Statutory Land Exchanges That Reflect "Appropriate" Value and "Well Serve" the Public Interest

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I. INTRODUCTION

Public lands cover a third of the United State’s total land area. West of the 100th meridian that fraction becomes one half of all the land. Public lands support uses as diverse as mining and pristine wilderness preservation. The land itself embraces almost every kind of habitat, from tundra to sub-tropical jungle, but running through it all is a patchwork of private in-
holdings which have often confounded the ability of the Federal government to effectively manage the land.

The public lands did not begin in this fragmented state; they were broken up because of an awkward attempt to accelerate our Nation’s westward expansion. What was an expedient solution to underwrite the settlement of the west has become an impediment to the full use and enjoyment of our public lands, and the Federal government has been trying to consolidate them ever since.

Over the ensuing years the consolidation method of choice has been the statutory land exchange. In recent years the statutory land exchange has been criticized as ineffective and subject to abuse. It has even been described as an insider-trading scheme between the land management agencies and corporate America. The question becomes whether statutory land exchanges are really suitable for the task at hand; making whole the patchwork that is our public lands.

Part I of this comment on statutory land exchanges addresses the history that gave rise to the checkerboard public lands. Part II discusses how statutory land exchanges became the management agencies’ tool of choice for consolidating public land. Part III describes the statutory and regulatory framework which land exchanges must conform to. Part IV reviews the harsh criticism that has been leveled at the agencies implementing exchanges. Part V compares some current alternatives to the statutory land exchange. Finally, part VI suggests how the statutory land exchange process can be amended to address the problems that have plagued exchanges for the past two decades.

II. A CHECKERED PAST -- THE EVOLUTION OF THE CHECKERBOARD LANDS

A. The Golden Horde

Between 1781, when the Articles of Confederation went into effect, and the purchase of Alaska in 1867, approximately 1.84 billion acres were added to the land holdings of the United States Government. If these public lands had been divided among the approximately 38 million Americans tallied in the census of 1870, every man, woman and child would have received 48 acres. In its youth, America was indeed land rich. The bounty of this land wealth seemed endless. However, as with all things of finite value, the measure of it was quickly to be had, and that measurement is said to have begun with the discovery of gold at Sutter’s Mill, California, in 1848. With that discovery came the California gold rush which marked “a sharp increase in the settlement of the west.”


At that time millions of people on the eastern seaboard of the United States were straining to reach out and grab hold of the untold wealth the west had to offer. The problem was how to locate all these people on the land. To do so required the creation of vast new lines of communication, such as railroads, to support the logistics essential to this immigrant army, this European *Golden Horde.*

This immense undertaking was beyond the means of private investors; the sums of money needed, coupled with the risk entailed, made some form of government assistance essential. What form of assistance would serve best; direct assistance via government construction projects or loans of cash to entrepreneurs? The answer turned out to be neither. Instead the Government turned to a tried and true method that required no governmental personnel on the job and no cash from the treasury. The method selected for solving the problem used the very thing that was so abundant; the ‘land grant’.

During the first half of the 19th century the constitutionality of the Federal government’s participation in public works such as canals, roads and railroads was hotly debated. It was argued that these were “internal improvements” to the states and as such were not within the enumerated powers of Congress. The Federal government sought a loophole and settled on the idea of land grants. By offering grants of land, which were constitutional, and by making these grants conditional upon certain use restrictions, the government could maintain a discreet level of involvement (or perhaps control) over these internal improvements and yet eschew the constitutional argument that they had provided direct support for internal improvements of the states.6

In practice these grants became known as the “checkerboard land grants.” They derived their name from the rectangular survey system enacted by the Land Ordnance Act of 1785. The survey divided the land into numbered sections one mile square, giving the map the appearance of a “checkerboard.” Thus divided, the grant gave odd numbered sections to private entities, such as the railroad companies, while the even numbered sections were kept by the Federal government. While seemingly haphazard, there was a rationale for this design.

The granting of private land commingled with retained Federal land was designed to increase the value of the federally held land. As noted above, rather than expend cash to help capitalize the railways, the government

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3. The Golden Horde was the name given to the Asian army of Batu Khan, who crossed the Russian Steppe and conquered all of Eastern Europe, reaching as far as Germany in 1242.
5. *Id.* at 672.
7. *Id.* at 47.
traded in land. These grants were not limited to land for the railroad’s tracks but also included land from the surrounding countryside. This land was given on the condition that the railroads raise their capital from the sale of this land to settlers, at supposedly affordable prices. The rationale was that the success of the railroad and settlers would cause all the land situated along the line to appreciate. Both private land and the Federal land mixed in with it would go up in value. The government also believed that when the government’s appreciated land was disposed of, the increased price would offset the expenditure of the original grant of land.⁹

B. The Octopus

The key to assessing the checkerboard scheme is to realize that, at that time, the government viewed itself as merely a custodian of the land until it could be transferred either to the states or into private hands.¹⁰ The commingling of private and Federal land was of no import because the Federal government intended all the land find its way into the settlers’ hands, either from sale by the railroad to satisfy the railroad’s conditional grant, or by direct government sale or homesteading. However, as time would reveal, neither of the government’s aspirations would be met.

