

Alternatives to the Transfer of Public Lands Act

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INTRODUCTION

This White Paper is the fourth in a series addressing state efforts to take over federally managed public lands. The State of Utah leads this charge, demanding in the Transfer of Public Lands Act (TPLA) that the United States extinguish title to 31.2 million acres of public lands within Utah and transfer title to those lands to the state.¹ Utah is threatening litigation if the federal government fails to concede to the state's demands,² and legislatures in most Western states have taken up similar bills.³

We argue here that time and resources would be better spent on collaborative efforts to improve resource management practices. Alternatives to litigation are important because, as our prior work shows, Utah's claims are likely to fail. The federal government is not obligated to dispose of public lands — beyond the 400 million acres it already ceded across the eleven contiguous Western States.⁴ And even if a disposal obligation were found to exist, such an obligation would not necessitate *giving* the land to the states. Furthermore, a state takeover of public lands would subject states to significant fiscal risk while likely reducing opportunities for public involvement in land management decisions.⁵ Faced with the prospect of a long, costly, and likely fruitless legal fight, states should consider other responses to what are, for many, sincerely held frustrations over the condition and management of our public lands.

Regardless of divergent definitions of what constitutes “better” management, we believe that improving public land management is a laudable goal. But before considering alternatives to the TPLA, we must first begin to understand the frustrations that underpin it. This paper therefore begins by discussing five of the main problems that we believe give rise to the frustration driving the transfer movement. We then present seven possible alternatives to demanding title to federal lands that we believe respond to these problems and that are likely to produce lasting and tangible land management improvements. Neither the list of problems, nor the list of alternatives, is exhaustive. While we identify what we see as key challenges and opportunities, others will undoubtedly add to our list. We hope that a productive dialogue over public land management policies and practices can grow from this effort.

THE PROBLEMS DRIVING TAKEOVER EFFORTS

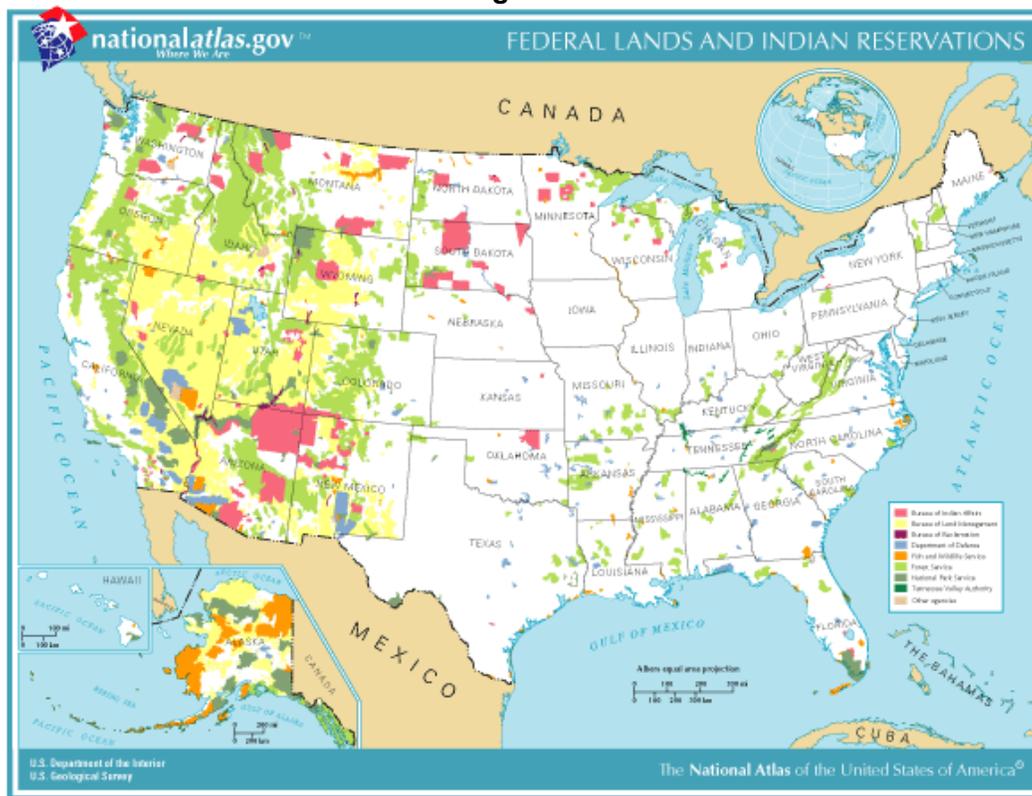
Public opinion about both how public lands in Utah should be managed, and satisfaction with ongoing management, varies by management issues and across the state.⁶ While the TPLA effectively taps into the frustrations that are common in some communities, public land takeover legislation is a blunt tool for addressing the causes of these frustrations. We believe that understanding the causes of frustrations is the first step in developing viable solutions to them. The problems listed below are not an exhaustive list of challenges, but we believe that they are some of the most profound and that they represent a good starting point for discussion.

A Fragmented Landscape. Across the eleven contiguous Western states, the federal government controls forty-seven percent of the land surface.⁷ Management of that land is split between numerous federal agencies, including the Bureau of Land Management (BLM), U.S. Forest Service (USFS), National Park Service, U.S. Fish & Wildlife Service, the Bureau of Indian Affairs, and the Department of Defense. According to two respected scholars, “[today, t]he land ownership map of the West in many places resembles a crazy quilt, without reason or coherent pattern . . . [and] fragmented ownership patterns generate a plethora of disputes over access and similar problems.”⁸ See Figure 1.

Western lands are surveyed into townships, each of which contains thirty-six sections; each section is normally one square-mile (640 acres) in size.⁹ Upon admission to the Union, Arizona, New Mexico, and Utah each received the right to title to sections two, sixteen, thirty-two, and thirty-six in every township.¹⁰ Other previously admitted states received similar though less generous land grants. These lands are referred to as state trust lands because the national government granted them to states in support of public schools and institutions, and the lands

are held in trust by the states to support those beneficiaries. Congress spread these lands across the landscape to ensure that a representative sample of resources was available to support state institutions, and to create an incentive to develop all parts of the state. These discontinuous grants, however, have badly fragmented the landscape. See Figure 2.

