"Insider's Game" or Valuable Land Management Tool? Current Issues in the Federal Land Exchange Program

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I. INTRODUCTION

Public lands compose nearly one-third of the area of the United States and range from the northernmost peninsula of Alaska to the coastal wetlands of Florida.[1] The public domain under ownership by the federal government, including areas of acquired national forest and wildlife refuges, totals nearly 725 million acres.[2] Although federally

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1. PUBLIC LAND LAW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 19 (1970).

2. *Id.*

owned lands are found in every state, the greatest concentration of these lands lies in the eleven western states, where the vastness of rangeland, national forest, and national parks is often larger than the total acreage of states east of the Mississippi.[3] The wealth of natural resources, wildlife, and aesthetic beauty contained in public lands means that there will inevitably be a number of different stakeholders with divergent interests in the ownership and preservation of these lands.

The policy of the federal government in its first 100 years of nationhood permitted the sale of large tracts of public lands to private individuals in order to encourage settlement of the West.[4] Disposition of these lands resulted in a patchwork of private land holdings interspersed with those lands managed and owned by various government agencies.[5] The noncontiguous nature of public lands in the West has posed substantial difficulties both for agency management and private land users.[6] Land exchanges between the federal government and private individuals or corporations are increasingly being used as a way to consolidate public land holdings in order to better implement natural resource management programs and land use planning.[7] Land exchanges occur frequently when the federal government enters into an agreement with a private landholder to trade parcels of public land in order to obtain private land that the government seeks to bring under federal management.[8] Sharp controversies between government agencies, developers, and environmentalists have arisen on account of the enormous value of federal lands and the difficulties inherent in the land exchange process.[9]

Land exchanges initiated by the federal government have increasingly been the target of public scrutiny and widespread criticism from environmentalists, citizen groups, and politicians alike.[10] A comprehensive report released this past July by the General Accounting

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3. *Id.* The eleven western states and the percentage of each state's land that is federally owned are as follows: Arizona (43%), California (45%), Colorado (36%), Idaho (62%), Montana (27%), Nevada (80%), New Mexico (34%), Oregon (52%), Utah (64%), Washington (28%), and Wyoming (50%). Alaska's federal ownership is 47%. BUREAU OF LAND MANAGEMENT, 184 PUBLIC LAND STATISTICS 1999, tbl. 1-3 (2000), *available at* http://www.blm.gov (last visited Feb. 4, 2001).

4. *See* Ryan M. Beaudoin, *Federal Ownership and Management of America's Public Lands Through Land Exchanges*, 4 GREAT PLAINS NAT. RESOURCES J. 229, 229-30 (2000).

5. *Id.* at 230.

6. *Id.*

7. *See id.* at 231.

8. *Id.*

9. *Id.* at 230-31.

10. *See* Craig Welch, *Land Swap Critics Resist Ban, Auditors Urge Abandoning Such Exchanges*, SEATTLE TIMES, July 14, 2000, at B1.

Office (GAO), Congress's nonpartisan research arm, disclosed that the land exchange program consistently undervalues public lands and fails to serve the public interest.[11] The General Accounting Office's Report (GAO Report) was prompted by numerous complaints and accusations on the part of concerned citizens and political officials arguing that the land exchange process is fraught with faulty appraisals and ad-hoc decisionmaking by the Bureau of Land Management and the Forest Service, the two federal agencies authorized to carry out exchanges.[12] According to critics, public lands are being exchanged for less valuable private property and consequently, the trades are costing taxpayers millions of dollars on an annual basis.[13] Many urge that the land exchange program is inherently difficult to implement in a way that ensures proper valuation of the lands because agencies have historically had broad discretion to engage in land trades without being accountable to the public.[14] While the GAO Report recommended that Congress impose a moratorium on the current land exchange program, other critics of land exchanges favor agency reforms over a complete ban.[15] If the federal land exchange program is eliminated, they argue, trades will simply continue through congressional deal-making without being susceptible to public review and court challenges.[16] Furthermore, commentators argue that congressional land trades are the most problematic because they typically circumvent the current environmental review process and serve only the interests of powerful constituents, not the public at large.[17]

This Comment addresses the current issues surrounding the federal land exchange process. Part I introduces the contemporary problems associated with the program, including the ways in which agencies have failed to comply with statutory regulations governing the land exchange process as well as the losses suffered by taxpayers as a result of a

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *General Accounting Office Slams Land Trades, Research, Advocacy & Outreach for Land Exchange Policy Reform*, LAND EXCHANGE UPDATE, Winter 2000, at 1.

> The Western Land Exchange Project concurred with the GAO's dire findings, and with [Representative George] Miller's call for a moratorium. We disagreed, however, with the GAO recommendation that the agencies' land exchange be permanently eliminated, fearing this would result in limiting that authority to the U.S. Congress, whose track record on land trades is far worse even than that of the agencies.

Id.

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

program that trades lands well below their actual worth. Part II places the history of the land exchange program in the context of changing federal land policy during this century and the last. The statutory provisions authorizing federal land exchanges and the legal basis for appraising federal lands will also be presented. Part III looks at the current controversy over federal land exchanges through a discussion of a number of controversial trades that have occurred in recent years. In particular, the United States Court of Appeals for the Ninth Circuit's 1999 decision to enjoin the Weyerhaeuser-Forest Service Huckleberry Mountain Land Exchange demonstrates how federal agencies have failed to conduct the requisite analysis of the environmental impacts of an exchange.[18] Furthermore, the recent decision by the Ninth Circuit in *Desert Citizens Against Pollution v. Bisson* is a landmark case in land exchange jurisprudence.[19] Such controversial exchanges highlight the need for an environmental review process and for public access to the details of trades in order to ensure proper valuation of public lands. The role of the court in assessing agency discretion is especially necessary to make certain that agencies are publicly accountable for their decisions.[20] Given the conservative policies of the new federal administration that favor both privatization and heavy economic development of public lands, the judicial process is essential in ensuring compliance with statutory environmental mandates and preventing arbitrary decision-making by agency officials.[21] Finally, this Comment will consider the various solutions and arguments offered by different stakeholders in the land exchange debate, including arguments for and against a moratorium on land exchanges and the need for increased oversight and agency reform measures.

II. BACKGROUND: THE HISTORY OF THE FEDERAL LAND EXCHANGE PROGRAM

The history of western expansion in the United States has been intimately tied to the federal government's land use policies since the

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18. *See* Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 815 (9th Cir. 1999).

19. *See* Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir. 2000).

20. The Western Land Exchange Project calls the Ninth Circuit's decision "a true watershed case in land exchange litigation, empowering citizens to challenge federal land trades on one of the central issues at play in these projects—the scandalous undervaluing of federal lands coveted by private interests." *See* Desert Citizens v. Bisson*: Ninth Circuit Sides with Activists, Research, Advocacy & Outreach for Land Exchange Policy Reform*, LAND EXCHANGE UPDATE, Winter 2000, at 4 [hereinafter LAND EXCHANGE UPDATE].