First, the railroads typically failed to sell the grant land to the settlers, instead finding it more prosperous to either sell it outright to large timber and mining corporations or to mortgage the land to its own affiliates and subsidiaries. Congress often facilitated this activity by easing the reversion provisions when the grant conditions were not met.¹¹ Second, the government found itself unable to sell or homestead much of the land it retained. Two factors no affected the government’s ability to profitable use its retained land. First and foremost was the free use of public lands. When the railroad’s successors in interest purchased the checkerboard they had free rein to utilize the adjoining public land. Why purchase the Federal land when it could be had for free through use rights such as range grazing rights.¹² Second, the Homestead Act, west of the 100th meridian, did not permit homesteaders to claim sufficient quantities of land to make homesteading truly viable.¹³ This was no doubt exacerbated by the fact that nearly all the government checkerboard land was surrounded by the railroad and their successors in interest, and had not passed into the hands of other settlers who would be ready and able to buy and sell on the open market. In

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¹⁰. See generally Coggins et al., supra n. 6, at 49.
¹². Coggins et al., supra n. 6, at 92.
¹³. Id. at 79.
short, the government land was isolated by land still embraced by the tentacles of the "Great Octopus," the railroad land grant companies and their successors in interest.

What began as a tool to underwrite rapid westward expansion left the public lands pocked with private in-holdings. Once the flowing mass of humanity that was the pioneer settlement of the west began to slow and finally set, the grants of public land, that solvent which made the flow of humanity so liquid, evaporated. Retention rather than disposition of public lands became the definition of acting in the public interest.

C. Consolidation

By the end of the 19th Century the government had committed itself to a policy of retention of the public lands for multiple uses. The era was marked by such seminal events as the creation of the world's first national park at Yellowstone in 1872, followed in 1891 by creation of a national timber reserve known as the National Forest System. These events typified a new retention policy that allowed both recreational and economic uses. From the outset, however, the dispersed nature of the government's lands, as well as accompanying access problems, created impediments to management. The answer to the management problem was as true then as it is today: consolidation.

The checkerboard land grants gave the public lands the appearance of an ad-hoc assemblage of property which neither public nor private entities could develop without imposing upon the other. This framework directly limited both parties from full enjoyment of the value of the land, both in economic and conservation terms. For example, private in-holdings often blocked access to government lands, not only for private citizens but for the government as well. In the landmark case of Leo Sheep Co. v. United States (1979), the Supreme Court held the government cannot obtain an easement by necessity to cross private land that blocks access to Federal land. The Court pointed out that if access was desired the government could use its power of condemnation. This cumbersome procedure has no doubt limited the government's access to its own lands. According to some authorities "[a]pproximately 40 to 60 percent of all public lands in the West have serious access problems and one-third of the public lands have no legal over-land access at all." Thus the land grants created fundamental access and management problems that needed to be addressed. Although these problems persist to this day, it was recognized early on that land management

14. Coggins, supra n. 6, at 103.
15. Id.
16. Leo Sheep Co., 440 U.S. at 688.
17. Chavez, supra n. 9, at 1373-74.
tools were needed to consolidate lands atomized by checkerboard land grants.

D. The Acts

The legislative history at the beginning of the land retention era reveals how Congress soon realized the need to promote consolidation and address the fragmented nature of its holdings. From the beginning we see land exchanges take an important role in the consolidation process. First came the Weeks Act of 1911, which gave authority to the Secretary of Agriculture to "acquire lands to protect watersheds, produce timber, and exchange Federal lands." 18 This was followed in 1922 by the General Exchange Act, which gave similar authority to the Secretary of Interior. Not only did the General Exchange Act provide similar authority, it also set out some of the basic requirements that have been embodied in all subsequent Federal land exchange legislation. In particular the General Exchange Act set out the requirement that exchanges be equal in value, not merely acreage. 19 The Taylor Grazing Act of 1934 further developed the fundamental language of exchange legislation. 20 This act allowed the 'Grazing Service,' later to become the Bureau of Land Management, to engage in land exchanges of equal value only if the public interest would benefit from such exchanges. 21

In 1976 these acts were either repealed or, as in the case of the Taylor Grazing Act, supplemented by the Federal Land Policy and Management Act (FLPMA). 22 FLPMA embraced a comprehensive approach to Federal land management. In enacting FLPMA Congress concluded the nation's interests in public land would "be best realized if the public lands and their resources [were] periodically and systematically inventoried and their present and future use [were] projected through a land use planning process coordinated with other Federal and State planning efforts...." 23 The land use planning process was to culminate in the production of regional land use management plans for all Federal land under FLPMA's purview. It therefore required the tools used to consolidate Federal lands, such as land exchanges, be used only in accord with those regional plans. To further this goal, FLPMA went on to establish uniform statutory procedures for disposals of public land, which included land exchanges. 24 These statutory procedures kept the requirements embodied by earlier land laws, namely the requirement for equal value of the lands exchanged, and modified others.

20. 43 U.S.C. §§ 315-316o.
21. Hanson & Panagia, *supra* n. 11, at 181-82.
FLPMA now requires exchanges only be conducted when "the public interest will be well served by making the exchange."\textsuperscript{25} In 1988 Congress added to the statutory framework of FLPMA by passing the Federal Land Exchange Facilitation Act (FLEFA).\textsuperscript{26} FLEFA was designed to facilitate and expedite the FLPMA exchange process. Its main thrust is the requirement that the exchange parties use arbitration whenever the proposed land appraisals differ markedly in valuation. As such, FLEFA sets out the current framework upon which the BLM and the Forest Service promulgated the regulatory process that controls statutory land exchanges.\textsuperscript{27}

II. WHY STATUTORY LAND EXCHANGES BECAME THE BELLE OF THE BALL

As the 20\textsuperscript{th} Century progressed a new paradigm gradually eclipsed the access and management efficiency rationale for consolidation. The passage of FLPMA required Federal agencies to take an approach that uses comprehensive, science-based planning to manage the public lands.\textsuperscript{28} This legislation, when taken in concert with the requirement to abide by the Endangered Species Act (ESA), set the stage for what became known as "ecosystem management."\textsuperscript{29}

