

**PROPOSED TRANSFER OF FEDERAL LANDS TO WESTERN STATES:
UNDERSTANDING THE PROBLEM AND DESIGNING SOLUTIONS**

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**I. STATE LAW EFFORTS TO REDRESS THE IMBALANCE OF FEDERAL LANDS
WITHIN WESTERN STATES**

A. Utah Public Lands Transfer Act

1. In order to bring federal land into balance with private land, the Act calls for the United States to extinguish its title in federal lands within the State of Utah boundaries, excluding specific classes of land. Utah Code §63L-6 (2012).
2. The proposed transfer excludes an estimated 6.7 million acres of federal land in the state, including almost 2.5 million acres reserved for the Uintah and Ouray, Paiute Shiwits, Goshute, Skull Valley, and a portion of the Navajo Indian Reservations, 851,460 acres in Military Reservations, 2,202,600 acres reserved as National Parks and National Monuments [except for Glen Canyon National Recreation Area and the Grand Staircase / Escalante National Monument], 110,820 acres for wildlife refuges, and about 1,024,886 acres of wilderness already designated by Congress, of which 767,000 acres are in National Forests and 257,886 acres were established in the Omnibus Public Lands Management Act of 2009, Pub. L. 111-11. Utah Code §63L-6-102(e).
3. Of the present private land base of 11.2 million acres, about 3 million acres reflect land sold by the State. Banner R., Baldwin, B., McGinty, E. *Rangeland Resources of Utah, Section 2, Land Ownership of Utah*, Utah State Univ. Ext. Service (2009) at 13.
4. Utah estimates that about 31.2 million acres will be transferred to augment the current state, municipal and private land base of 11.2 million acres. *An Analysis of a Transfer of Federal Lands to the State of Utah*, University of Utah, Bur. of Economic and Business Research, Utah State University, Dept. of Applied Economics, Weber State University, Dept. of Economics (Nov. 2014) at xxv.
 - a. The transferred land applies to public lands managed by the Bureau of Land Management (BLM) pursuant to Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§1701-1782; and
 - b. National forest land managed by the Forest Service under the Organic Act of 1897, 16 U.S.C. §475, the Multiple Use Sustained Yield Act of 1964, 16 U.S.C. §§528-531, and the National Forest Management Act, 16 U.S.C. §§1600-1614.
 - c. The United States will receive 95% of net proceeds for any land sold.

- d. The balance of 5% net proceeds will be deposited in State Permanent School Fund.

B. Utah Land Ownership Quick Facts

1. The United States owns approximately 64.9% of land in Utah. General Services Administration, Office of Governmentwide Policy, *Federal Real Property Profile*, Table 16 at 18-19 (Sept. 30, 2004).
2. At statehood, Utah received four sections in each township for the support of the public schools and institutions. About half of the original 7.4 million acres was sold. Most of the balance is managed to produce revenue for the support of the public schools and institutions. Banner R., Baldwin, B., McGinty, E. *Rangeland Resources of Utah, Section 2, Land Ownership of Utah*, Utah State Univ. Ext. Service (2009) at 13.
3. The State of Utah owns roughly four million acres of surface land, and 1.6 million acres of mineral rights.
4. In 1994, Utah established the School and Institutional Trust Lands Administration (SITLA) to manage these lands to maximize income to the State School Permanent Fund. Utah Code, Title 53C.
 - a. SITLA manages 3.4 million acres of surface and the mineral rights.
 - b. The Trust Lands are held in trust in accordance with the Utah Enabling Act and managed for the support of public schools and institutions.
 - c. Under SITLA's administration the Permanent Fund has grown to \$2 billion in 2013 from \$51 million in 1994.
<http://trustlands.utah.gov/our-agency/what-are-trust-lands/>
5. State lands not managed by SITLA include lands managed for wildlife and parks.
 - a. 121,080 acres are managed as state parks.
 - b. 464,077 acres have been purchased by the State or transferred from SITLA to Division of Natural Resources and are managed for wildlife habitat.
6. The Utah Counties and the State have also pursued conservation plan and funding for wildlife habitat under a Partners for Wildlife program.
 - a. The Utah Comprehensive Wildlife Strategy represents the efforts and funding of federal and state agencies, counties and private organizations to enhance wildlife habitat.
 - b. Since its inception, it has developed vegetation and habitat projects throughout the state.