21. *See* Susan Drumheller, *Clinton Proposal to Buy, Sell Land Draws Suspicion, Plan Designed to Address Forest Land Exchange Abuse*, SPOKESMAN REV., Feb. 16, 2000, at A1.

early years of nationhood. The United States initially acquired enormous land holdings when the original states surrendered their western lands to the federal government.[22] The Northwest Ordinances of 1785 and 1787 transferred lands in the region into federal ownership and mandated that new states be established with recently acquired lands.[23] Similarly, the Louisiana Purchase and the acquisition of Florida, Alaska, and the Southwest increased the acreage of federally owned lands exponentially.[24]

Immediately following and during the period of acquisition of federal lands, the government began parceling out land into private ownership.[25] Much of the land in the West was suitable for farming practices and grazing, making it possible for small groups of settlers to establish communities and earn a livelihood from the land.[26] In order to encourage citizens to move into the frontier states of the American West and utilize the vast natural resources of these lands, the federal government engaged in intensive sale of public lands to individuals.[27] The process of land disposition involved a number of different mechanisms for putting land into the hands of individuals, including cash sales, gifts to war veterans for their services, grants to states, railroads, and canal companies.[28] "There was a strong ideological belief among the citizenry and in the Congress that the United States should expand its settlement to fill the whole mid-continent of North America and that the transfer of land from federal to private (or in some cases state) ownership was an essential part of this process."[29]

The present checkerboard of private and public land holdings in the West is a direct result of the government's policy in the last century of privatizing lands to encourage decentralization.[30] Of the lands acquired by the government in the first one hundred years of nationhood, not all were suitable for economic development and human settlement.[31] Much of the land in the West was too mountainous, dry, or inaccessible for farming.[32] Consequently, the government also reserved from sale large tracts of land that would subsequently be designated as national forests,

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22. PUBLIC LAND LAW COMMISSION, *supra* note 1, at 19.
23. *Id.*
24. *See* Marion Clawson, *The Federal Land and Policy Management Act of 1976 in a Broad Historical Perspective*, 21 ARIZ. L. REV. 585, 588 (1979).
25. *Id.*
26. *See* PUBLIC LAND LAW COMMISSION, *supra* note 1, at 19.
27. Beaudoin, *supra* note 4, at 232.
28. Clawson, *supra* note 24, at 588.
29. *Id.* at 589.
30. *See* Beaudoin, *supra* note 4, at 230.
31. *See* PUBLIC LAND LAW COMMISSION, *supra* note 1, at 19.
32. *See id.*

parks, and public rangelands.[33] Millions of acres have been set aside since the first acts of land reservation by the government, beginning with the establishment of Yellowstone National Park in 1872 and continuing through the Forest Reserve Act in 1981.[34] Furthermore, the Taylor Grazing Act of 1934 had an effect on land ownership by eliminating the widespread practice of selling land to individuals and establishing public grazing districts.[35] Problems between federal land management agencies and private landholders were thus inevitable given the patchwork pattern of land holdings in the West after the reservation of land for public uses.[36]

The Pacific Northwest, in particular, has been the subject of numerous conflicts over the management of public lands that are set amidst huge parcels of forest owned by timber companies.[37] In the 1860s, in order to build a railroad from the Great Lakes to Puget Sound on the Pacific, Congress granted the Northern Pacific Railway every other square mile of land extending anywhere from twenty to forty miles from the railroad right of way so that the company could sell the land to settlers in order to raise capital.[38] However, typically, the companies never did sell these lands and they remained tied up in corporate ownership.[39] The lands at issue in land exchanges undertaken by the federal government in the 1990s are largely owned by Weyerhaeuser, Plum Creek, Boise Cascade, and other logging companies.[40]

The Bureau of Land Management (BLM) and the Forest Service have used land exchanges in the Pacific Northwest and throughout the West as a way to consolidate holdings in order to implement resource management programs.[41] Historically, both agencies tended to buy land through cash exchanges, but beginning in the 1980s when funds available for outright purchase began to diminish, the agencies increasingly turned to exchanges as a way to acquire lands.[42] According to the General Accounting Office, "Since 1981, the agencies have used

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33. *See id.*
34. Clawson, *supra* note 24, at 589.
35. *See* Beaudoin, *supra* note 4, at 230.
36. *See id.* at 229-31.
37. *See* Janine Blaeloch & George Draffan, *A Way to End Land Exchange Inequities*, SEATTLE TIMES GUEST EDITORIAL, Dec. 21, 1998.
38. *Id.*
39. *Id.*
40. *Id.*
41. *See* GENERAL ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, COMMITTEE ON RESOURCES, HOUSE OF REPRESENTATIVES, BLM AND THE FOREST SERVICE: LAND EXCHANGES NEED TO REFLECT APPROPRIATE VALUE AND SERVE THE PUBLIC INTEREST, 7 (June 2000) [hereinafter GAO REPORT].
42. *Id.*

exchanges to dispose of fragmented parcels of land and to consolidate land ownership patterns to promote more efficient management of land and resources."[43] In carrying out these land exchanges, however, the agencies have failed to meet the essential statutory requirements authorizing exchanges.[44]

A. Statutory Requirements for Federal Land Exchanges

Both the BLM and the Forest Service are authorized under federal law to engage in land exchanges with private landholders.[45] In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA) in order to define the broad policy objectives of the government's land management programs.[46] Due to the increased size and diversity of public land holdings at that time, a comprehensive management scheme was necessary to effectuate the policies of the government regarding the use and conservation of natural resources, rangelands, and forests.[47] FLPMA requires that the agencies implement land use planning in a way that serves the national interest and provides for both wildlife habitat and recreational use by humans.[48] Additionally, both agencies are authorized to make trades of federal land if it is determined that the public interest will be best served by disposition of a certain parcel.[49] Land exchanges fall within the agencies' authority to dispose of lands so long as the exchange conforms to the broader framework of the land use policies of the agencies.[50]

The Federal Land Exchange Facilitation Act of 1988 (FLEFA) amended FLPMA to better

> facilitate and expedite land exchanges by providing more uniform rules pertaining to land appraisals and by establishing procedures for resolving appraisal disputes. In proceeding with a land exchange, the agencies must determine that the estimated values of the federal and non-federal lands are

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43. *Id.* at 7.
44. *Id.* at 16.
45. PUBLIC LAND LAW COMMISSION, *supra* note 1, at 20-21.

> The Bureau of Land Management is responsible for administration of more than 465 million acres of public domain lands that have not been set aside for particular uses; together with other lands, it administers over 60 percent of all Federal lands. . . . About one-fourth of the Federal lands are administered by the Forest Service. Most of this is 160 million acres of public domain under its control in the West.

Id.

46. 43 U.S.C. §§ 1701-1785 (1994); *see also* Beaudoin, *supra* note 4, at 234.
47. Beaudoin, *supra* note 4, at 234.
48. 43 U.S.C. § 1701(a)(8) (1994).
49. *Id.* § 1701(a)(1).
50. 43 C.F.R. § 2200.0-6(b) (1999).

> equal or approximately equal, that the public interest is well-served, and that other [specific] requirements are met.[51]

Though both the BLM and the Forest Service are authorized to engage in land exchanges, each agency's regulations governing exchanges differ somewhat due to their distinct policy objectives.[52]

B. BLM Exchanges

The BLM carries out all land exchanges involving public domain lands and federally owned mineral estates.[53] As an agency of the Department of Interior, the BLM must undertake a series of steps to complete a land exchange with a private party.[54] Initially, the BLM must identify those lands that will be exchanged to determine that all the lands lie within the same state, since interstate land exchanges are permitted only with congressional approval.[55] The BLM will assess the feasibility of the exchange once the nonfederal party to the exchange has prepared a formal proposal.[56] If it is determined that the proposal is consistent with the BLM's existing management plan, both parties to the exchange execute a nonbinding agreement to initiate an exchange.[57] A public notice and comment period in the weeks following the exchange agreement is required to allow for suggestions and complaints from affected parties.[58] The BLM then undertakes an appraisal of the lands to be exchanged, as mandated by FLPMA.[59] Section 206(b) of FLPMA states:

> The values of the lands exchanged by the Secretary under this Act . . . either shall be equal, or if they are not equal, the value shall be equalized by the payment of money to the grantor or to the Secretary . . . so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership. The Secretary . . . shall try to reduce the amount of the payment of money to as small an amount as possible.[60]

In the instance that the federal land has a higher estimated value than the nonfederal land, the private party will make a payment to the agency in