A. A New Paradigm

When FLPMA and the ESA are read together, the two acts functionally require agencies to use a holistic approach to public land management. In short the acts implicitly demand that public lands and the species that inhabit them be managed as an integrated ecosystem.\textsuperscript{30} When taking a holistic approach to managing ecosystems, scientists have observed that maintaining the biological diversity of plant and animal species is essential if endangered or threatened species are to be preserved.\textsuperscript{31} Studies show an ecosystem's biodiversity is best supported by blocks of land large enough to allow wide-spread species distribution over their native range, and these large blocks are in every way superior to smaller blocks of land that contain smaller populations spread far apart.\textsuperscript{32} It is this requirement that nature be considered combined with the new management paradigm of man that is in large part fueling the modern use of land exchanges.\textsuperscript{33}
B. Alternatives to the Land Exchange – Fickle Choices

The agencies' historical preference for land exchanges is primarily rooted in the lack of practical alternatives.\(^{34}\) The agencies can request Congress appropriate money to buy inholdings. This supposes a willing seller, as well as willingness on the part of Congress to appropriate the funds in the first place. In deficit years Congress has been more likely to cut the agencies' operating budgets rather than appropriate money to expand the land under their management. Even in years where Congress has agreed to fully fund the agencies, any appropriation bills to expand Federal landholdings has been required to run the gauntlet of vociferous opposition from the western states. The western states, keen to protect their tax base, have long favored the position of no net increase in Federal ownership.\(^{35}\) Taken in total, this method of consolidation has proven unreliable at best.

However, an alternative method of funding has been made available to the agencies. The fickle nature of congressional appropriations for land purchases led to the passage of legislation to create a fund dedicated to the purchase of inholdings and environmentally sensitive lands. The fund is called the Land and Water Conservation Fund,\(^{36}\) (LWCF) and federal leases of offshore oil and gas rights generate its money. All told the LWCF receives approximately $900 million a year.\(^{37}\) However, the use of the LWCF is not within the discretion of the agencies; a congressional appropriation from the LWCF is required for each purchase.\(^{38}\) Additionally, since LWCF's inception, Congress has consistently diverted the funds to other uses, generally making only one fifth of those monies available.\(^{39}\) The Forest Service views the availability of those funds as so unpredictable, it took a court order to force them to even consider using those funds under the NEPA requirement to look at reasonable alternatives to a land exchange.\(^{40}\) To quote the Service, they saw the availability of LCWF funds as too "remote and speculative" to be considered as a worthwhile alternative.\(^{41}\)

Although a Federal court disagreed with this assessment, it does indicate the regard that the Forest Service has for the reliability of funding derived from the LCWF.

Another alternative to land exchanges is the power of condemnation, but this is not a power currently available to agencies such as the Forest Service or the BLM. Per section 1715(a) of FLPMA, the use of eminent domain is


\(^{35}\) Keiter, supra n. 31, at 310.


\(^{37}\) Vaskov, supra n. 34, at 83-84.

\(^{38}\) Keiter, supra n. 34, at 311.

\(^{39}\) Id.

\(^{40}\) Muckleshoot Indian Tribe v. U. S. Forest Serv., 177 F.3d 800, 814 (9th Cir. 1999).

\(^{41}\) Id.
only available to the Secretaries, and is only allowed when access to Federal land is blocked. The power to condemn land is further restricted to as narrow a corridor as is necessary to gain access. Ultimately the agencies must prevail on Congress to summon the political will to do the dastardly deed and confiscate an unwilling landowner’s property. Besides the political price to be paid for condemnation, the agencies must persuade Congress to pay the required monetary price, for the Fifth Amendment to the United States Constitution mandates that condemnation requires just compensation.

At the end of the day, land exchanges began to look pretty good to the agencies. In an exchange, the agencies need not rely on any appropriations, the coin in trade being the very land under their control. Further, it is within their discretion to enter into an exchange, and once entered, those exchanges under one hundred and fifty thousand dollars (and meeting certain requirements) require no Congressional notification, and can go forward under the sole authority and supervision of the agency’s field management. In addition, the western states’ lobby against the erosion of their tax base is appeased because, in theory, there is no net gain or loss in property.

As far as the agencies are concerned, land exchanges have become the belle of the ball. It has been the BLM’s stated policy to use land exchanges whenever feasible for land acquisitions. The Forest Service has pursued an equally aggressive agenda; executing over 1,200 exchanges valued in excess of a billion dollars in the 1990s alone. In recent years however, this roaring business has drawn close scrutiny. This scrutiny has revealed that although the agencies may be marching toward a noble goal, the goal of consolidation of their fragmented land, it has often come at a price not always apparent to the agencies. Close examination of their exchange transactions has revealed that the agencies have consistently undervalued key economic, biological and aesthetic values associated with the lands they gave up. To understand this oversight one needs to understand how an exchange is conducted, as well as the typical parties to an exchange.

III. THE STATUTORY LAND EXCHANGE

FLPMA is the modern authority for statutory land exchanges. It provides that, inter alia, the exchange must meet three fundamental requirements: first, the purpose and effect of the exchange must conform to the agencies

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42. 43 U.S.C. § 1715(a).
43. U.S. Const. amend. V.
44. 36 C.F.R. § 254.3(a) (2005).
45. 36 C.F.R. § 254.3(k) (2005).
48. Id. at 11.
land use plan. Second, the values of the lands exchanged should be equal, or be equalized by a payment of money. Third, the exchange may only be consummated if the agency finds the “public interest will be well served by making that exchange.” When the parties enter into an exchange those requirements are carried out under the regulatory framework authorized by FLPMA, and as amended by FLEFA. Regulations have been promulgated by both the Forest Service and the BLM, but they are essentially identical.