Figure 1.



Across the eleven contiguous Western states, state trust lands administrators today manage 40.4 million acres (63,100 mi²) of surface estate.¹¹ In Utah, for example, the School and Institutional Trust Lands Administration (SITLA) manages 3.3 million acres — a land area larger than the state of Connecticut,¹² but scattered across the landscape in over 9,000 individual parcels. The challenges inherent in effectively managing a fragmented landscape come into focus when we consider the second major problem, competing management objectives.

Competing Mandates. Fragmentation breeds conflict when adjacent lands are managed for incompatible purposes. SITLA, like other states' trust lands administrators, is obligated to manage lands in the most "prudent and profitable manner possible" to support public schools and institutions.¹³ Specifically, SITLA is legally obligated to "obtain the optimum values from use of trust lands and revenues for the trust beneficiaries, including the return of not less than fair market value for the use, sale, or exchange of school and institutional trust assets."¹⁴ SITLA cannot consider multiple uses or the public interest unless its fiscal obligations to the trust beneficiaries have first been fully satisfied.¹⁵

In contrast to SITLA, the BLM and U.S. Forest Service (USFS) operate under a multiple-use, sustained-yield mandate.¹⁶ This statutory mandate requires balancing commodity production and resource protection. The BLM is thus directed to manage public lands in a manner that "will protect the quality of scenic, scientific, historical, ecological, environmental, air and atmospheric, water resources, and archaeological values."¹⁷ Both agencies also manage

large tracts of congressionally designated Wilderness, and the BLM manages Wilderness Study Areas (WSAs) to prevent impairment to Wilderness values until Congress acts on pending Wilderness Area designation proposals.¹⁸

Figure 2.
The Public Land Survey System

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

Public lands that are managed for conservation purposes, like Wilderness, surround many state trust land parcels. In Montana, 1.2 million acres of state trust lands are land-locked by federal and private lands.¹⁹ In Utah, 96,000 SITLA acres are within WSAs.²⁰ An additional 20,220 acres are in the Beaver Dam Wash or Red Cliffs National Conservation Areas, which are managed, in part, “to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources of the National Conservation Area.”²¹ The proposed Bears Ears National Monument would include an additional 157,000 acres of SITLA land.²²

State trust land inholdings are also found in BLM managed National Monuments in Arizona, California, Idaho, Montana, and New Mexico,²³ as well as BLM managed National Conservation Areas in Arizona and Idaho.²⁴ While inholdings within National Forests have not been broken out by ownership type, inholdings are found in USFS managed Wilderness Areas in each of the eleven contiguous Western states.²⁵ All told, inholdings in USFS lands managed under a conservation designation total 416,615 acres across this landscape.²⁶ Conflict is inevitable when federal land managers must emphasize across the same landscape where states are seeking to maximize revenue generation.

Inflexible State Statutes Hinder Collaboration. The Utah legislature has enacted laws establishing detailed positions regarding federal public land management. Narrow positions limit flexibility and ultimately undercut Utah’s broader interests. For instance, under state law, BLM and USFS land management plans should not “designate, establish, manage, or treat” public

lands in ways that “resemble Wilderness.”²⁷ Rather, federal plans should “achieve and maintain at the highest reasonably sustainable levels a continuing yield of energy, hard rock, and nuclear resources;”²⁸ “achieve and maintain livestock grazing . . . at the highest reasonably sustainable levels.”²⁹ Furthermore, except in very rare instances, the BLM should not designate Areas of Critical Environmental Concern, “as the BLM lands are generally not compatible with the state’s plan and policy for managing the subject lands.”³⁰ Similar prohibitions apply to including rivers in the National Wild and Scenic River system.³¹

To advance its land management vision, Utah has established expansive “energy zones” where the “highest management priority . . . is responsible management and development of existing energy and mineral resources.”³² Accordingly, Utah supports “full development of all existing energy and mineral resources,”³³ within these zones and calls upon the federal government to “expedite the processing, granting, and streamlining of mineral development and energy leases and applications to drill, extract, and otherwise develop all existing energy and mineral resources” within them.³⁴ Utah has also designated “Timber Agricultural Commodity Zones”³⁵ and “Grazing Agricultural Commodity Zones”³⁶ where these uses are given top billing.

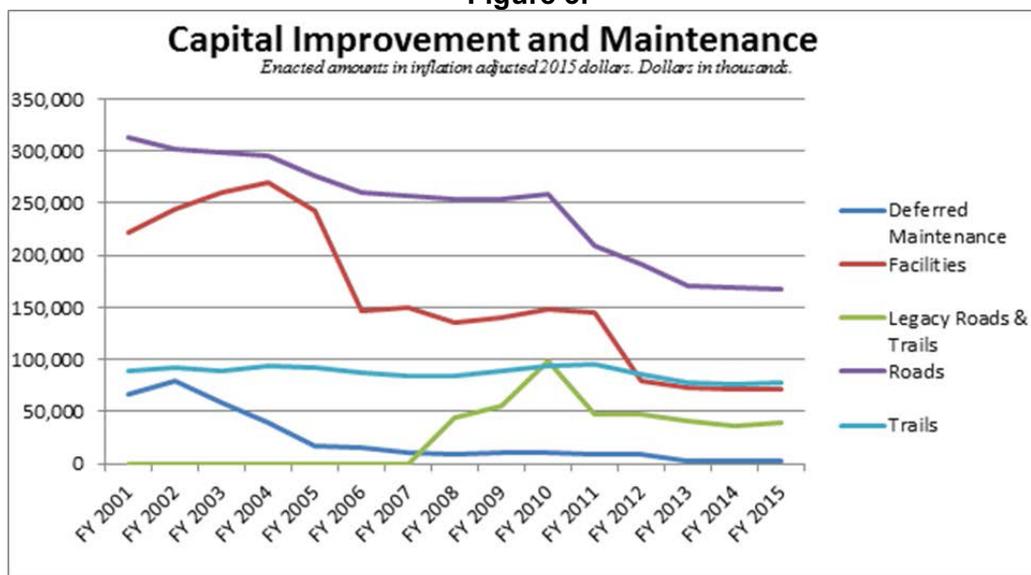
In places, these zones overlap areas where the BLM has restricted oil and gas leasing or other activities in order to protect sensitive resources, placing Utah law in direct conflict with the federal multiple-use mandate and judicial rulings requiring federal land managers to consider conservation-related values.³⁷ Where Utah’s positions conflict with federal law, federal managers have little room to accommodate Utah’s demands without violating the law. By codifying conflict into state law, the legislature virtually guarantees that demands will not be met, and that frustration will ensue. Furthermore, unattainable demands mislead the public into believing that states can dictate federal management, and that full development is a legally tenable goal. Dissatisfaction within some segments of the population naturally increases when such goals go unfulfilled. Shifting the focus to the values behind the positions, as we discuss below, could open a more productive path forward.