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51. GAO REPORT, *supra* note 41, at 7.
52. Beaudoin, *supra* note 4, at 235.
53. *Id.* at 236.
54. *Id.* at 236-37.
55. *Id.* at 236.
56. 43 C.F.R. § 2201.1(b) (1999).
57. *Id.* § 2201.1(c).
58. Beaudoin, *supra* note 4, at 237.
59. *Id.* at 237-38.
60. 43 U.S.C. § 1716(b) (1994).

order to equalize the exchange.[61] This payment is then deposited into the Federal Treasury.[62] In the alternative, if the land held by the private party is estimated to be of higher value, the agency may use appropriated funds to equalize the exchange.[63] Provided all parties agree, the cash equalization payment may be waived in either instance so long as the total payment is no more than three percent of the federal land's value or $15,000, whichever sum is less.[64]

The BLM's appraisal of the land to be exchanged requires a determination of the market value of the lands based on the "highest and best use" of the property.[65] Market value is based on what the property would be worth if sold by a nonfederal party in a common market.[66] FLPMA also mandates that appraisal standards used by the agencies in the exchange "reflect nationally recognized appraisal standards, including to the extent appropriate, the Uniform Appraisal Standards (UAS) for Federal Land Acquisitions."[67]

In addition to the statutory provisions requiring that the estimated value of lands must be approximately equal, the BLM, as well as the Forest Service, may not approve a land exchange unless the trade adequately serves the public interest.[68] The agency must give consideration to "better Federal land management and the needs of the State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals and fish and wildlife."[69] In making this determination regarding the various local interests at stake, the agency must show that the benefits acquired by the public as a result of the exchange will be equal to or greater than if the agency had not traded the federal lands.[70] "The decision-maker must balance whether the resource values and public objectives are better served through ownership and management of the nonfederal lands

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61. Beaudoin, *supra* note 4, at 238.
62. GAO REPORT, *supra* note 41, at 8.
63. *Id.*
64. *Id.*
65. 43 C.F.R. § 2201.3-2(a)(1)-(2) (1994).
66. *Id.*
67. 43 U.S.C. § 1716(f)(2) (1994). According to the UAS, market value is

> the amount . . . for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy. In ascertaining that figure, consideration should be given to all matters that might be brought forward and reasonably given substantial weight in bargaining by persons of ordinary prudence.

INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 4 (1992).

68. *See* GAO REPORT, *supra* note 41, at 9.
69. 43 U.S.C. § 1716(a) (1994).
70. *Id.*

versus the resource value and public objectives that are served by maintaining control of the federal lands BLM has identified for possible exchange."[71] The agency official must explain how the public interest will in fact be served in the final written approval of the exchange.[72]

The BLM also has limited authority to engage in outright selling of federal land parcels if the agency determines that a particular land use objective can only be accomplished through a sale as opposed to a trade.[73] Examples of circumstances in which FLPMA permits the BLM to make land sales include: (1) if the land is not suitable for management by a federal agency, (2) if ownership no longer serves the land use objectives of the agency, or (3) if transfer to nonfederal ownership will accomplish important goals related to the public interest that cannot be achieved through federal ownership.[74] The requirements for sale of federal lands are more stringent than agency trades and demand that the land in question be offered through a competitive bidding process.[75] Only if the BLM determines that specific equity or policy considerations make other methods of sale necessary, may the agency circumvent the bidding process (by giving preference to current users or adjoining landowners).[76]

C. Forest Service Land Exchanges

A major difference between the statutory provisions authorizing land exchanges for the Forest Service, in contrast with the BLM, is that the Forest Service may not engage in any land sales.[77] The Forest Service must undertake the same process as the BLM in executing a land exchange, including the Agreement to Initiate (ATI), a public notice and comment period, a fair market value appraisal of the federal lands in question, and consideration of whether the public will benefit from the exchange.[78] The Forest Service is governed by both FLPMA and the National Forest Management Act (NFMA) and must carry out land exchanges in conformity with the multiple-use, sustained yield policy objectives contained in these Acts.[79]

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71. Beaudoin, *supra* note 4, at 238.
72. 43 C.F.R. § 2201.7-1(a) (1999).
73. 43 U.S.C. § 1713(a) (1994).
74. *Id.*
75. GAO REPORT, *supra* note 41, at 10.
76. *Id.*
77. *Id.*
78. *See* Beaudoin, *supra* note 4, at 240-41.
79. *See id.* at 240. The Multiple-Use, Sustained-Yield Act of 1960 initially gave the Forest Service authority to implement management plans in conjunction with a diverse range of uses. *Id.*; 16 U.S.C. §§ 528-31 (1994). The statutory regulations governing land exchanges by

D. Other Statutory Requirements for Land Exchanges

In addition to the applicable provisions of FLPMA governing appraisal values and the balance of public interests, the Act requires compliance with other specific regulations.[80] The lands in question must be within the same state, titles to the land must be exchanged immediately, land exchanged must be within the boundaries of the land systems established by Congress, such as a national park or monument, and must be immediately reserved for exclusive use in that system.[81] Both agencies may also utilize third parties to facilitate the exchange.[82] Nonfederal parties may put valuable properties on the market.[83] Third-party facilitators may be able to purchase those properties and then hold them until the agency is prepared to complete the exchange.[84] These facilitators can identify multiple parcels of federal or nonfederal lands and consolidate these lands into an assembled package in order to complete multiple exchanges over a certain period of time.[85]

Lastly, the land exchange process must also comply with regulations promulgated under the National Environmental Policy Act (NEPA) to ensure that the agencies have conducted an adequate assessment of the environmental impacts of an exchange.[86] Whether a land exchange is determined to be a "major federal action" requiring an Environmental Impact Statement (EIS), or whether the initial Environmental Assessment (EA) indicates that the exchange will not have a "significant effect on the human environment," for the exchange to undergo the formal NEPA process means that the agencies are more accountable to the public.[87]

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the Forest Service are the Forest and Rangeland Renewable Resources Planning Act, known as National Forest Management Act, 16 U.S.C. §§ 1600-1687 (1994) and FLPMA, 43 U.S.C. §§ 1701-1785 (1994).

80. GAO REPORT, *supra* note 41, at 10.

81. *Id.*

82. *Id.* at 10.

83. *Id.*

84. *Id.*

85. *Id.*

86. 42 U.S.C. §§ 4321-4370(d) (1994). Under NEPA, the BLM is required to conduct an environmental analysis upon signing the agreement to initiate the exchange, pursuant to 43 C.F.R. § 2200.0-6(h) (1999). The Forest Service is likewise mandated to conduct an environmental analysis pursuant to 36 C.F.R. § 254.3(g) (1999).

87. The EA is conducted by the federal agency to determine whether a more detailed EIS will have to be prepared. 40 C.F.R. § 1508.9 (1999). In the alternative, if there is a "finding of no significant impact" (FONSI), the EIS process is circumvented. *Id.* § 1508.9(a)(1)-(3) (1999). An EIS is required for any "major federal action" which "significantly affects the quality of the human environment." 42 U.S.C. § 4332(C) (1994). A "major federal action" is one in which the federal government is responsible in large part for the financing, oversight, and approval of a project. 40 C.F.R. § 1508.18. In order to determine whether the action is significant, the effect

> NEPA benefits the process by forcing the parties involved in a federal land exchange to investigate the consequences the exchange will have on the public lands. The general effect of NEPA on the land exchange process has been to alert the parties to potential problems associated with a specific exchange, as well as provide a mechanism for allocation of environmental responsibility.[88]

Under NEPA, the identification of alternatives to the land exchange is particularly important in instances where there are conflicts over the use of lands to be traded. Consideration of alternatives means that the agency is forced to "take a hard look" at both the adverse environmental effects of the exchange as well as the interests being served.[89]

III. CURRENT CONTROVERSY IN THE FEDERAL LAND EXCHANGE DEBATE

A. General Accounting Office Findings

Although environmentalists and citizen groups have long attempted to raise public awareness of the flaws inherent in the land exchange process, it was the General Accounting Office's examination of the land exchange process, released to the public in July 2000, that prompted national concern.[90] Between April 1999 and April 2000, the GAO assessed a total of fifty-one land exchanges, twenty-five by the Forest Service and twenty-five by the BLM, predominantly in Western states.[91] The report disclosed that fifteen of the exchanges reflected the most serious problems with the land exchange process.[92] In brief, the GAO found two major flaws with the system: (1) Due to the use of inconsistent appraisal techniques, agencies have typically given fair market value to the nonfederal land they acquire while simultaneously devaluing federal lands; and (2) the agencies have engaged in land exchanges that do not serve the public interest.[93] Furthermore, the GAO report also highlighted a controversial issue regarding the BLM's sale of

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on the environment is analyzed according to both the context of the action and it's intensity. *Id.* § 1508.27(a).