A. The Mechanics

The Forest Service and BLM regulations attempt to fulfill FLPMA’s directives by using a four step process: 1) Proposal Scoping and Development 2) Feasibility Phase, 3) Processing Phase and 4) Decision.

Under the Proposal Scoping and Development Phase an exchange may be proposed by the agencies, a private party (including corporations), or a third party facilitator who takes on responsibility for putting the deal together for both the agency and the private party. Once the proposal is made the agency scopes the proposal and makes a preliminary assessment of whether the proposal meets the agency land management plan and whether it generally conforms to the other statutory and regulatory requirements. At this point the agency may suggest ways to improve the proposal. Once the informal talks with the agency field staff are complete and they have given the proponent of the exchange an indication that the proposal is worth pursuing, the next step is for the proponent to submit a formal proposal, and so begins the feasibility phase.

Upon receipt of a formal proposal the agency will generate a feasibility analysis report. This report addresses the major resource values involved and formally makes a determination of whether the proposal conforms to the agency’s existing land management plans, FLPMA’s first directive. The feasibility report then discusses the possibility of conflicts or problems, and finally estimates the cost of processing the exchange and states who is expected to bear those costs. Based on this report the agency will decide whether to enter into a non-binding agreement to initiate the exchange process and commence the NEPA studies.

An exchange initiation agreement sets out the parties’ duties to generate the required reports and sets out the costs each party is to bear processing

53. 36 C.F.R. § 254.4(a), (c)(3) (2005); 43 C.F.R. § 2201.1(a), (c)(3) (2005).
55. 36 C.F.R. § 254.4(a) (2005); 43 C.F.R. § 2200.1(a) (2005).
57. Id.
the exchange.\textsuperscript{58} It is of note that during the processing phase, “[o]ne or more of the parties may assume, without compensation, all or part of the costs.”\textsuperscript{59} This is significant because it allows the agency to defer all the costs to the private exchange party (read corporation). This practice has gone so far as to allow the direct payment of agency officials’ salaries while they are engaged in compiling the reports.\textsuperscript{60} The compiled reports include, \textit{inter alia}, an environmental impact review as required by NEPA, a cultural and historic resource inventory as required by the National Historic Preservation Act, and an appraisal of the value of the lands to be exchanged.\textsuperscript{61} It is this last report, the land value appraisal, which informs the agency as to whether FLPMA’s ‘exchange must be of equal value’ directive has been satisfied.\textsuperscript{62} However, it is the aggregate of all these reports which is used in deciding FLPMA’s overarching directive - that the “public interest will be well served by making that exchange”. It is upon that analysis the agency enters the final phase and renders a final decision. Once the decision is made the agency will give public notice, and for a 45 day period eligible parties may object to the decision.\textsuperscript{63}

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\textbf{B. The Real World}
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As we have seen, FLPMA requires certain principles of public policy be met when exchanges are conducted, and the regulations are designed to implement those requirements. But as with all things worldly there is the knowing of it and then there is the doing of it.

In practice, land exchanges seem to take place in an insular world and typically involve the same or very similar parties most of the time. An examination of the land exchange notices posted in the Federal Register reveals that the agencies are generally negotiating for land consolidation for the protection of endangered species or preservation of land that is either environmentally sensitive or contains public recreation opportunities. However, the private parties are predominately represented by corporations from the resource extraction industries who, through their mining and timber operations, are already intensive users of Federal lands.\textsuperscript{64} As intensive users of Federal lands, these corporations have working relationships with the agencies which, in some cases, go back to the agencies’ very inception. The familiarity of the parties has called into question whether land exchange

\textsuperscript{58} 36 C.F.R. § 254.4 (2005); 43 C.F.R. § 2201.1 (2005).
\textsuperscript{60} Vaskov, supra, n. 34, at 91-92.
\textsuperscript{62} 43 USCS § 1716(h).
\textsuperscript{63} 36 C.F.R. § 254.13(b) (2005); 43 C.F.R. § 2201.7-1(b)-(c) (2005).
\textsuperscript{64} Jones, supra n. 56, at 22.
negotiations are actually taking place at 'arms length,' and in accordance with the statutes and regulations. 65

IV. CRITIQUE OF STATUTORY LAND EXCHANGES – THE GAO WEIGHS IN

Over the past decade there has been harsh criticism of the efficacy of the land exchange process, culminating in 2000 with the Government Accounting Office’s (GAO) recommendation of a moratorium on all exchanges conducted by the agencies. 66 How did it come to this and what are the major criticisms leveled at the agencies? The issues turn primarily upon the agencies’ interpretation of two of FLPMA’s prime directives: (1) that the exchange must be in return for land of equal value, and (2) that an exchange only be made if it well serves the public interest.

A. Appraising the Appraisers

The appraisal of land values is seen as one of the most critical stages in the exchange process. The appraisal underlies the agencies’ determination that the lands exchanged are of equal or approximately equal value.