7. Statehood Land Grant Incomplete
 - a. Utah never received all of the lands granted at statehood or provided for as in lieu lands.
 - b. The Enabling Act provided that if the in situ school sections were reserved or otherwise disposed of, the State would be indemnified by selecting other sections. 28 Stat. 109.
 - c. The Interior Secretary relied on the Taylor Grazing Act, 43 U.S.C. §315g, to deny the indemnity state land selections on the grounds that the lands were too valuable to transfer, generally land with mineral potential.
 - d. Utah sued for these lands in 1980 and in a 5-4 decision, the Supreme Court affirmed the right of Interior to find the selected lands were too valuable to transfer. *Andrus v. Utah*, 446 U.S. 500, 502 (1980).
 - e. Ultimately, the issue was resolved through legislation and negotiation for an in lieu land selection process. 43 U.S.C. §853.
 - f. This process also bogged down and the State is still short of the land granted at Statehood more than 100 years later. This delayed land grant is valued at \$1.2 million. Bird, M. *In Lieu Lands for Some Western State Schools: Unpaid IOUs from the Federal Government*, May 19, 2005. <http://www.childrenslandalliance.com/wp-content/uploads/2013/07/In-Lieu-Lands-for-Schools-in-Some-Western-States1.pdf>.

C. Feasibility Study Under the Public Lands Transfer Act

1. The Utah Public Lands Transfer Act required a study to evaluate the costs and feasibility of assuming management of the lands to be transferred. Utah Code §63J-4-606. *An Analysis of a Transfer of Federal Lands to the State of Utah*, University of Utah, Bur. of Economic and Business Research, Utah State University, Dept. of Applied Economics, Weber State University, Dept. of Economics (Nov. 2014).
 - a. The 784-page report was the combined effort of the economics departments of the University of Utah, Utah State University, and Weber State University.
 - b. The study recognizes that there are many unknowns regarding the proposed lands transfer. *Id.* xxxi. It, nevertheless, identifies the likely costs if the state assumes management of the federal lands. These costs are principally the loss of income from federal employees and federal dollars spent in the state managing the federal lands. The other

consequences turn on the treatment of mineral leases and similar leases or permits, and the responsibilities for wildfire suppression, wildlife habitat management, road and facility maintenance and program administration.

2. It concludes: 1) there would be a loss of \$149.8 million in federal payroll and a total loss of \$247 million spent each year in the state; 2) that federal activity generates \$15.8 million to the State and \$1.4 million in local government revenue; 3) management costs to the state would be \$280 million, which includes Payment in Lieu of Taxes (PILT) payments currently received by the counties which the state would continue to pay. *Id.* at xxvi.
3. The Study assumes there will be additional costs associated with providing access along existing roads, reclaiming abandoned mines, and other deferred maintenance. *Id.* at xxvii.
4. Due to the rich resources, the study concludes that the future revenues received following such a transfer would be significant and could replace the loss of federal outlays. *Id.* About \$331.7 million were generated in 2013 from public and national forest lands with oil, gas and coal accounting for most of that revenue stream of \$24 million. Fees are also received from grazing, rights-of-way, and other recreation or special use permits. *Id.*
 - a. Whether the state could cover the costs of managing the public lands depends on whether the federal government continues to receive its share of royalty payments under existing leases. Under federal law, federal mineral lessees pay a 12% royalty and the states get half of that or 6¼ percent (minus handling fees). 30 U.S.C. §191.
 - b. If the State were to receive all of the 12% royalty payments, rather than half, then the State could generate significant revenues and more than break even. *Id.* xxxi.
 - c. This scenario would require changes in the existing mineral leases, because otherwise the contractual obligations would continue royalty payments to the United States.
 - (1) Presumably, new mineral leases would pay a royalty to the state.
 - (2) The study did not project the new leases based on current unleased land or the probability of development. Nor did the income models use prices as low as they are now. It does not appear to have applied a management cost regime that reflects state law as opposed to federal law, which would remove or simplify the NEPA process.
 - d. The study assumed some land would be sold but did not project the amount or the location.

- e. The study concludes the transition years would be costly but the resources involved support the conclusion that the state and its residents would benefit from the transfer. xxv-xxxii.