88. Beaudoin, *supra* note 4, at 249.

89. *See* Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 814 (9th Cir. 1999). "We conclude that in this case, the Forest Service failed to take the necessary hard look at the environmental impacts of the exchange and similarly failed to consider adequate alternatives to the proposed exchange." *Id.*

90. *Let's Make a Land Deal*, WASH. POST EDITORIAL, July 15, 2000, at A20 ("[A]ccording to a General Accounting Office report released this week, the land-exchange program has shortchanged taxpayers by millions of dollars by undervaluing federal land or overvaluing private land in some of its deals.").

91. *See* LAND EXCHANGE UPDATE, *supra* note 20, at 1.

92. *Id.*

93. *See* GAO REPORT, *supra* note 41, at 4.

public lands and subsequent deposit of the funds into escrow accounts to be used for acquiring other parcels of nonfederal land, often through the use of third-party facilitators.[94] Although the BLM contests that it does have the authority to retain the proceeds from these sales, the GAO claims that the practice is illegal and all profits must go directly into the Federal Treasury.[95]

The GAO report described in detail a number of specific land exchanges where both faulty appraisals and questionable public benefits were at issue.[96] Many of these exchanges had previously been contested in the general press by environmental watchdog groups fearing development on or near areas of scenic and cultural value.[97] The GAO detailed one exchange in Nevada by the BLM where the nonfederal party acquired seventy acres of federal land at a value of $763,000 but was able to resell the parcel that same day for $4.6 million.[98] The same company also acquired forty more acres from the BLM for a price of $504,000 and resold the land for $1 million on the same day.[99] As the GAO noted, "Such large and quick profits raise questions about the adequacy of the exchange valuation."[100]

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94. *Id.*

95. *Id.* at 23.

96. *See id.* at 28-33.

97. *See, e.g.*, *Scandal Ridden Snowbasin Exchange Is Completed*, Western Land Exchange Project, http://www.westlx.org/news.htm (last updated Apr. 28, 2001) (describing how Save Our Canyons, an environmental group opposed to the development of the Wasatch Front in Utah, was unable to successfully challenge the Forest Service's Snowbasin Land Exchange. The exchange will permit a Utah developer to expand his holdings on ski resort property by acquiring adjacent public lands); Deborah Nelson, Jim Simon, Eric Nalder & Danny Westneat, *Trading Away the West: How the Public Is Losing Trees, Land, and Money. Weyerhaeuser Gets Forest Land, but What Do the Taxpayers Get?*, SEATTLE TIMES, Sept. 27, 1998, at A1 [hereinafter Nelson et al., *Trading Away the West: Weyerhaeuser*]. The *Times* found

> example after example in which the public came up short either during the process or in the end result. . . . In Arizona, a Bureau of Reclamation appraiser documented that the public was about to be cheated out of at least $8 million in a trade with a developer. The appraiser was fired and the deal sailed through.

Deborah Nelson, Jim Simon, Eric Nalder & Danny Westneat, *Trading Away the West: Mining Company Has Close Ties with Government in Proposed Land Exchange, Part I: The Corporations*, SEATTLE TIMES, Sept. 27, 1998 [hereinafter Nelson et al., *Trading Away the West: Mining Company*]. The *Times* disclosed that Phelps Dodge Corporation paid the salaries of the BLM officials responsible for giving the mining company 20,600 acres of land to operate open-pit copper mines on land sacred to the San Carlos Apache Indian Tribes. In addition to the environmental concerns over the waste produced by the mines, area residents and environmentalists questioned the fact that the government received only 4600 acres of recreational land in exchange. *Id.*

98. GAO REPORT, *supra* note 41, at 19.

99. *Id.*

100. *Id.*

The Cache Creek Management Area Land Exchange in California, ongoing for the last ten years, was initiated to acquire nonfederal lands to provide a protected habitat for the bald eagle.[101] However, the BLM never specifically described the parcels of land to be exchanged, as required under FLPMA, nor did it identify the public benefits gained in the acquisition of the specific nonfederal lands.[102] Nonetheless, it completed over forty transactions in which it exchanged more than 20,300 acres of federal land while acquiring only 4800 acres.[103] Because the lands were not specifically identified, it was not clear that the goals of acquiring lands for an eagle habitat were achieved through the exchange or if the benefits of the nonfederal lands matched or exceeded those of the lands conveyed by the BLM.[104]

B. The Huckleberry Land Exchange

The Huckleberry Land Exchange was also cited in the GAO Report for failing to adequately consider the public interest.[105] The checkerboard pattern of land ownership in the Pacific Northwest has meant that federal agencies cannot effectively manage the federal lands and resources in this region.[106] The nineteenth-century land grants given to North Pacific Railroad to encourage western development were eventually sold to timber companies resulting in a system of "messy, intermingled ownership."[107] Forest Service officials for the Mount Baker-Snoqualmie National Forest completed their exchange with Weyerhaeuser in March 1998 but were quickly confronted with opposition from environmentalists who were disturbed by the inequities of the exchange.[108] At first glance, the land exchange appeared to transfer enormous tracts of private forestland into federal ownership in order to augment resource management schemes in the area.[109] The Forest Service swapped 4300 acres of land on Huckleberry Mountain for 30,000 acres of Weyerhaeuser forest.[110] Although the lands exchanged were estimated to be approximately equal, critics argued that the Forest Service appraisers failed to account for the poor quality of the lands, a factor that could have reduced the value of the land by as much as ten

101. *See id.* at 20.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *See* Nelson et al., *Trading Away the West: Weyerhaeuser*, *supra* note 97.
107. *Id.*
108. *Id.*
109. *See id.*
110. *Id.*

million dollars.[111] In fact, of the 30,000 acres acquired by the Forest Service, 18,000 are in the lowest category of growth recognized by the timber industry.[112] "Some is high-elevation clear-cut planted with seedlings that struggle to grow inches a year. An additional 3000 acres are too hostile to grow trees at all."[113] The Forest Service entered into the exchange with Weyerhaeuser, in part, to acquire more parcels of old growth forest necessary for protecting endangered wildlife.[114] Yet the old growth is mostly in small patches, interspersed among logging roads, and clear-cut slopes.[115]

In addition to the poor quality of the lands acquired by the Forest Service in the Huckleberry Exchange, the appraisal resulted in a considerable discount to Weyerhaeuser as well as an undervaluation of the land conveyed by the Forest Service.[116] Independent appraisers who were consulted to review the exchange revealed that Weyerhaeuser had been given what amounted to a multimillion dollar break, at the expense of taxpayers.[117] These appraisers were concerned by the low values given to the Forest Service's timber and the corresponding high values given to the arguably poor quality lands offered by the timber company.[118] Upon review, the estimates were not grounded on any uniform appraisal basis, "even the most basic statistics—how many trees were on the Forest Service land—appeared to be based on inadequate field checking."[119] However, because the deeds had already been transferred when independent appraisers discovered the inequities of the exchange, environmental groups were hard-pressed to challenge the initial appraisals.[120] Furthermore, the Forest Service did not disclose to the public the details of the appraisal until the trade was completed.[121]