The appraiser is tasked by statute and regulation with determining the market value of the land based on two elements. First, the appraiser must determine the ‘highest and best use of the land.’ This is defined as the most probable legal use of the property. 67 Second, once the highest and best use has been determined, the appraiser determines the market value of such property based on “the most probable price in cash, or terms equivalent to cash, that [such] lands . . . should bring in a competitive . . . market . . . .” 68 When making this analysis the appraiser shall “[i]nclude historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values or amenities as reflected in prices paid for similar properties in the competitive market.” 69

On its face the appraisal system appears as though it will capture all the tangible and intangible values associated with the land, and reduce them to a fungible cash equivalent for equal value comparison. At least it should in a perfect world where similar amenities and properties have already been valued on the competitive market and can be used as a yardstick. As the GAO pointed out in their audit of the exchange program, a fundamental problem arises when there is no functional market for remote lands or the unique properties that may be associated with them. 70 Critics urge that this is the inherent weakness of exchanges because, in effect, what we have is a

65. Tang, supra n. 18, at 62.
66. GAO, supra n. 47, at 6.
68. 36 C.F.R. § 254.2 (2005); 43 C.F.R. § 2200.0-5(n) (2005).
70. Keiter, supra n. 31, at 313.
barter system. The parties have no objective standard of value, which in turn creates difficulty in determining whether the trade was fair.\textsuperscript{71}

The criticism regarding objective standards has some validity, but it does not seem to hold true for all parties or all exchanges. This becomes apparent when we look at instances where private parties have acquired land in an exchange and then subsequently sold it for a greatly appreciated price. The classic example comes from the GAO report on land exchanges. The BLM traded 70 acres of Las Vegas land valued at $763,000, whereupon the private party sold the land for $4.6 million the same day.\textsuperscript{72} Obviously the valuation was woefully inadequate, but only from the agency's perspective. The private party fared quite well. In fact there are no examples of where the private parties did anything but fair well. Whatever valuation system the private parties were using, in comparison to the government they seem to be doing a far better job of anticipating the market price. As one congressional wag put it, the agencies seem to have "flat got snookered."\textsuperscript{73} So the question becomes, if private parties' valuation can be successful, why have government valuations consistently come up short? To answer that question we must examine the conditions under which government valuations take place.

Review of the agency appraisal work demonstrates fundamental errors committed by agency appraisers and their supervisors. First and foremost is the failure of appraisers to employ standard government appraisal procedures. The GAO found this failure led to the agencies giving "more than fair market value for nonfederal land they acquired and accept[ing] less than fair market value for federal land they conveyed."\textsuperscript{74} A subcategory of this is appraisers' failure to make proper use of 'highest and best use' analysis. The 9th Circuit has noted that failure to take into account the highest and best use of land in the hands of a private party significantly skews the appraisal value because it does not consider the development or resale value of the Federal property.\textsuperscript{75} "Stringent application of the "highest and best use" standard is imperative in light of the fact that both the BLM and the Forest Service consistently undervalue Federal lands at the expense of the taxpayer."\textsuperscript{76}

Other reviews have found further operational flaws in the agencies' appraisal work. In a study similar to the GAO's, the Appraisal Foundation listed several serious defects in the way the BLM carried out their apprais-

\textsuperscript{71} Vaskov, supra n. 34, at 88.
\textsuperscript{72} GAO, supra n. 47, at 19.
\textsuperscript{73} Vaskov, supra n. 34, at 79.
\textsuperscript{74} GAO, supra n. 47, at 4.
\textsuperscript{75} Desert Citizens against Pollution v. Bisson, 231 F.3d 1172, 1181 (9th Cir. 2000).
The Foundation noted it was the policy of the BLM to encourage appraiser involvement in direct negotiations and bargaining with the private party. The Foundation saw this practice as highly prejudicial to the appraisers’ independence and created a coercive pressure on the appraisers to conform their appraisal to the bargained-for position. The Foundation called this policy a “material weakness.” The Foundation determined the failure of the agencies’ appraisal process was also due to the highly politicized climate in which the exchange process takes place. The Foundation cited the practice of non-appraisers acting in appraisal roles and their subsequent “interference with or failure to procure objective and independent market value opinions.”

The reports demonstrate it is not the government appraisal standards that set up the agencies to get snookered. Rather it is the agencies’ leadership failure for not having the discipline to properly abide by established standards. It would, however, be simplistic to say that slavishly adhering to proper appraisal standards can account for all the disparity in valuation between the exchange and a subsequent greater valuation at auction. There are market forces inherent to auction dynamics that no appraisal can capture or ever hope to capture. On this basis some would say the obvious answer is to substitute auctions for exchanges, and thus the market valuation question will in effect be self-executing. But, this potential solution does not account for some major pitfalls, which are examined infra, in part V of this paper.

B. Public Interest Determination

The determination of whether the exchange “well serves” the public interest is the most important issue for the agency to decide. This is also an issue in which the agency is given great discretion. The agency is essentially asked to make a valuation of the public interests in the Federal and non-Federal land. After valuation, the agency is asked to balance the two valuations, and decide if the “resource values and the public objectives served by the non-Federal lands . . . [are] equal [to] or exceed the resource values and the public objectives served by the Federal lands to be conveyed.” If the public interest value of the non-Federal lands do not equal or exceed those of the Federal land the agency must reject the exchange. Thus the public interest question becomes, what are these values and how are they weighed?