Unfunded Mandates. Inadequate BLM and USFS management is a common argument for state efforts to control the public domain. Inadequate management, transfer backers contend, results in “overgrown forests that can’t defend against a bark beetle infestation”³⁸ — forests that are “ruined”³⁹ and where “fire danger is ‘off the charts.’”⁴⁰ Concerns over the health of our public lands are understandable, as are concerns over federal agencies’ ability to meet their management responsibilities. The underlying problem, however, has more to do with the fact that the demands placed on public land managers have grown, while the resources available to meet those demands have declined.

Agencies like the USFS have been forced to reallocate much of their budget away from resource stewardship and towards wildfire management. In 1995, sixteen percent of USFS appropriations went to wildfire management; in 2014, wildfire management accounted for fifty-two percent of USFS appropriations. All non-fire related spending decreased over that period, with National Forest System management falling from 58 percent of agency appropriations to just twenty-nine percent during those two decades.⁴¹

Appropriations translate directly into the personnel available to manage our public lands and address resource management concerns. Between 1998 and 2015, National Forest management staffing fell by nearly 7,000 — or almost forty percent.⁴² Budget and staffing reallocation resulted in a twenty-four percent cut for the vegetation and watershed management program, a sixty-four percent cut in spending on land management planning, a sixty-eight percent cut in spending on facilities maintenance, and a ninety-five percent cut in funds spent on addressing the USFS’s \$5.5 billion maintenance backlog.⁴³ See Figure 3. With limited staffing and resources, public land managers have little time to process permit applications or engage with stakeholders, reinforcing the misperception that agency personnel are unable or unwilling to work with state and local governments.

Figure 3.



USFS, *The Rising Cost of Fire Operations: Effects on the Forest Service's Non-Fire Work* (2015).

Westerners recognize the problem. In recent surveys, seventy-two percent of respondents in the Intermountain West described the “[l]ack of resources to properly maintain and take care of national parks, forests and other lands” as a “serious problem,”⁴⁴ and ninety-five percent of respondents said that “[m]aking sure that rangers have the resources they need to take care of public lands and provide services to visitors” is important.⁴⁵

Keeping Pace with Social and Scientific Change. Managing public lands under a multiple-use mandate means striking a balance between competing interests. Those interests, and the factors that drive them, change over time, and that change has been more profound in the West than in any other region of the country. Indeed, between 1976 and 2015, the three fastest growing states in the nation were Nevada, Arizona, and Utah — each of which more than doubled in population (Nevada more than tripled).⁴⁶ Even if nothing else changed, a growing population and finite land base demand continuing federal land policy evolution.

But other things did change. Our knowledge of the natural world and ecological processes grew exponentially. Federal water projects, rural electrification, and the federal highway system allowed inaccessible and inhospitable areas to grow into prosperous communities. As the West grew, the Western economy grew with it, evolving from timber, mining, and agricultural industry dominance to a more diverse service sector-oriented economy.

Laws, like the 1872 Mining Act, that were intended to encourage development were not always amended to keep up with social change, and even when laws did change, they often did so only after creating an indelible mark on the land.⁴⁷ Complicating matters, modern environmental laws like the Endangered Species Act that were enacted in response to growing knowledge and changing values have sometimes been difficult to square with the expansionist era laws that preceded them. Many communities have failed to anticipate or adapt to these kinds of evolving conditions and management requirements.

Timber communities in the Pacific Northwest, for example, failed to anticipate the convergence of mill automation, falling timber prices, and loss of wildlife habitat that came to a head in the timber and spotted owl crisis of the 1980s and '90s. Communities throughout the West now face a similar shock as we transition away from fuels like coal, around which regional economies developed. These kinds of transitions combine with demographic changes and evolving social priorities in ways that are often wrenching for rural Western communities.

It should therefore come as no surprise when some Westerners contend that changes in public land management are an attack on the Western way of life and the communities that developed in reliance on public lands.

POTENTIAL RESPONSES TO PUBLIC LAND MANAGEMENT CHALLENGES

At the outset, it is important to recognize the disconnect between the remedy proposed under the TPLA, and the problems spawning frustration over public land management. The TPLA, for example, will not eliminate the challenges posed by our ever changing world and inherent in striking a balance between the multitude of public land uses. Nor will the TPLA eliminate the shortfall in funding for public land management. Rather than spend millions of dollars and years litigating what are, at best, weak legal claims, states should consider investing in efforts such as those outlined below that they can undertake immediately. Again, these examples are merely illustrative, and expanded dialogue will undoubtedly help identify other examples.

Potential Response – Collaborative Planning and Problem Solving. A strong majority of Utahns agree that public lands are an important part of the culture and heritage of their community.⁴⁸ Indeed, few believe that they could be as happy living in a state that does not have a significant amount of public land.⁴⁹ These feelings hold true across all counties in the state, and for rural and urban residents alike.⁵⁰ In fact, residents across the Intermountain West feel similarly, with eighty percent of residents identifying the ability to live near, recreate on, and enjoy public lands as a factor in deciding to live and stay in the West.⁵¹ Healthy public lands, a voice in their management, and opportunities to maintain jobs and lifestyles tied to the land for residents and their children are such commonly held goals that we often lose sight of them in the face of disagreement about the means of achieving these ends. By focusing on what we have in common and our shared desires, Westerners have repeatedly come together to forge solutions to seemingly intractable public land management challenges across the West.