The Ninth Circuit rejected the Huckleberry Land Exchange on the grounds that the Forest Service failed to comply with the statutory provisions governing federal land exchanges.[122] The court criticized the Forest Service's "lopsided" analysis of the exchange because the EIS only contained statements highlighting the benefits of the exchange and

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *See* Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 815 (9th Cir. 1999).

did not address any of the potential problems associated with timber harvesting on the lands transferred to Weyerhaeuser, or on the adjacent lands.[123]

> The Huckleberry EIS should have analyzed the cumulative effects of logging incident to this exchange upon that damaged watershed area in conjunction with the other degradation mentioned in that document. . . . The EIS performed no such analysis. It fails to evaluate the near term impacts of Weyerhaeuser's logging of old growth timber in any meaningful fashion. . . . Moreover, the record reflects that the Forest Service was all but certain that the National Forest Lands in the upper Green River Basin would be included in the Plum Creek Exchange. . . . Given the virtual certainty of the transaction and its scope, the Forest Service was required under NEPA to evaluate the cumulative impacts of the Plum Creek transaction.[124]

The court was dubious about whose interests were actually served by the exchange, faulting the Forest Service's failure to consider alternatives that conformed to its policy objectives and basic land use planning goals.[125] The Forest Service could have placed deed restrictions on the land traded to Weyerhaeuser so that the lands would be managed under federal law standards rather than pursuant to the more flexible standards of state law.[126] FLPMA dictates that the agency "shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate."[127]

C. The Internal Dynamics of Agency Land Trades

Why would the Forest Service and the BLM intentionally undervalue public lands at the expense of taxpayers? Arguably, this results from the mutually dependent relationship between federal agencies and large corporations intent on acquiring valuable public lands for development. Due to the costly nature of the land exchange process, which may take years to complete, federal agencies must often rely on

123. *Id.* at 810.

124. *Id.* at 811-12. In the year before the Huckleberry EIS was made public, negotiations between the Forest Service and Plum Creek Timber Company were underway for an additional exchange of National Forest Lands in the Green River basin. Contrary to the district court's finding that the Plum Creek Exchange was too speculative for environmental analysis, the Ninth Circuit held that the exchange was "reasonably foreseeable" and should have been included in the EIS. *Id.* at 812.

125. *See id.* at 813.

126. *Id.*

127. *Id.* at 814 (citing 36 C.F.R. § 254.3(h) (1999)).

corporations to cover the administrative costs of the exchange.[128] Expenses incurred by the agency throughout the initial land surveillance and in the negotiating and appraisal stages require a substantial use of staff and financial resources.[129] Consequently, the agencies are often persuaded to accept the support of corporations, despite the fact that the impartiality of the federal officials is seriously compromised.[130] The Phelps Dodge Land Exchange on the Arizona-New Mexico border is one clear example of how the "land trade business is an insider's game, with timber and mining companies often controlling the game board."[131] In this instance, the salaries of the BLM officials are being paid in part by Phelps Dodge.[132] The agreement between the parties stated that Phelps Dodge would compensate two agency officials but in reality, the money received is spread throughout the entire agency office.[133] More disturbing is the fact that Phelps Dodge contracted and paid private consultants to conduct an EIS on the land exchanges and proposed copper mines.[134] Although regulations specify that the costs of consulting fees must be divided equally, corporations are abundantly aware that offering to pay for the entire process allows them considerably more bargaining power.[135] It is unlikely that an EIS prepared by a private consultant, supported directly by the corporation, will adequately assess the impacts of the project on local environmental conditions or give the required consideration to less harmful alternatives. Additionally, Phelps Dodge had a significant incentive to enter into the land swap, rather than simply lease the lands from the BLM.[136] Once the company gains ownership of the lands, they circumvent the federal mining regulations that apply to leased land but not to land owned by the company.[137]

D. Desert Citizens v. Bisson

In *Desert Citizens v. Bisson,* the Ninth Circuit overruled the district court's decision approving the BLM's appraisal of federal land in Imperial County, California that was exchanged for use as a landfill.[138]

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128. Nelson et al., *Trading Away the West: Mining Company*, *supra* note 97.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *See* Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th. Cir. 2000).

The court held that plaintiffs had standing to bring action, and that the BLM's failure to consider use of the exchanged lands as a landfill in determining the value was arbitrary and capricious.[139] The BLM entered into an agreement with Gold Fields Mining Corporation (Gold Fields) to exchange private lands owned by the corporation that lie within the Santa Rosa Mountains Wilderness and National Scenic Areas in Riverside County, and Little Chuckwalla Mountains Wilderness Area in Imperial County.[140] The BLM transferred approximately 1745 acres of federal land in Imperial County with an estimated value of $610,914 for the 2642 acres owned by Gold Fields, appraised at $609,995, thereby equalizing the exchange through a cash payment of $919.[141] Gold Fields intended to use the acquired federal lands as a landfill.[142] Desert Citizens challenged the BLM's reliance on an outdated appraisal that undervalued the federal lands and failed to comply with section 206(b) of FLPMA which requires an equal value exchange.[143]

1. Standing

The district court initially dismissed the plaintiffs' claims on the ground that they had not met the injury-in-fact necessary for constitutional standing because their injury did not result from a violation of FLPMA.[144] According to the district court, the plaintiffs' challenge of the appraisal was not sufficiently particularized to be distinguished from a general taxpayer grievance.[145] The court also concluded no causal connection existed between plaintiffs' injury and the undervaluation.[146] On appeal, the Ninth Circuit reversed the district court's denial of standing and found that plaintiffs did allege an injury in fact that was sufficiently particularized and redressable.[147] The court argued that the plaintiffs had demonstrated a legally protected interest because members of plaintiffs' group used the federal lands for recreational and aesthetic purposes.[148] The court also criticized the lower court's construction of a "novel rule" requiring plaintiffs to show that their injury in fact was the result of noncompliance with an environmental regulation or statute.[149]

139. *Id.* at 1187-88.
140. *Id.* at 1175.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 1176.
145. *Id.*
146. *Id.*
147. *Id.* at 1187-88.
148. *Id.* at 1176.
149. *Id.* at 1177.

Furthermore, the court held that the plaintiffs' challenge of the appraisal was not a generalized grievance affecting all taxpayers but rather, "an effort by land users to ensure appropriate federal guardianship of the public lands which they frequent."[150] The court further distinguished the plaintiffs' claim in the present case from that of *Northern Plains Resource Council v. Lujan*, in which standing was denied because the environmental groups' only demonstrated injury was to their status as taxpayers and not a particularized environmental injury.[151]

In addressing the issue of causal connection between plaintiff's stated injury and the alleged undervaluation by the BLM, the Ninth Circuit found that the district court had placed an undue burden on Desert Citizens.[152] Contrary to the district court's holding, the appeals court held that the plaintiffs need only show that a favorable decision would be likely to remedy their injury and not that a favorable decision would with certainty redress the injury.[153] The district court believed that the losses suffered by the plaintiffs would be the same regardless of the valuation of the land because public lands would nonetheless be exchanged.[154] However, the Ninth Circuit argued that this wrongly assumed that plaintiffs' injuries would not be redressed by a decision to set aside the exchange.[155]

> If the court had found the appraisal flawed, and the BLM's valuation arbitrary and capricious, it would have granted the relief requested; the transfer based on the current appraisal would not have taken place and Desert Citizens' members could have continued to use and enjoy the selected federal lands. The relief Desert Citizens is seeking would thus redress their injury because the particular exchange would not go through.[156]

Thus, plaintiffs were not required to establish with absolute certainty that following the requisite appraisal regulations would have ultimately resulted in a different decision.[157] The Ninth Circuit also

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> Nothing in our jurisprudence requires citation of a so-called 'environmental' statute as a pre-requisite to standing. Standing is based upon the nature of the injury alleged and whether a favorable decision would redress the injury. Finally, the court provided no basis for its determination that FLPMA, which governs vast tracts of public land, is not an environmental statute.