FLPMA and its regulations give the agency a non-exclusive list of factors to consider when making public interest valuation. The agency must consider if the land will provide for “better Federal land management and

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78. Id.
79. Id. at 286.
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.\textsuperscript{81} The agency is tasked with making the consideration of these factors part of their record of decision, but the statute does not assign any weight or relative rank to the factors. Therefore the agencies have been given wide discretion to decide this balancing test. The test is in fact a subjective one to which the courts will defer, unless the determination clearly does not fall within the boundaries of FLPMA’s legislative purpose.\textsuperscript{82}

Although the agencies have wide latitude in deciding public interest, they do not have the latitude to ignore analysis or treat decisions in a cavalier fashion. Some of the most damning criticism leveled at the agencies has cited just such agency indiscretion. The GAO report noted they had encountered numerous examples where the agencies had failed to even consider the required factors when deciding if the exchanges matched or exceeded the benefits of retaining the Federal land.\textsuperscript{83} In one particularly egregious example the BLM wished to acquire an old bowling alley as the site for their headquarters in Elko, Nevada. In return the BLM personnel merely told the owner to select a parcel from a map of the BLM holdings in Nevada. The gentleman selected a parcel in Las Vegas, which is reported to be currently valued at over $9 million.\textsuperscript{84} As with the issue of valuation, this sort of failure to honor public interest has more to do with a failure of leadership rather than the failure of the public interest analysis itself. Public interest analysis has not however, escaped criticism.

The lack of objective standards when it comes to the agencies’ evaluation of the public interest factors vests the agencies with such wide latitude there are virtually no limitations on agency action. So long as the agency makes some determination within the broad bounds of FLPMA’s legislative purpose the courts will not interfere.\textsuperscript{85} Some would argue this allows the agency to willfully escape any meaningful public interest determination.

Another criticism is that the exchange process does not allow for much, if any, public scrutiny or comment. The negotiations take place in private and the land appraisals are kept confidential until the exchange has been completed. Formal request for public comment does not come until after the agency has made its determination.\textsuperscript{86} Without timely access to the appraisals, and other information, it is doubtful if the public is ever in an effective position to evaluate whether the exchange will well-serve the public interest. With the formal request to comment at the end of the process, com-

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\item \textsuperscript{81} 43 U.S.C. § 1716(a) (2002).
\item \textsuperscript{82} Eyre, \textit{supra} n. 77, at 272-73.
\item \textsuperscript{83} GAO, \textit{supra} n. 47, at 4.
\item \textsuperscript{84} Vaskov, \textit{supra} n. 34, at 88.
\item \textsuperscript{85} Eyre, \textit{supra} n. 77, at 273, (quoting State ex rel. Sullivan v. Lujan, 969 F.2d 877, 883 (10th Cir. 1992)).
\item \textsuperscript{86} Vaskov, \textit{supra} n. 34, at 89.
\end{itemize}
ments serve little more than an attempt to close the barn door after the horse has bolted.

These two critiques are doubly damning when we recall that the private parties to the exchanges are generally intensive users of the public lands who have close ties to the agencies. Given the less-than-arms-length nature of the relationship (recall the practice of the corporations underwriting the exchange process), the confidential nature of the land appraisals and bargaining, as well as the agencies latitude to determine public interest with little or no meaningful public scrutiny, it is no surprise that land exchanges have been characterized as a game of insider trading. The GAO called on Congress to consider halting all land exchange programs, and the Appraisal Foundation called for an investigation by the Department of Justice. But none of that has come to pass. The agencies have undertaken some reform of their land exchange guidelines, but exchanges are still available to the agencies under the same statutory and regulatory terms. To understand why this is so we must look at the proposed alternatives, or what would otherwise come to pass if statutory exchanges were banned.

V. ALTERNATIVES TO THE STATUTORY LAND EXCHANGE - THROWING THE BABY OUT WITH THE BATHWATER

There is a fear that if statutory land exchanges were to end, the effect would be to throw the baby out with the bathwater, as the agencies are not the only ones who conduct land exchanges; Congress does as well.

A. Legislative Exchanges

Legislative exchanges have always injected an overtly political component into the exchange process and have typically come about when particularly large or contentious land exchanges are at issue. They have drawn strong criticism because legislative exchanges have overridden environmental laws, negated appraisal requirements and eliminated public involvement.

Because of the nature of legislative exchanges there is an argument that statutory exchanges are the lesser of two evils. The concern is if statutory land exchanges were removed, then less desirable legislative exchanges will fill the vacuum. It would appear that statutory land exchanges remain because, in many respects, they offer a greater likelihood of achieving exchanges that are in the public interest.

87. GAO, supra n. 47, at 6.
88. Eyre, supra n. 77, at 287.
89. Keiter, supra n. 31, at 315.
90. Id. at 316.
B. FLTFA – A New Take on an Old Problem

The concern over legislative exchanges is not the only reason why land exchanges have remained entrenched. There have been legislative experiments with other mechanisms which have raised little interest to date, and perhaps rightfully so. The Federal Land Transaction Facilitation Act of 2000 (FLTFA) \(^91\) has been the main contender to statutory land exchanges in recent years. This act looks to solve the land appraisal / market value problem by allowing the agency to identify their surplus lands, theoretically the ones they would give in a land exchange, sell them at auction and retain the funds (rather than have them go to the Treasury where it would take Congressional appropriation to retrieve them). The agency then dedicates these funds to the purchase of lands with exceptional natural resource value or for the purchase of fragmented lands. On its surface FLTFA does appear to cure poor appraisals, but it does so only for part of the transaction.