D. Litigating the Right to Compel Transfer

Utah also commissioned a legal assessment to ascertain if Utah had to sue to compel the transfer. Davillier Legal Group, *Legal Analysis of the Legal Consulting Services Team Prepared for the Utah Commission for the Stewardship of Public Lands*, December 2015. The analysis explores three primary legal theories that conclude the land transfer is necessary to conform to a state's rights of equal sovereignty, the principles of admission on equal footing set forth in each enabling act, and the contractual rights under each statehood compact.

1. The equal sovereignty principle holds that each state enjoys the same sovereign rights, which would include jurisdiction over the land within the respective boundaries.
 - a. The analysis relies on two Supreme Court cases that held that each state enjoyed a right of equal sovereignty. *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-204 (2009); and *Shelby County v. Holder*, 570 U.S. ___, 133 S. Ct. 2612 (2013).
 - b. Both cases concerned application of pre-screening under the Voting Rights Act, which the Supreme Court held violated the equal sovereignty of the respective states. Justice Roberts wrote: "Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States." *Shelby County Alabama v. Holder*, 133 S. Ct. at 2623.
2. The equal footing doctrine, while similar to equal sovereignty principle, rests on the notion that every state was admitted as an equal with the same powers as the other states in the Union. The federal government's retention of jurisdiction over land within the western states deprives them of equal footing since 72% of the states exercise jurisdiction over virtually all of the land within the states.
 - a. The doctrine is derived from the language in the respective enabling acts that admitted each state. For instance, the Utah Enabling Act states: "AN ACT to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States." Utah Enabling Act, 28 Stat. 107 (1894).

- b. The Supreme Court held that the reference to equal footing in the Alabama Enabling Act meant that the United States had no claim to the water bottoms of navigable rivers because to find otherwise would defeat the assurance that the state was admitted on an equal footing. *Pollard's Lessee v. Hagan*, 44 U.S. 212 221 (1845).
 - c. The doctrine has been extended to other sovereign powers. *United States v. Texas*, 339 U.S. 707, 713 (1950). The "equal footing" clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee v. Hagan*, [3 How. 212, 228–29] which would produce inequality among the States. For equality of States means that they are not "less or greater, or different in dignity or power." See *Coyle v. Smith*, 221 U.S. 559, 566, 31 S.Ct. 688, 55 L.Ed. 853.
- 3. The Enabling Act of each state is a sacred compact between the people of the territory and the U.S. Congress and once ratified remains binding on both parties.
 - a. The Utah Enabling Act includes language expressing the intent that the federal land within the territorial boundaries will be patented.
That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; **and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States**, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use;
UTAH CODE ANN., Enabling Act. §3 (emphasis added).
- 4. The bold-faced language above expresses the intent of Congress to dispose of some or all of the land in exchange for the state's relinquishing any claim to title.

- a. As part of the consideration for relinquishing any claim of title to land within the boundaries of the Utah territory, the new State also received four sections per township and the representation that aside from reservations for Indians and the national forests, the land would remain open for settlement.
 - b. From 1901 through 1918, succeeding Presidents created, consolidated, and modified the forest reserves, which are now the Uintas, Cache, Manti, LaSal, Fishlake and Dixie National Forests. The Ashley National Forest was established under the Flaming Gorge National Recreation Area. 16 U.S.C. §640v.
 - c. Most of the public lands were withdrawn from settlement for grazing districts under the Taylor Grazing Act, 43 U.S.C. §315, and could not be released without reclassification.
5. The legal analysis also recognizes Congress' power under the Property Clause of the U.S. Constitution is a probable defense. The Property Clause of the United States Constitution states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST., ARTICLE IV, SECTION 3, CLAUSE 2.
- a. The premise from the above language is that Congress can override state sovereign interests as it applies to federal property. Proponents of this view cite *Light v. United States*, 220 U.S. 523, 536 (1911), a case in which a rancher challenged the establishment of forest reserve grazing rules on the grounds that the state had not consented to the reserve. The Supreme Court held that the 1891 Forest Reserve Creative Act was a constitutional exercise of Congress' power under the Property Clause and Congress was the agent entitled to act. *Id.*
 - b. The *Light* case concerned the right of the federal government to regulate grazing, not whether the establishment of forest reserves violated the rights of the state, which was not a party.
 - c. *Kleppe v. New Mexico*, 426 U.S. 529 (1976) concerned management of wild horses on federal land, which are protected under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§1331-1340, and was therefore a proper exercise of power under the Property Clause. *Id.* at 540. The case concerned which agency could remove feral horses not whether continued ownership of federal lands impinged on rights of the western state.
 - d. In other cases, the Supreme Court held that the scope of the Property Clause had limits. In *Calif. Coastal Commn. v. Granite Rock Co.*, 480 U.S. 572, 594 (1984), the Court held