Id.

150. *Id.*
151. N. Plains Res. Council v. Lujan, 874 F.2d 661, 669 (9th Cir. 1989).
152. *Desert Citizens*, 231 F.3d at 1178.
153. *Id.*
154. *Id.*
155. *See id.*
156. *Id.*
157. *See id.* at 1179.

found that plaintiffs' injuries fell within the zone of interests under FLPMA because the Act provides for judicial review of the agency's compliance with land use goals.[158] Because FLPMA mandates that land exchanges conform to the basic policy objectives of the agency, the plaintiffs were permitted to challenge an exchange that threatened their recreational and aesthetic use of the land.[159] The court further rejected the BLM's argument that FLPMA's arbitration statute precluded standing.[160] Congress did not intend for the optional arbitration provision to eliminate "broader citizen review."[161] Lastly, with regards to standing, the court found that plaintiff's challenge of the equal value provisions were proper under FLPMA and that they were not required to bring an action under NEPA.[162] The BLM failed to demonstrate that the plaintiffs were limited exclusively to either of the statutes for judicial review.[163]

2. Adequacy of the Appraisal: Highest and Best Use

Upon determining that the plaintiffs in *Desert Citizens* had standing to challenge the Imperial County exchange, the court next assessed the fitness of the appraisal.[164] Under the Administrative Procedures Act (APA) the decision of an agency is afforded substantial deference so long as there is a rational basis for the action.[165] Consequently, courts must examine the rationale of the agency and consider the relevant factors and surrounding circumstances.[166] The court looked to whether the appraisal recognized the "highest and best use" of the federal lands in question.[167] The district court reasoned that because construction of a landfill was a high-risk venture demanding intensive preliminary planning and was also dependent upon further purchase of adjacent lands from Gold Fields, a landfill was not a feasible potential use for the land.[168]

158. *Id.*
159. *Id.* at 1178.
160. *Id.* at 1179-80.
161. *Id.* at 1180.
162. *Id.*
163. *Id.* ("[T]he public interest and the equal value requirements are separate requirements that must be met prior to approval of a land exchange. Satisfaction of one of these requirements is insufficient to excuse the other.").
164. *Id.*
165. *Id.* (citing 5 U.S.C. § 706(2)(A) (1994)). The APA prohibits the court from replacing its judgment for that of the agency unless the decision is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.*
166. *Id.*
167. *Id.* at 1180-85.
168. *Id.* at 1180-81. The factors determining feasibility under the UAS include the physical, legal, and financial considerations affecting the proposed use. The 1994 draft EIS indicated that the lands were physically suitable for use as a landfill and even described it as a "preferred action," indicating that the necessary legal authorizations would be granted. There

Therefore, the district court concluded that the BLM was not required to consider in its market valuation those uses that were not feasible or meritorious.[169] The Ninth Circuit rejected this assertion and argued that the construction of a landfill was reasonably probable and should have been considered in the valuation.[170] The district court erred in permitting the BLM to rely on an appraisal by Nichols & Gaston (a firm contracting with BLM to conduct the estimate) that did not consider the market value of the potential future use of the lands as a landfill.[171]

The BLM did not follow the statutory regulations governing appraisals as outlined in the Uniform Appraisal Standards, particularly the requirement that development trends are be taken into consideration in the estimated value of the land.[172]

> The appraisal determines the highest and best use to be utilized in conjunction with Gold Fields' current mining operation. Yet the appraiser well knew that Gold Fields and the BLM fully intended to utilize the land for the Mesquite Regional landfill, and had taken substantial steps to do so.[173]

Even the Nichols & Gaston property description in the appraisal report made reference to the fact that the lands would likely be used for a landfill.[174] The BLM also relied incorrectly on *United States v. Weyerhaeuser* to show that the expected use of federal lands as a landfill should not have an effect on market value.[175] The Ninth Circuit distinguished *Weyerhaeuser* on the grounds that as a condemnation case, the question of proper appraisal involves just compensation as well as

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was also evidence to show that a probable change in zoning ordinances would accommodate the landfill in that area. Additionally, subsequent proposals by other competitors in the landfill business illustrate that there was a general market for sites remote from urbanized areas in that region. *Id.* at 1184-85.

169. *Id.* at 1180.

170. *Id.* at 1181.

171. *Id.* at 1182-83.

172. *See id.* at 1182.

173. *Id.*

174. *Id.* The court emphasized the flaws in the BLM valuation in a footnote to the opinion stating:

> As earlier noted, the consequences of a consideration of landfill use could be substantial. The Nichols & Gaston appraisal valued the land's highest and best use as mine support, a use that renders the land virtually valueless in terms of market value. The market value of the land, if used as a landfill, is certain to be considerably more than this minimal value. This difference in value could alter the calculus of the land exchange tremendously.

Id. at 1183.

175. *Id.*; *see* United States v. Weyerhaeuser, 538 F.2d 1363, 1366 (9th Cir. 1976). *Weyerhaeuser* was a condemnation action in which the court held that the government did not have to pay for the enhanced price of the property created solely by demand. *Id.*

market value.[176] In the present case the companies that would benefit from use of the property as a landfill were private entities and were not entitled to the same privileges as the government.[177]

The Ninth Circuit similarly rejected the district court's finding that there was no feasible market for a landfill because landfills are inherently high-risk business ventures and additional property would have to be purchased from Gold Fields.[178] Even if a proposed use is considered to be risky, it must still be factored into the appraisal because these risks will eventually affect the value of the property.[179] In determining the highest and best use of a particular property, it is immaterial that there are certain contingent procedures that must first be undertaken.[180] Ultimately, the proposed use of the lands indicates a strong market demand for a landfill in the area and

> the use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose. There is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions.[181]

The Ninth Circuit also determined that the BLM's reliance on an outdated appraisal was arbitrary and capricious.[182] Both the agency's guidelines pertaining to appraisals and the UAS require that the value assigned to a property be reviewed to reflect changes in the market.[183] The Nichols & Gaston Appraisal relied upon by the plaintiffs was conducted in June 1994 but the BLM did not actually use the appraisal as the basis for its Record of Decision until almost two years later.[184] Substantial changes in zoning had taken place between the date of the appraisal and the BLM's decision to exchange the lands in question.[185] These changes involved permitting alterations that increased the

176. 231 F.3d at 1183.
177. *See id.*
178. *See id.* at 1184-85.
179. *Id.* at 1184.
180. *Id.* at 1185.
181. *Id.* at 1184.
182. *Id.* at 1187.
183. *Id.* at 1185. The BLM's handbook on appraisals recognizes two instances in which a review of the value is required (1) expiration of the "shelf-life" and (2) "significant local events" that may affect the value of the property such as zoning modifications or plans for development. The appraisal is presumed to be valid only for six months. *Id.* (citing BLM Handbook Manual H-2200-1, ch. VII(J)). The UAS similarly states that appraisals must be reviewed if they were made in advance of the actual negotiations in order to account for changing market conditions. *See id.* at 1185 (citing INTERAGENCY LAND ACQUISITION CONFERENCE, UNIFORM APPRAISAL STANDARDS FOR FEDERAL LAND ACQUISITIONS 4, 87 (1992)).
184. 231 F.3d at 1185.
185. *Id.*

likelihood of using the property for a landfill but the BLM did not consider these alterations in an updated appraisal.[186]