Land transactions under FLTFA have some marked drawbacks of their own. While perhaps offering a solution to the appraisal problem, it is only a solution for appraisal of the land that the agency is willing sell. FLTFA still fails to account for the appraisal of the land yet to be purchased, and at the same time makes it difficult to judge if the transaction well serves the public interest. Simply stated the transaction converts the lands into cash and commingles it in the fund together. Now the inherent value of the land is no longer readily apparent. When the cash is paid out for the replacement property there is no sense of what value, or how much land has just been traded for the replacement property. So the problem remains, how do you measure units of ecological aesthetics against commercial potential? With FLTFA this measurement merely becomes more obscure because inherent value has been divorced from one side of the transaction. At least in the land exchange, a stark contrast may be revealed when the lands are examined side by side.\(^92\)

FLTFA may have other undesirable side effects. Not only does it obscure how much land was sold to make a particular purchase, it may further encourage what is called *eco-speculation* or *green mail*. This is an old form of speculation with a new twist. In the past a developer might have got wind of a government project and purchased land in advance of that project knowing they can get an appreciated price for it when the project takes place. In eco-speculation “private wheeler-dealers have found it profitable to buy scenic land and merely threaten to log it or build a road on it; the screams of outrage guarantee they'll get a spectacular trade when they finally do hand it over to public ownership.”\(^93\)

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92. Tang, supra n. 18, at 71.
93. Id. at 72.
An old criticism of land exchanges was that people with inholdings could force land exchanges to take place by creating a credible threat. A classic example of creating a credible threat occurred when the Noranda Corporation proposed opening the New World Mine on the border of Yellowstone National Park. To quote Park Ranger Stuart Coleman: "If you were going to throw a dart at a map of the United States and place a gold mine there, those mountains would probably be the worst place a dart could land. That's exactly what Noranda is doing, and we are very concerned about it." This provoked so much outrage the Clinton administration brokered a land exchange in return for stopping the development. However, and this is the trick of the tale, Noranda claimed that none of the replacement lands offered were satisfactory. In the end the government had to settle with a large cash buyout. Availability of a large agency-owned cash fund under FLFTA may have the unintended effect of further fueling this sort of speculation.

VI. THE WAY FORWARD

So we have come full circle, left with the only date for the dance, the land exchange. There are glaring problems, but the land exchange has such a history and is so entrenched with the agencies it does not seem likely to be on its way out. But is that all there is to it? Obviously not. People have made recommendations at every turn. The agencies themselves have taken steps to remedy what was seen as their failures in leadership and process. But more can be done.

If reduced to a formula, one might say the answer to fragmented or endangered lands equals a "statutory land exchange" that realizes 'appropriate land values' and 'well serves the public interest'. A simple enough paraphrase of FLPMA's exchange policy to be sure, but each component does have the potential to help forward FLPMA's overarching policy: the public lands shall be managed in a manner that will protect their inherent qualities on the basis of multiple use. So let us look at possible ways forward for each component.

A. The Statutory Land Exchange

First, the "statutory land exchange" itself. The format of the statutory land exchange in many ways is already equipped to further the policy rationale behind the other components of the formula. The statutory land exchange, as opposed to other forms of exchange, requires the use of the NEPA, NHPA and HAZMAT evaluations. These ready-made evaluation

94. Vaskov, supra n. 34, at 90.
96. See generally GAO, supra n. 47, 40-82 ("Comments from the Forest Service & BLM").
tools currently play key roles in determining what serves the public interest. But more than anything the statutory land exchange affords people the opportunity to place two parcels of land side by side and compare them. Such a comparison allows us the opportunity to make a normative judgment call about their equality. This is simply not available if one of the parcels has been transmogrified into cash.

B. Appropriate Land Values

FLPMA’s definition of appropriate value calls for the determination of the land’s fair market value. Some argue that fair market value can not be realized without some form of competitive bid. But as we have seen, that only supplies a value for one of the parcels and causes the intangible values of that parcel to disappear from the equation.

Other valuation standards beside market value have been suggested; of note is the concept of “replacement value,” which has been used in the context of federal acquisition of Indian lands. The replacement or substitute value looks to capture the unique characteristics of land that has no active market. Replacement value it is reasoned, may do a more accurate job of translating the values of the old land into the values of the new land, and thus ensure greater equality. Unfortunately this may be too rigorous of a requirement. Finding a sufficient match may make most exchanges impossible to consummate if the exchange is required to reproduce value-for-value and feature-for-feature. One must also ask what would be the incentive, for either party, to trade for something they already have a close approximation of? For some it is this diversity of interests that actually drives the transaction. In an exchange known as the Huckleberry Exchange, the Forest Service received several thousand acres of highly logged land in return for a few hundred acres of old growth forest. As one Forest Service Supervisor notably remarked “I’m probably one of the few people in the Forest Service who thinks it’s better to get land than trees ... You can grow trees - but not land.”

The answer may be right before us, but with some modification. The appraisal system currently in place is quite comprehensive. It does specifically require that aesthetic and ecological values be counted. Most of the criticism leveled at the appraisals has more to do with following correct procedure and stamping out factors that introduce bias. One suggestion put forward is the creation of an independent governmental appraisal agency. This appraisal agency should be supplied with more stringent guidelines

99. Id.
100. Tang, supra n. 18, at 71.
101. Id.
102. Eyre, supra n. 77, at 293.
and should be completely divorced from those who are ultimately responsible for approving the exchange. In this way the accuracy and validity of their appraisals should be relieved of the potential for bias that plagues the current system.

C. Well Serves the Public Interest

The last and most complex component in the formula is the determination of whether the exchange well serves the public interest. Here the problem is the amount of discretion afforded the agencies in making their public interest determination. Given the typical relationship of the parties and the likelihood for undue political pressure, this broad latitude allows harried administrators to conveniently escape a meaningful public interest analysis. There are four things that can be done to correct this.