The Malpai Borderlands Group, founded in 1994 and led by ranchers who live and work primarily in Southeast Arizona and Southwest New Mexico, is built around shared community goals. The Group began out of informal discussions among ranching neighbors who recognized that the way of life and wild landscape that they loved was being threatened by encroaching subdivision. In cooperation with state, federal, and non-profit partners, the Group protected 78,000 acres of private land through conservation easements, preserving the land as productive ranch land and wildlife habitat. They established grass banks, allowing local ranchers who experience serious droughts to rest grazing lands and graze their cattle on neighboring lands where grass is more abundant. They have restored native grassland and reintroduced fire as a natural landscape process, conducting prescribed fire on over 69,000 acres.⁵²

Following in the Malpai Borderlands Group's footsteps, the Altar Valley Conservation Alliance was founded by Southern Arizona ranchers facing development pressure, degraded rangelands, and paralyzed management that threatened their valley's agricultural future. The Alliance formed collaborative partnerships between ranchers and resource managers to conserve healthy and productive working landscapes, to promote a thriving agricultural economy, and to sustain a resilient rural community. Together, the Alliance and its partners have developed collaborative wildland fire management plans, and protected over 200,000 acres of agricultural land that could have been lost to subdivisions. As they explain, "cowboys and conservationists have joined forces to create 21st century history that celebrates and practices the best of the old and new ways of taking care of land, wildlife, and people. The next generations' prospects here in the Altar Valley are much brighter."⁵³

Such efforts are not unique to the Southwest or cattle ranchers. In Idaho, the Clearwater Basin Collaborative is a group of ranchers, businesses, conservation organizations, government agencies, and tribal interests that are working together to craft a plan for the protection, use,

and management of national forest land within the Clearwater Basin. The Collaborative identified preliminary areas of agreement, guiding its administrative and legislative efforts as the group tackles economic development, ecological protection and restoration, recreational access, timber production, and tribal treaty rights.⁵⁴

In Montana, the Blackfoot Challenge is a grassroots group organized to coordinate management of the Blackfoot River, its tributaries, and adjacent lands. The group came together in response to unsustainable land-use practices, impending conversion of ranchland into subdivisions, and looming commercial development that posed a threat to rural lifestyles and wildlife habitat. The group consists of private landowners, federal and state agency representatives, local government officials, and corporate landowners. The group is coordinating efforts to enhance, conserve and protect the natural resources and rural lifestyle of the Blackfoot River Valley.⁵⁵

Collaboration is rarely easy, especially when long-simmering tensions must be overcome. Misunderstandings and setbacks will occur. Yet, these kinds of collaborative efforts show the win-win potential inherent in community-based collaborative efforts and what can be accomplished when divergent interests commit to working together.

Potential Response — Improved Coordination between Federal, State and Local Governments. Federal land management agencies are required by law to coordinate their management activities with state and local governments. If utilized to their full potential, these requirements could help states and local residents address land management challenges. But statutory coordination mandates, it should be noted, depend on federal agencies having the personnel needed to meaningfully engage their non-federal counterparts, so adequate federal agency staffing is necessary (as discussed below) if the full potential of coordination requirements is to be harnessed.

Under FLPMA, the BLM is obligated to “prepare and maintain on a continuing basis an inventory of all public lands and other resources.”⁵⁶ Based on this inventory, the BLM must develop and periodically revise plans for public land management.⁵⁷ Critically, the BLM must:

[T]o the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management of activities of or for such lands with the land use planning and management actions of . . . the States and local governments within which the lands are located. . . . Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent [s]he finds consistent with Federal law and the purposes of this Act.⁵⁸

Similarly, regulations implementing the National Forest Management Act require the USFS to “coordinate land management planning with the equivalent and related planning efforts of . . . state and local governments.”⁵⁹ In preparing or revising land and resource management plans, the USFS must consider state and local government objectives and the “compatibility and interrelated impacts of these plans and policies; (iii) Opportunities for the plan to address the impacts identified or contribute to joint objectives; and (iv) Opportunities to resolve or reduce conflicts, within the context of developing the plan’s desired conditions or objectives.”⁶⁰

FLPMA’s consistency requirement provides the eleven contiguous Western states with a seat at the table for decisions involving management of over 174 million acres of BLM land. Similarly, USFS regulations grant these states and their local governments a substantial role in planning for the over 140 million National Forest System acres. In short, the status granted to state and local governments guarantees them a much more substantial role in public land management decisions than is afforded to the general public, industry, or special interests.

President Obama further highlighted the importance of cooperating with states by

requiring federal agencies involved in the permitting of water resource projects, renewable energy generation projects, electricity transmission projects, and pipelines to:

[E]ncourage early collaboration among agencies, project sponsors, and affected stakeholders in order to incorporate and address their interests and minimize delays, . . . [and] rely upon early and active consultation with State, local, and tribal governments to avoid conflicts or duplication of effort, resolve concerns, and allow for concurrent rather than sequential reviews.⁶¹

These opportunities are not being realized fully, however, in part because many states and counties do not have fully developed plans or planning programs. State-level plans may be too broad to include the requisite detail, and less populous counties may lack the capacity to develop either high-quality plans or the information upon which quality plans are based.

To be effective, these plans must contain a vision and level of detail comparable to the plans federal agencies are developing and using. Plans should reflect anticipated social and demographic change, and contain a clear vision for the future reflecting these realities; a detailed description of future land use desires, with emphasis areas responding to these changes and the community vision; and specific steps to move towards that desired future condition. The Washington State Growth Management Act, for example, requires counties to develop detailed plans addressing land use, housing, capital facilities, utilities, rural areas, transportation, economics, and parks and recreation.⁶² The vision contained in county growth management plans is based on projected changes in population size and composition, and must be reflected in maps and text.⁶³ The combination of clear vision and specific objectives to meet those objectives can be immensely useful and persuasive when coordinating planning across multiple government agencies and levels of government.

While most Utah counties have undertaken some planning, research by a graduate student in the City and Municipal Planning Department at the University of Utah demonstrates that many county plans are outdated, formulaic, and lack critical information or detail.⁶⁴ Moreover, plans for six of Utah's twenty-nine counties are not available online, making it more difficult for federal agencies or the public to proactively consider and utilize the information contained in the plans.⁶⁵ These problems are more acute in smaller rural counties that may lack the staff and resources to complete or periodically revise comprehensive plans. State funding to build planning capacity and to prepare high-quality plans could give local governments a more effective voice in public land management. But funding must be accompanied by clear and detailed requirements regarding plan content and public planning processes, as well as efforts to develop or improve professional planning capacity — and local planning processes must be designed to integrate with federal planning efforts.