In summation, the Ninth Circuit asserted that the "major discrepancy" of the land exchange was the BLM's undervaluation of the public lands offered to Gold Fields by not factoring in the use of the property as a landfill site in the appraisal.[187] The court set aside the exchange on the grounds that none of the appraisals utilized by the BLM during the negotiations considered the use of the property for a landfill, but it was clear from both the Record of Decision and the Final EIS that both parties fully intended the construction of a regional landfill.[188] Although the BLM had available for comparison an appraisal of a similar landfill site, it chose to ignore the potential use of the Mesquite site.[189] Whereas, the BLM assigned a value of $350 per acre to the lands acquired by Gold Fields, the estimated value of the comparative site was $46,000 per acre: an obvious irreconcilable difference.[190] In concluding that the BLM failed to comply with the statutory requirements governing appraisals of federal land, the court stated:

> The government must not wear blinders when it participates in a real estate transaction, particularly if the result, as here is the transfer of a flagrantly undervalued parcel of federal land to a private party. . . . At the time of the Record of the Decision to transfer the 1,745 acres, Imperial County had approved the landfill and had made all of the zoning and land use decisions necessary to accommodate the project. The action of the BLM was arbitrary and capricious in not, at the very least, considering the landfill use as the highest and best use of the 1,745 acres.[191]

Finally, the Ninth Circuit rejected the defendants' argument that the land exchange could not legally be enjoined since the lands at issue had already been transferred.[192] The BLM and Gold Fields contended that the court could not properly issue a mandatory injunction to halt their progress because the exchange was consummated the day after the district court's initial dismissal of the plaintiff's action.[193] The court relied on *National Forest Preservation Group v. Butz* as the basis for its decision to set aside the exchange.[194] In that case, the Ninth Circuit held

186. *Id.* at 1186.

187. *See id.* The court was disturbed that the BLM's Record of Decision approving the exchange in February 1996 was entitled "Record of Decision: Mesquite Regional Landfill" yet the landfill was not actually taken into consideration as a probable use of the property. *Id.*

188. *See id.* at 1186-87.

189. *Id.*

190. *See id.* at 1187.

191. *Id.*

192. *See id.*

193. *Id.*

194. *Id.* (citing 485 F.2d 408, 411 (9th Cir. 1973)).

that a defendant acts at his own risk when he moves forward with an action pending the outcome of a decision on the merits.[195] In the present case, both parties had notice that a suit seeking an injunction against them was pending and as such, they "acted in their own peril."[196] Furthermore, the legal rights of the parties would not be impinged upon by an order voiding the executed portion of the exchange since the transfer had not taken place prior to the initial challenge in the district court.[197] Consequently, the court's entry of a preliminary injunction against defendants is within the scope of legally recognized remedies for land exchanges found to be arbitrary and capricious.[198]

IV. ANALYSIS

A. Judicial Review and Public Accountability

The Ninth Circuit's decision in *Desert Citizens* demonstrates how judicial review of agency decisionmaking is critical in the context of land exchanges. The Mesquite Landfill is one of three proposals for massive landfills in the Southern California area.[199] In setting aside the present agreement between the BLM and Gold Fields, the court insisted that federal lands be properly valued and that the public interest be well-served by the exchange.[200] FLPMA permits judicial review of agency decisionmaking in order to make certain that land exchanges are carried out pursuant to statutory authorization and in conformity with the basic policy goals of the agency.[201] In *Desert Citizens*, the court identified a number of instances in which the BLM had not complied with appraisal standards established for land exchanges, such as the disregard for the "shelf-life" of the estimated value.[202] The court's discussion of "highest and best use" is significant because it highlights the need to consider potential uses of the federal lands as well as changing market conditions when assigning a value to those lands.[203] 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

195. 485 F.2d at 411.
196. 231 F.3d at 1187.
197. *Id.*
198. *See id.*
199. *See* LAND EXCHANGE UPDATE, *supra* note 20, at 3. The two other proposed landfill sites are the Eagle Mountain Landfill near Joshua Tree National Park and Railcycle in San Bernardino. *Id.*
200. *See id.*
201. 43 U.S.C. § 1701(a)(6) (1994).
202. 231 F.3d at 1185-86.
203. *See id.* at 1181-82.

the expense of the taxpayer.[204] If properly applied, the "highest and best use" standard ensures that the agencies take into consideration future uses of the proposed land for trade and conduct the appraisal accordingly.[205] Often, these future uses will substantially increase the value of the federal lands to be traded but taxpayers will continue to incur losses if the "highest and best use" standard is not properly utilized in the appraisal.

Apart from the valuation issue in *Desert Citizens*, the decision to confer standing on the plaintiffs is also important because it empowers citizens to challenge land exchange decisions utilizing the procedural safeguards of FLPMA. The court established significant precedent in holding that plaintiffs had alleged a legally-protected interest in the federal lands at issue and that they sustained an injury in fact as a result of the exchange.[206] According to the court, the plaintiffs' injury was sufficiently particularized from general taxpayer grievances because there was a causal connection between their alleged environmental injury and the BLM's undervaluation of the federal lands in the trade.[207] This is important because it is essential that citizens have access to a forum in which to challenge agency adherence to the land exchange provisions under NEPA and FLPMA.[208]

> The present challenge to FLPMA's equal-value requirement is not merely a generalized allegation of federal revenue loss at taxpayer's expense. Rather, it is an effort by land users to ensure appropriate federal guardianship of the public lands which they frequent. If, by exchange, public lands are lost to those who use and enjoy the land, they are certainly entitled under the APA to file suit to assure that no exchange takes place unless the governing federal statutes are followed, including the requirement that the land exchange is properly valued by the agency.[209]

Desert Citizens also reflects the importance of public accountability in the land exchange process.[210] By revealing the faulty appraisals conducted by the agency without regard for the actual value of the federal lands, the plaintiffs raised public awareness about the inequities of the exchange.[211] Public access to the appraisal information prior to completion of an exchange is critical so that individuals may challenge

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204. *See id.* at 1187.
205. *See id.*
206. *See* LAND EXCHANGE UPDATE, *supra* note 20, at 3.
207. 231 F.3d at 1178.
208. *See* Jim Simon et al., *Can Anything Be Done to Resolve Problems with Land Exchanges?*, SEATTLE TIMES, Oct. 2, 1998, at A15.
209. 231 F.3d at 1177.
210. *See* LAND EXCHANGE UPDATE, *supra* note 20, at 3.
211. *Id.*

the exchange if it does not adequately serve the public interest.[212] Furthermore, because land exchanges authorized exclusively by Congress do not have to go through the formal steps required in a federal agency land exchange, the public can be completely excluded from these exchanges. Consequently, complete elimination of the agency land exchange program may not adequately address the issue of public accountability. In fact, a moratorium on federal land exchanges that does not include the congressional trades negotiated between politicians and corporations creates an even greater risk that the public interest will be side stepped.[213]

B. Proposed Moratorium on the Federal Land Exchange Program

The General Accounting Office has called for a moratorium on land exchanges based on widespread procedural abuses by both federal agencies.[214] Due to the inherent difficulties associated with land exchanges, as compared with buying and selling property on a common market, the GAO Report urges Congress to discontinue the current programs.[215] Although the GAO recognized that both agencies had taken a number of steps to reform the land exchange process, "procedural improvements, while useful, do not address the inherent difficulties and inefficiency associated with land exchanges. In this context, we believe there is reason to question whether land exchanges remain a viable tool for acquiring nonfederal land, especially in rapidly developing real estate markets."[216] In 1988, both agencies began increased oversight of their land exchange programs, establishing review teams to streamline the appraisal process and augment internal management practices.[217] However, the GAO determined that these reforms did not address the most critical problems with the land exchange program, including the need to better protect the public interest and adherence to the equal value principle.[218]

The GAO also repeatedly stressed the need to overhaul the BLM's illegal practice of depositing funds into escrow accounts to purchase other lands in the future.[219] The lack of financial documentation on the

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212. *See* Nelson et al, *Trading Away the West: Mining Company*, *supra* note 97.