First, FLPMA, the enabling statue for statutory land exchanges, should be amended to explicitly require a "substantial evidence" standard of judicial review for statutory land exchanges. The current public interest analysis requires the agencies to consider if the exchange will provide better Federal land management and meet the economic, community, and environmental needs of the people. In essence FLPMA requires the agencies to determine if the exchange is reasonable under those terms. This is subjective in nature and without more the Supreme Court has consistently said it will not interfere with the agencies' interpretation of those factors. On this basis courts may only review the agency decisions under the arbitrary and capricious standard, which merely asks the courts to consider whether the agency based their decision on the permitted factors. "The court is not empowered to substitute its judgment for that of the agency... so long as there is a rational basis for the agency's decision."104

The agencies will continue to follow the path of least resistance if they are allowed to merely substantiate their decision making by showing they took permitted factors into consideration. No truly searching inquiry will be had on the efficacy of their actions. Congress must provide a specific mandate that will allow the court to review the agency’s decision for conformity with statutory intent. Merely asking the agency to analyze what is reasonable will inevitably require the court to give way to the agency’s discretion under the doctrine of deference to administrative decisions.105

What sort of specific mandate can Congress give? Making an objective test out of public interest determination is not particularly practical. Such an attempt cannot take into account the myriad of possibilities that make up what might be in the public interest. Therefore, such a test is not possible

because at some point someone really must decide what is reasonable. The true problem is that the process has long been subject to abuse. So long as the agency comes up with any rational explanation for their decision within the boundary set by FLPMA, the courts, and thus the people, are powerless to intervene. The agencies, like most people, would no doubt do better if they knew they were held to a more exacting standard. To address this problem Congress should amend FLPMA to explicitly require the “substantial evidence” standard of judicial review. This will allow the courts to ask “whether a ‘reasonable mind’ would accept the evidence ‘as adequate to form a conclusion.’”\footnote{Whipps, supra n. 104, at 1132.} If the agency fails to meet this test the court may set aside the agencies decision. It is this sort of probing, in-depth review, with actual consequences, which will require the agency to make a more exhaustive analysis of what is in the public interest.

Second, information about the terms of the exchange negotiations and the appraisals must be shared earlier in the process. Without this information there can be no meaningful commentary on the agencies’ determination of what well serves the public interest. Without knowing the terms of the deal no one is in a position to raise objections because it withholds from them the ability to make a side by side comparison, the very thing that is so unique to the land exchange. The confidentiality of the private party’s information should be waived as a price of doing business on the public lands. Releasing the information at the end of the exchange makes “the formal request for public comment become little more then a minister's call for objections at a wedding.”\footnote{Vaskov, supra n. 34, at 89.}

Third, the cost sharing provisions that the regulations currently contain should be amended. The regulations currently allow the private party to assume all the costs of processing the exchange, including providing their own contractors for the land appraisals and the NEPA analysis. They have even gone so far as to subsidize the salaries of agency officials working on the exchange. This practice introduces opportunities for bias to occur and must end. The Federal government must bear its own costs.

Finally, we come to the determination of whether an exchange of lands is in the public interest. This determination is so contentious primarily because so many different parties have an opinion as to what the public interest is, but only one party, the agency, is allowed to make that determination. Here FLTFA contains a very worthwhile provision. It calls for a collaborative planning process between state and Federal governments to select the lands that are to be disposed of. As one commentator put it, “[f]rom a certain perspective, the public interest issue is inherently taken care of . . . because the statutes require a collaborative planning process.”\footnote{Tang, supra n. 18, at 74.}
laborative planning process should be extended to FLPMA. The collabora-
tive committee should be composed of Federal, state, local and tribal repre-
sentatives, specifically tasked with deciding which land to exchange. In this
way, at least for the lands to be given up in an exchange, the public interest
determination would to some degree be self-realizing.

VII. CONCLUSION

Almost from its inception, checkerboard lands have proved to be a major
impediment to the full enjoyment of public and private lands. These atom-
ized lands have spurred statutory efforts to address the management and
access issues created by fragmented land holdings. The statutory land ex-
change has risen to prominence among those legislative efforts.

The utility of statutory land exchanges has made them the darling of the
land management agencies, and in the past thirty years the paradigm of
ecosystem land management has fueled their use to the point where statu-
tory land exchanges have become the agencies’ consolidation tool of
choice.

This considerable popularity has come with a downside. As the GAO and
the Appraisal Foundation have pointed out, the agencies have consistently
accepted lands of lesser value than the land they give up. In addition, it is
alleged that the inability to obtain lands of equal value has been the product
of a game of insider trading with private parties.

When we examine the alternatives to statutory land exchanges it be-
comes apparent that the alternatives are not any better. In fact some may be
considerably worse. Although statutory land exchanges are imperfect and
have been subject to abuse, a land exchange does allow a direct comparison
between the land to be acquired and the land given up. We should not throw
the baby out with the bathwater. What is required, rather, is a revision of
the statutory scheme that curbs abuse and forwards the legislative intent
underlying this worthy land consolidation tool.

To effectively reform statutory land exchanges several key issues must
be addressed. First, the appraisal system must be revised. An independent
appraisal service should be created to check the bias introduced into ap-
praisals done by the same management team rendering the final decision on
the exchange. Second, several aspects of the public interest valuation proc-
cess must also be revised. To begin with, the agencies should be held to a
higher level of judicial review so they are less likely to pay mere lip service
to public interest determination. Next, the terms of the exchange negoti-
ations must be made public so meaningful public comments can be made.
Third, the practice of allowing private parties to subsidize the agency’s de-
cision-making costs should be discontinued. Finally, a joint committee of
the Federal, state, local and tribal governments should be tasked with selec-
tion of the public land to be given up. In these ways the statutory land ex-
change may continue to help address the two hundred-year-old question of how to consolidate our fragmented public lands.