The National Environmental Policy Act (NEPA) also provides an opportunity for local governments to be involved in public land management decisions. NEPA requires a detailed statement on the environmental impacts of, and alternatives to, every “major federal action significantly affecting the quality of the human environment.”⁶⁶ State or local agencies may become a cooperating agency,⁶⁷ and assist with the NEPA analysis.⁶⁸ Cooperating agency status can give state and local governments significant leverage, as the NEPA lead agency must “[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.”⁶⁹ Again, this is a much stronger position than that held by the general public, industry, or interest groups.

As with FLPMA's coordination requirement, a state or local government's ability to influence the NEPA process depends heavily on the quality of the information they bring to the table. Opinions and suggestions are not enough. States and local governments must invest the time and effort to prepare rigorous fact-based plans, scientifically sound environmental

analyses, and thoughtful recommendations. Where state and local input is not developed fully, these plans stand little chance of influencing federal decisions. Indeed, poor quality state and local plans may do more harm than good if they demand the undeliverable, and citizens believe that their plans were ignored.

Potential Response — Develop Interest-Based State Policies. Meaningful collaboration and reform is built upon mutually respectful relationships. But as a BLM spokeswoman recently noted, this has not always been the case: “It is frustrating as we work to identify the best possible path forward for everyone when some of the entities we are trying to work with consistently feel the need to poke us in the eye and then complain we are not working with them.”⁷⁰ This antagonistic approach needs to change if the state and federal government are to collaborate on public land management reform. Replacing inflexible state statutory demands with interest-based policies would help Utah partner with the federal government and improve public land management.

Key rural interests with respect to federal management of public lands appear to include: (1) securing a stronger and more effective voice in how public lands and the resources they contain are managed; (2) improving the health of the public lands; and (3) increasing economic stability and opportunities for rural communities that have historically relied on our public lands. By focusing on these broader interests, the parties can begin to think more creatively about how to advance common interests, potentially opening the door to efforts that are not possible under a more positional approach exemplified by state statutes making very specific demands.

Residents across the Intermountain West strongly support a more collaborative approach, with a full eighty-five percent of respondents to a recent survey preferring that “elected officials and state leaders [] work together and seek to find common ground” on issues involving the public lands, water, and wildlife.⁷¹ Notably, despite Utah’s efforts to seize public lands, support for collaborative efforts is stronger in Utah than in any other state in the Intermountain West, with respondents favoring collaboration outnumbering those who favor a “no compromise” approach by an eleven to one margin.⁷²

Potential Response — Adequate Funding for Federal Land Managers. It is not helpful to bemoan resource conditions and permitting delays while depriving federal managers of the staff and resources needed to manage public lands or process permit applications. Charging market rates for commodities produced from public lands and dedicating that additional revenue to public land management is one way of addressing the funding shortfall.

Under federal law, the United States charges a 12.5 percent royalty on oil and natural gas produced from federal lands.⁷³ In contrast, within the Intermountain West, states charge between 16.67 percent and 25 percent production royalties.⁷⁴ Raising the federal oil and gas royalty rate to 16.67 percent would have produced over \$800 million in additional revenue from development on public lands in Colorado, Montana, New Mexico, Utah, and Wyoming alone during 2012.⁷⁵ Under federal law, roughly half that sum would have been distributed to the states where the development occurred,⁷⁶ while the remainder could have been used to fund the agencies managing our public lands — a win for states and resource managers alike.

Modernizing federal coal leasing regulations provides a similar opportunity. The BLM charges a 12.5 percent royalty on coal produced from surface mines, and an 8 percent royalty on coal produced from underground mines.⁷⁷ Federal coal royalty regulations, however, are riddled with loopholes that reduce revenue to the treasury. In fact, current regulatory subsidies, marketing loopholes, and royalty valuation policy deprived the federal government of about \$850 million between 2008 and 2012.⁷⁸ Applying current statutory rates to the gross market price of coal rather than to the mine-mouth price would go even further, generating an additional \$5.6 billion in federal revenue over the same period.⁷⁹ Roughly half of this revenue would have gone to the states where the development occurred, and the remainder could have funded

public land management.

Similarly, over the years, miners have located and staked claim to millions of acres of public lands. Although some of these claims were “patented” and transferred into private ownership, many claims went unpatented, and the land remains in federal ownership.⁸⁰ Mining can still occur on unpatented lands, and minerals developed from these unpatented lands are not currently subject to any federal mineral royalty. The federal government, however, remains free to impose a royalty on minerals mined from federal lands, or even to tax all mined minerals. The federal government currently taxes coal production at a rate of \$1.10 per ton for coal removed from underground mines, and at a rate of \$0.55 per ton for coal removed from surface mines, not to exceed 4.4 percent of the price at which the coal is sold by the producer.⁸¹ A tax on hard rock mineral development could be modeled after coal taxes and provide millions of dollars in revenue. Similarly, a decision to forego pending coal excise tax cuts would provide significant funding for public land management.⁸²

Though some will argue that any tax increase will slow economic growth, the prevalence of state taxes on natural resource commodity development belies the point. As of 2013, thirty-five states imposed a severance tax on natural resources removed from the land, and severance taxes provided states with \$16.5 billion in revenue.⁸³ All eleven contiguous Western states have severance taxes, with revenue to each state averaging \$231.8 million annually. Wyoming leads its peers, generating a high of \$868 million annually based in part on a 6 percent tax on natural gas or oil, a 3.75 percent tax on underground mined coal, and a 7 percent tax on surface mined coal.⁸⁴ Wyoming’s severance tax does not appear to have chilled energy development, as the state ranks eighth in the nation in oil production, fifth in natural gas production, and first in coal production.⁸⁵ Of at least equal importance, fifty-eight percent of Westerners support raising royalties on oil, gas, coal, and other minerals extracted from public lands, outpacing opponents of rate increases by more than a two to one margin.⁸⁶