213. *See* Deborah Nelson & Rick Weiss, *Land Exchange Program Hurts Public, GAO Says; Taxpayers Shortchanged in Many Deals*, WASH. POST, July 13, 2000, at A1.

214. GAO REPORT, *supra* note 41, at 34.

215. *Id.*

216. *Id.* at 33.

217. *See id.* at 28-33 (documenting the various reform measures taken by agencies to address the problems within the land exchange process).

218. *Id.* at 28.

219. *Id.* at 34.

part of the Bureau is particularly troubling since it is unclear where and how the proceeds of sales are used.[220]

> By not using a competitive process in these sales, the Bureau may have lost opportunities to receive more proceeds for the land than was received through the direct sales. Moreover, the Bureau has no authority to acquire land with the proceeds of its sales but is generally required to use its appropriations to acquire land.[221]

The GAO concluded that a moratorium should be imposed on the exchanges until both agencies take the necessary steps to address inconsistencies in their programs.[222] The chief recommendations also included a review by agency oversight teams of all exchanges prior to completion, including evaluation of initial agreements to verify that statutory requirements are met early on in the process.[223] Additionally, the GAO called for immediate elimination of the BLM's unauthorized sale of lands and urged Congress to conduct a detailed audit tracking the financial records of these exchanges to disclose any erroneous use of public lands.[224]

C. The Dangers of Congressional Land Trades

While commentators acclaim the GAO's unveiling of land exchange inequities, many critics of the land exchange program urge that a moratorium will not address the problem in its entirety since interest groups will still be able to lobby congress for land swaps to serve their needs.[225] "A moratorium should be extended to land exchanges that are legislated by Congress at the request of private landowners; such trades can legally circumvent the environmental and public review process that the agencies are required to follow."[226] For example, a proposed exchange between the BLM and the state of Utah has recently come under intense criticism from environmentalists who argue that the trade will result in commercial development of environmentally-sensitive lands in the southern part of the state.[227] The exchange was negotiated in May 2000 between former Secretary of the Interior, Bruce Babbit and Utah Governor Michael Leavitt to transfer public lands near Zion

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220. *Id.* at 33.
221. *Id.* at 26.
222. *Id.* at 34.
223. *Id.* at 35.
224. *Id.* at 34.
225. Nelson & Weiss, *supra* note 213, at A1.
226. *Id.* (reporting the remarks of Janine Blaeloch, Director of Western Land Exchange Project).
227. Jim Carlton, *Big Land Exchange in Utah Draws Fire; Critics Question Swap Process, Fear Development Will Mar Views of Zion*, WALL ST. J., June 13, 2000, at A2.

National Park to the state's school trust land association in exchange for lands sought by the BLM.[228] The Utah exchange is a legislatively-authorized trade that critics say "avoided the appraisals, environmental analysis and lengthy public hearings that typically are involved in such trades."[229] One opponent of the Utah exchange argued:

> Utah's West Desert Exchange is case in point. Because this project has been taken to Congress, the NEPA process has been effectively waived. There has been no environmental analysis to inform the public of what this project means on the ground or what its long term effects would be (golf courses and subdivisions at the entrance to Zion National Park? Strip malls across the landscape?) There will be no examination of alternatives and no recourse for challenge by concerned citizens.[230]

In response to the successful court challenges mounted by environmentalists in recent years, agency officials have opted for congressional land swaps in order to evade public opposition.[231] State officials involved in the Utah deal defended the legislative swap on the grounds that "it is too cumbersome to conduct appraisals in a land swap such as this, in which the state is giving more than 175 scattered parcels."[232] In defense of the legislative swap, the BLM argued that they would be acquiring valuable in-holdings in different remote areas throughout the state, necessary for consolidating federal management schemes.[233]

Yet the Utah West Desert Exchange illustrates the fundamental problem with a congressional trade system that openly attempts to bypass the environmental review process and is not accountable to the public.[234] Congressional land exchanges are most likely to promote special interests at the expense of taxpayers precisely because they are not subject to the procedural safeguards of the federal agency land exchange program.[235] Furthermore, the new federal administration's

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228. *Id.*

229. *Id.*

230. Janine Blaeloch, *Rep. Hansen's West Desert Land Exchange Shortchanges the Public*, SALT LAKE TRIB., June 25, 2000, at AA4.

231. *See* Carlton, *supra* note 227, at A2.

232. *Id.* at A2.

233. *Id.*

234. *See* Blaeloch, *supra* note 230, at AA4.

235. *See id.*

> [O]ne of the few positive aspects of the agency process is that it must make room for citizen involvement in land trades through . . . (NEPA) and allow citizens to challenge trades that do not serve the public interest. In stark contrast, legislated land deals pushed through Congress by lawmakers like Hansen pose far worse problems for citizens and public lands, because they are driven solely by political expediency.

Id.

conservative policies regarding land management and natural resources will undoubtedly influence congressional trades to a significant degree.[236] Many key policy makers in the new administration favor increased privatization of federally owned lands and would be more apt to support sale of these lands to large corporate enterprises.[237] Land exchanges like the West Desert Exchange, in which the opportunity for formal environmental review was circumvented, will continue as long as timber, mining, and real estate developers can ally with law makers to promote corporate interests at the expense of the public lands and American taxpayers.[238]

V. CONCLUSION

A moratorium that extends only to agency land exchanges will not effectively address the problems with the current land exchange process. Land trades authorized by Congress must also be accountable to the public to ensure that public lands are properly valued. Under the new federal administration, land management policy objectives will arguably focus on increased privatization of federal lands, particularly in the West. Because of these policy goals, the environmental review process mandated under the federal land exchange program is essential in assuring that public lands are not sold or traded exclusively for the benefit of special interest groups.

Presently, both the BLM and the Forest Service engage in land exchange practices that shortchange the public because they base their appraisals on outdated information that markedly undervalues federal lands. However, complete elimination of the program would only serve to draw the process beyond the reach of public accountability. Challenges to land exchanges brought by citizen groups and

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236. Jim Carlton, *Environmentalists Move to Block Sales of Public Land Proposed in Clinton Plan*, WALL ST. J., Feb. 11, 2000, at A1. In President Clinton's budget plan last year, he proposed giving the Forest Service increased authority to sell lands, in addition to exchanges. "The proposal ostensibly is designed to enable the government to use the funds to swap public tracts for more desirable private land. However, environmentalists fear that wholesale swaths of land could be liquidated under a conservative administration." *Id.* Fear of James Watt–era forest management, in which vast tracts of land were sold to private parties under the Reagan Administration, is legitimate in the West where many conservative congressman are now urging for less federal land ownership. *Id.*

237. Drumheller, *supra* note 21, at A1. Terry Anderson, Director of the conservative Political Economy Research Center and unofficial advisor to George W. Bush on natural resource issues, has called for the auctioning off all of public lands in the next twenty to forty years. Conservative commentators like Anderson argue that the federal government is not currently doing an adequate job of managing the lands so they should be parceled out to individuals who may use them in a better fashion. *Id.*

238. Blaeloch, *supra* note 230, at AA4.

environmentalists are currently the most effective means of raising public awareness about inequitable land exchanges. Furthermore, despite the problems associated with trades, land exchanges are necessary tools in consolidating federal ownership of land for enhanced resource management programs and protection of endangered species and fragile ecosystems. The land exchange program can best be addressed by an overhaul of agency processes, including increased oversight of land trades by agency review panels, the use of independent appraisals, and availability to the public of appraisals prior to completion of an exchange.[239] The Ninth Circuit's decision in *Desert Citizens* illustrates the importance of an open and honest appraisal of public lands as well as the need for a forum in which citizens can challenge land trades when they contradict the public interest. Legislation and policy changes that address the need for increased oversight of agency land trades, as well as the reform of congressional trades, will serve to protect invaluable public lands and resources in an era of increased privatization.

239. Nelson et al., *Trading Away the West: Mining Company*, *supra* note 97.