended.

195. S. REP. NO. 267, 2000 WL 391563, at *39-40 (testimony of Larry Finer, Assistant Director, Bureau of Land Management).

196. Federal Land Transaction Facilitation Act of 2000, Pub. L. No. 106-248, at § 206(c)(2)(A).

197. *Id.* § 206(e)(2).

IV.

CONCLUSION

The Southern Nevada Public Lands Management Act and the Federal Land Transaction Facilitation Act signify a major change in public land management and reconfiguration policy. The Acts are the first to allow the federal land management agencies to conduct large-scale sales of surplus public lands and retain the proceeds in order to purchase private land better suited for federal conservation and management. In doing so, they eliminate one of the major problems of the land exchange process: determining fair market value. In that respect alone, the two Acts represent an important step in the evolution of public land law. But it is one thing to write a law and another to see its intent turn into reality. Perhaps, this is where the two acts may differ.

The Southern Nevada Public Lands Management Act manages to avoid many of the problems that have haunted the land exchange process. Its scope and limitations are clearly defined. Its wording has, for the most part, been carefully chosen. Perhaps most importantly, the Act's joint selection process and the Act's accompanying implementation agreement, provide for extensive local decision-making regarding the amount and type of public land sold, and the kinds of land worthy of purchasing for conservation. The result is a carefully tailored Act that has, by all accounts, been an effective tool and has realized its intent. One Nevada BLM spokesperson was recently quoted as saying that the Act "certainly has enhance[d] our capabilities to provide improvements."¹⁹⁸ The Bush Administration estimates that BLM land sales under the Act will bring in more than \$51 million next year.¹⁹⁹ As a result, the Nevada BLM, in cooperation with local government, has been busy planning how best to spend that money in order to ensure that Nevada's conservation record is a sensible one. Preliminary plans include purchasing a private ranch in the Spring Mountains near Las Vegas which contains important habitat for several threatened species. In addition, the BLM is planning on using the money to update and improve the visitor's center at the Red Rock National Recreation Area.²⁰⁰

While few sales have been conducted under the Federal Land Transaction Facilitation Act, it is doubtful that its sale authority

198. Christine Dorsey, *Federal Spending: Southern Nevada Dodges BLM Cuts*, LAS VEGAS REV.-J., Apr, 10, 2001.

199. *Id.*

200. *See id.*

will be as well utilized or be as successful as that of the Southern Nevada Act. The provisions of FLTFA are undoubtedly an attempt to capture the success of the SNPLMA and apply it to a larger area and in a broader context. In doing so, however, the FLTFA lost the key ingredient of the SNPLMA recipe – local input and decision-making. Instead of relying on the collective judgment of interested figures such as federal agency personnel, local governments, and concerned citizens to make important decisions regarding which public lands are best disposed of and what land is most in need of conservation, the FLTFA relies on inflexible artificial limits. In its attempt to provide structure and set priorities through defined terms such as “exceptional resource,” “approved land use plans,” and “lands adjacent to federally designated areas,” the FLTFA falls victim to its own good intentions. In doing so, it continues a long tradition of self-defeat in public land resource laws.²⁰¹ In the end, the FLTFA will become no more useful for public land reconfiguration than the sale provisions previously contained in the FLPMA.

201. *See generally* Coggins, *supra* note 18.