Potential Response —Transition Assistance. During the 1980s, the Pacific Northwest was immersed in bitter controversy over logging of old-growth forests, declining old-growth forest dependent species, timber mill automation and falling timber prices, and the role of federal forests in regional and local economies. The northern spotted owl had been listed as “threatened” under the Endangered Species Act in 1990,⁸⁷ and lawsuits over federal timber harvests led to an injunction shutting down the federal timber sale program on nine national forests.⁸⁸ In convening a conference to address these issues, President Clinton directed that “we must never forget the human and the economic dimensions of these problems. Where sound management policies can preserve the health of forest lands, sales should go forward. Where this requirement cannot be met, we need to do our best to offer new economic opportunities for year-round, high-wage, high-skill jobs.”⁸⁹

The Northwest Economic Adjustment Initiative (NWEAI) followed, and provided funding for economic development and mitigation of impacts resulting from reduced timber harvests within the region. Specifically, the NWEAI provided assistance to support workers and their families, business and industry, communities and infrastructure, and ecosystem service projects.⁹⁰ From 1994 through 1999, NWEAI funding totaled approximately \$1.2 billion.⁹¹

The NWEAI provided immediate relief for distressed timber communities, fostering long-term and environmentally responsible economic development consistent with and respectful of rural community character, and improving cooperation between governments.⁹² However, “no program can make career transition simple or painless, and the diversity of people and their approaches to changes in their lives must be accommodated. Positive outcomes may take a long time and cannot be measured simply in terms of wages or job placement.”⁹³

While the NWEAI did not alleviate all the pain of transitioning away from a timber-dependent economy, it did signal governmental recognition of the human cost of changing societal priorities. Similar efforts are needed across the West to help resource-dependent

communities transition to more diverse, sustainable, and prosperous futures. Helping communities adapt to our changing world and societal priorities needs to begin, to the extent possible, *before* harsh social dislocations occur. With early targeted assistance, we can enable residents across the rural West to retain connections to the land and to stabilize local economies, thus realizing a future that celebrates multi-generational ties to the land. In the end, after all, that appears to be what many rural Westerners are seeking.

Potential Response — Land Exchanges. As Figures 1 and 2 show, Western landscapes are highly fragmented. Consolidating state trust land ownership would facilitate improved planning and management for revenue-generating uses of state trust lands, while removing state trust lands from sensitive public lands would reduce conflicts, thereby facilitating new protective designations and management prescriptions. BLM and USFS land exchange authority is contained in FLPMA, which authorizes agencies to trade developable federal lands for state trust lands that are better suited for conservation.⁹⁴ The two key requirements for a FLPMA land exchange involve determinations that the parcels to be exchanged are of equal value, and that the exchange is in the public interest. Congress can also bypass FLPMA, specifically authorizing a land exchange and streamlining the approval process.

The Utah Recreational Land Exchange Act is an example of a successful recent exchange. The Act authorized the BLM to convey 35,609 acres of developable federal land to Utah in return for 25,553 acres of sensitive state lands.⁹⁵ This collaboratively negotiated and congressionally authorized exchange removed the threat of development from sensitive lands along the Colorado River and near two National Parks while allowing SITLA to pursue revenue generation in more appropriate locations. Both sides “won” by being able to advance their interests while resolving a significant ongoing management conflict.

Although the fragmentation-reducing benefits of land exchanges are clear, high transaction costs foil many exchange efforts, and reform is needed to improve the process.⁹⁶ That said, a collaborative approach to the fragmentation problem that recognizes legitimate competing interests and seeks common ground has worked before and has a greater chance of success than transfer efforts.

CONCLUSION

Federal, state, and local officials will not always agree on resource management strategies or the appropriate balance between resource protection and extraction, but there are meaningful avenues for progress available. Collaboration and land exchanges provide a less polarizing path for improving public land management. Respectful dialogue, collaborative relationships, adequate agency funding, and locally supported land exchanges can address many of the problems responsible for frustration over public land management, especially if coupled with programs to help rural communities transition to a more sustainable future. These efforts can bring competing interests together, empowering stakeholders to forge mutually acceptable solutions based on common interests rather than hardened polarized positions. They have worked in the past and can work again.

The alternatives outlined here are not as dramatic politically as demanding the transfer of federal lands under threat of litigation, but they have worked to improve public land management and to increase opportunities for public land communities. We hope that this paper will serve as a springboard for more discussions, and as a path forward that reflects the rich and diverse values inherent in our public lands.

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¹ UTAH CODE ANN. § 63L-6-103(1) (2014).

² The Utah Legislature appropriated \$2 million for litigation planning. See John C. Ruple & Robert B. Keiter, *When Winning Means Losing: Why a State Takeover of Public Lands May Leave States Without the Mineral They Covet*, STEGNER CENTER WHITE PAPER 2015-02 ,n. 10 (2015) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701292.

³ National Conference of State Legislatures, *State Legislation Addressing Transfer of Federal Public Lands to States* (2014). See also, Kindra McQuillan, *State Bills to Study Federal-to-State Land Transfers: A Rundown of the Legislation in Each State and a Look into the Motives Behind Them*, HIGH COUNTRY NEWS (April 30, 2015).

⁴ Robert B. Keiter & John C. Ruple, *A Legal Analysis of the Transfer of Public Lands Movement*, STEGNER CENTER WHITE PAPER 2014-02 (2014) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516004.

⁵ Ruple & Keiter, *When Winning Means Losing*, *supra* note 2; and Robert B. Keiter & John C. Ruple, *The Transfer of Public Lands Movement: Taking the 'Public' Out of Public Lands*, STEGNER CENTER WHITE PAPER 2015-01 (2015) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555922.

⁶ Richard S. Krannich, Institute for Social Science Research, Utah State University, *Public Lands and Utah Communities: A Statewide Survey of Utah Residents Summary Report of Research Findings 113-42* (2008) (on file with authors).

⁷ BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, *PUBLIC LAND STATISTICS 2014 7* (2015).

⁸ GEORGE CAMERON COGGINS AND ROBERT L. GLICKMAN, *1 PUBLIC NATURAL RESOURCES LAW*, § 2:9 (2d ed. 2010, Feb 2016 update).

⁹ 43 U.S.C. § 751 (2012).

¹⁰ 28 Stat. 107, 109 (1894).

¹¹ Data obtained from Headwaters Economics, *Economic Profile System* (Dec. 16, 2015) <http://headwaterseconomics.org/tools/economic-profile-system>.

¹² The land area of Connecticut is 4,840 square-miles or 3,097,600 acres. U.S. CENSUS BUREAU, DEPARTMENT OF COMMERCE, *2012 STATISTICAL ABSTRACT OF THE UNITED STATES*, Table 358; *Land and Water Area of States and Other Entities: 2008* <http://www.census.gov/compendia/statab/>.

¹³ UTAH CODE ANN. § 53C-1-102(2)(b) (2013); see also JON A. SOUDER AND SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT, & SUSTAINABLE USE* chs. 1&2 (1996) (discussing mandate as applied across the West).

¹⁴ UTAH CODE ANN. § 53C-1-302(1)(b)(iii) (2013).

¹⁵ *National Parks Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 922 (Utah 1994).

¹⁶ 43 U.S.C. §§ 1701(a)(7) and 1702(c) (2012) (BLM); and 16 U.S.C. §§ 528-31 (Forest Service).

¹⁷ 43 U.S.C. § 1701(a)(8) (2012).

¹⁸ *Id.* at § 1782(c).

¹⁹ Karl Puckett, *A New Approach: Program Aims to Open Islands of Landlocked State Land*, GREAT FALLS TRIBUNE (March 4, 2014).

²⁰ Personal communication, Jessica Kirby, Utah School and Institutional Trust Lands Administration GIS Manager.

²¹ 16 U.S.C. § 460www(a) (2012) (Red Cliffs NCA); 16 U.S.C. § 460xxx(a) (Beaver Dam Wash NCA). Acreage calculations are from PUBLIC LAND STATISTICS 2014, *supra* note 7 at 205.

²² SITLA, Monument Designations May Impact Utah Education Funding, <http://trustlands.utah.gov/monument-designations-may-impact-utah-education-funding/>.

²³ PUBLIC LAND STATISTICS 2014, *supra* note 7 at 203.

²⁴ *Id.* at 205.

²⁵ U.S. FOREST SERVICE, DEPARTMENT OF AGRICULTURE, LAND AREAS OF THE NATIONAL FOREST SYSTEM (2014).

²⁶ *Id.*

²⁷ UTAH CODE ANN. § 63J-8-104(1)(b) (2014).

²⁸ *Id.* at § 63J-8-104(1)(d).

²⁹ *Id.* at § 63J-8-104(1)(e).

³⁰ *Id.* at §§ 63J-8-104(1)(l) and -401(8)(c).

³¹ *Id.* at § 63J-8-104(8)(a).

³² *Id.* at § 63J-8-105.5(3)(b) (Uintah Basin Energy Zone). The Green River Energy Zone contains a similar statement regarding energy development being the “highest management priority” for Carbon County, but notes that energy development within Emery County is only a “high priority” that must be “balanced” with other ecological, cultural, and recreational values. *Id.* at -105.7(3)(b) and (c). See also *id.* at § -105.2(3)(b) (San Juan County Energy Zone).

³³ *Id.* at §§ 63J-8-105.5(4)(a) (Uintah Basin Energy Zone), -105.5(4)(a) (Green River Energy Zone), and -105.2(4)(a) (San Juan County Energy Zone).

³⁴ *Id.* at §§ 63J-8-105.5(5)(b) (Uintah Basin Energy Zone), -105.5(5)(b) (Green River Energy Zone), and -105.2(5)(b) (San Juan County Energy Zone).

³⁵ *Id.* at § 63J-8-105.9(7)(b).

³⁶ *Id.* at § 63J-8-105.8(7)(b).

³⁷ See, e.g., *Oregon Natural Deserts Ass’n v. BLM*, 625 F.3d 1092 (9th Cir. 2010) (requiring the BLM to address wilderness characteristics and off-road vehicle use during its planning process).

³⁸ Brandon Loomis, *Utah May Take its Lands Battle to Congress, Not Courts*, THE SALT LAKE TRIBUNE (June 21, 2012) available at <http://www.sltrib.com/sltrib/news/54344344-78/lands-state-battle-federal.html.csp>.

³⁹ *Id.*

⁴⁰ Brian Maffly, *Panel Debates Who is Best Suited to Manage Utah's Public Lands*, THE SALT LAKE TRIBUNE (May 15, 2014) available at <http://www.sltrib.com/sltrib/politics/57942898-90/public-debate-utah-lands.html.csp>. See also, UTAH CODE ANN. §§ 63J-8-105.8(5)(d) (2014) (finding that "improper management of vegetation" by the federal government is responsible for a litany of ecological harms), and -105.9(5)(b) (same with respect to forest vegetation).

⁴¹ U.S. Forest Service, Department of Agriculture, *The Rising Cost of Fire Operations: Effects on the Forest Service's Non-Fire Work* 6 (Aug. 4, 2015) <http://www.fs.fed.us/sites/default/files/2015-Fire-Budget-Report.pdf>.

⁴² *Id.* at 7.

⁴³ *Id.* at 8-14.

⁴⁴ COLORADO COLLEGE, THE 2015 CONSERVATION IN THE WEST POLL: A SURVEY OF THE ATTITUDES OF VOTERS IN SEVEN WESTERN STATES 12 (2015) <https://www.coloradocollege.edu/dotAsset/f8b242ee-17a7-426d-8c5f-a970bde80f74.pdf>.

⁴⁵ *Id.* at 18.

⁴⁶ Based on population estimates from www.census.gov.

⁴⁷ See generally, CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992) (describing outdated laws, which he describes as the "Lords of Yesterday," and how they continue to influence the West).

⁴⁸ Krannich, *supra* note 6, at 76.

⁴⁹ *Id.*

⁵⁰ *Id.* at 78-79.

⁵¹ 2015 CONSERVATION IN THE WEST POLL, *supra* note 44 at 6.

⁵² See Malpai Borderlands Group, <http://www.malpaiborderlandsgroup.org/>.

⁵³ See Altar Valley Conservation Alliance, <http://www.altarvalleyconservation.org/>.

⁵⁴ See Clearwater Basin Collaborative, <http://www.clearwaterbasincollaborative.org/>.

⁵⁵ See Blackfoot Challenge, <http://blackfootchallenge.org>.

⁵⁶ 40 U.S.C. § 1711 (2012).

⁵⁷ *Id.* at. §§ 1712(a) (develop and maintain land use plans) and 1712(c)(4) (rely on public land inventories).

⁵⁸ 43 U.S.C. § 1712(c)(9) (2012).

⁵⁹ 36 C.F.R. § 219.4(b)(1) (2015).

⁶⁰ *Id.* at § 219.4(b)(2).

⁶¹ Exec. Order No. 13,604, 77 Fed. Reg. 18,887 (March 22, 2012).

⁶² WASH. REV. CODE § 36.70A.070 (2011).

⁶³ *Id.*

⁶⁴ Ashley Scarff, University of Utah, Department of City & Metropolitan Planning, An Analysis of

the State of County Comprehensive Planning in Utah: Do State Planning Mandates and Implementation Programs Provide for Effective Collaboration Processes with the BLM on Public Land Management Issues? (Dec. 2015) (on file with authors).

⁶⁵ *Id.*

⁶⁶ 42 U.S.C. § 4332(2)(c) (2012).

⁶⁷ 40 C.F.R. § 1508.5 (2015).

⁶⁸ *Id.* at § 1501.6.

⁶⁹ *Id.* at § 1501.6(2)(a)(2).

⁷⁰ Amy Joy O'Donoghue, *Battle Between Utah's Rural Counties and BLM Intensifies*, DESERET NEWS, June 28, 2014 <http://www.deseretnews.com/article/865605994/Battle-between-Utahs-rural-counties-and-BLM-intensifies.html?pg=all>.

⁷¹ COLORADO COLLEGE, THE 2016 CONSERVATION IN THE WEST POLL: A SURVEY OF THE ATTITUDES OF VOTERS IN SEVEN WESTERN STATES 8 (2015) <https://www.coloradocollege.edu/dotAsset/1ae5d935-6a3d-4139-a128-e62d2441ec1f.pdf>.

⁷² *Id.*

⁷³ 43 C.F.R. § 3103.3-1 (2014).

⁷⁴ CENTER FOR WESTERN PRIORITIES, A FAIR SHARE: THE CASE FOR UPDATING FEDERAL ROYALTIES 3 (2013) <http://westernpriorities.org/wp-content/uploads/2013/06/royalties-report.pdf>.

⁷⁵ *Id.* at 10, showing \$403 million in additional revenue to those five states. As this figure represents the states' share of revenue, total revenue was roughly twice as much.

⁷⁶ 30 U.S.C. § 191 (2012 & Supp. 2013).

⁷⁷ 43 C.F.R. § 3473.3-2 (2014).

⁷⁸ HEADWATERS ECONOMICS, AN ASSESSMENT OF U.S. FEDERAL COAL ROYALTIES CURRENT ROYALTY STRUCTURE, EFFECTIVE ROYALTY RATES, AND REFORM OPTIONS 25 (2015) <http://headwaterseconomics.org/wphw/wp-content/uploads/Report-Coal-Royalty-Valuation.pdf>.

⁷⁹ *Id.* at 21.

⁸⁰ See generally, Robert W. Swenson, *Legal Aspects of Mineral Resource Exploitation*, in PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 699-765 (1968).

⁸¹ 26 U.S.C. § (2012). Lignite is specifically exempted from the tax, 26 U.S.C. § 4121(c), as is coal sold for export. See *Ranger Fuel Corporation v. United States*, 33 F.Supp.2d 466 (E.D.Va.1998).

⁸² The coal excise tax will be reduced by more than half no later than December 31, 2018. 26 U.S.C. § 4121(e)(2) (2012).

⁸³ Sheila O'Sullivan et al., U.S. Census Bureau, *State Government Tax Collections Summary Report: 2013* (2014) <http://www2.census.gov/govs/statetax/2013stcreport.pdf>.

⁸⁴ *Id.* See also, Cassarah Brown, National Conference of State Legislators, *State Revenues and the Natural Gas Boom: An Assessment of State Oil and Gas Production Taxes* (2013) <http://www.ncsl.org/research/energy/state-revenues-and-the-natural-gas-boom.aspx#ms>, and Wyoming Taxpayers Association, *Severance Taxes*

http://www.wyotax.org/severance_taxes.aspx.

⁸⁵ Ranking obtained from U.S. Energy Information Administration, State Profiles and Energy Estimates <http://www.eia.gov/state/rankings/>.

⁸⁶ 2016 CONSERVATION IN THE WEST POLL, *supra* note 71 at 14.

⁸⁷ 55 Fed. Reg. 26114 (June 26, 1990).

⁸⁸ *Seattle Audubon Society v. Moseley*, 798 F. Supp 1484 (W.D. Wash. 1992) (enjoining Forest Service timber sales that would log suitable habitat for the northern spotted owl).

⁸⁹ PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 388 (1993, Book I).

⁹⁰ Terry L. Raettig and Harriet H. Christensen, *The Northwest Economic Adjustment Initiative: Background and Framework in*, NORTHWEST FOREST PLAN: OUTCOMES AND LESSONS LEARNED FROM THE NORTHWEST ECONOMIC ADJUSTMENT INITIATIVE 2 (Harriet Christensen et al., eds., 1997).

⁹¹ *Id.*

⁹² *Id.* at 4.

⁹³ Paul Sommers, *Research on the Northwest Economic Adjustment Initiative: Outcomes and Process in*, NORTHWEST FOREST PLAN: OUTCOMES AND LESSONS LEARNED FROM THE NORTHWEST ECONOMIC ADJUSTMENT INITIATIVE 69 (Harriet Christensen et al., eds., 1997).

⁹⁴ 43 U.S.C. §§ 1715(a) and 1716(a) (2012).

⁹⁵ 123 Stat. 1982 (2009).

⁹⁶ See JOHN RUPLE AND ROBERT KEITER, THE FUTURE OF FEDERAL-STATE LAND EXCHANGES (2014) (explaining the benefits of, and barriers to, land exchange effectuation) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457272.