- that while Congress granted plenary authority over federal land, it did not supersede state law except when preempted.
6. The history of the Property Clause does not support the view that the Framers of the Constitution intended that the United States would remain a majority landowner in Utah or any other state.
 - a. The United States is based on the idea that each state enjoys the same rights of sovereignty. If so then some states should not be a colony of the federal government.
 - b. As Justice Roberts wrote:
 State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal government: “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *Bond v. United States*, 564 U.S. ___, ___, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269, 280 (2011).
Nat'l Fed'n of Indep. Bus. v. Sebelius, 571 U.S. ___, 132 S. Ct. 2566, 2578 (2012).

E. Actions in Other States

No other state has done as much as Utah. The following list shows that the issue generates significant statehouse debate.

1. The Arizona and Alaska legislatures authorized studies in 2015.
2. Nevada adopted resolution supporting transfer in 2015 after studies done in 2014 and 2013.
3. The Montana legislature approved a study, which was vetoed by Governor Bullock as too broad.

4. Bills have languished in Colorado, Wyoming, Washington, Oregon and Idaho.

II. UNEVEN DISTRIBUTION OF FEDERAL LAND IN WESTERN STATES

A. Map Depicts Mix of Private and Federal Lands in Western States

1. With exception of 12 western states, at least 90% of the land within each state's boundaries is private or state. General Services Administration, Office of Governmentwide Policy, *Federal Real Property Profile*, Table 16 at 18-19 (Sept. 30, 2004). This key fact gives 75% of the states a substantial tax base, the opportunity for coherent land use policy, and a competitive edge in attracting and keeping the residents needed for long-term employment. These states do not find their economies and communities rocked by sea changes in federal land policy.
2. North and South Dakota are often treated as western states although the federal lands were primarily reacquired under the Bankhead Jones Farm Tenant Act in Wyoming, North and South Dakota. These areas are known as the National Grasslands. 7 U.S.C. §1010; 36 C.F.R. Part 213.
3. Maps and charts illustrate the differences in land ownership among eastern, southern and Midwestern states and that of the western states.

B. Federal Land Imbalance Reflects Later Settlement in the West that Coincided with Rise of Conservation Movement in Late 19th Century.

1. United States sold land it owned to pay for wars and government from 1880s until mid-1850s. Gates, P. *History of the Development of Public Land Law*, Pub. Land Law Review Commn. (1968) ch. 4 pp. 59-72.
2. Creation of National Forests by executive order slowed settlement and land transfers in these western states. *Id.* Lands on National Forests could only be patented under the 1866 Mining Act, which authorized smaller parcels. *Id.* The base areas for many ski resorts are privately owned based on mining patents but the rest of the ski area is operated under a resort permit with the Forest Service.
3. Establishment of National Forests by executive order and later enactment of the Organic Act, 16 U.S.C. §475, illustrate the limited weight given to the opposition of the western states. Gates, P. *History of the Development of Public Land Law* at 569, 575. The National Forest reserves were retained and expanded.

4. After enactment of the Taylor Grazing Act, the Secretary withdrew all public lands within grazing districts from homestead and other land transfers. 43 U.S.C. §315a; Ex. Orders 6910 and 6964.
5. The objections by western congressman and residents to the forest reserves and later the grazing withdrawals had little impact. The failure to resolve the controversies to permit settlement reflected the underlying sentiment was that the East was civilized and the West was not and the western citizens could not be trusted.

III. CONSEQUENCES OF FEDERAL LAND OWNERSHIP

- A. The predominance of federal lands within an individual state leads to 1) lack of private lands for community expansion and economic development; 2) reduces tax base to support local government functions, including law enforcement, fire, emergency services, roads, and public schools, 3) restricts land uses and income stream to state and local governments in western states and 4) leaves state and communities vulnerable to federal policies developed far from the affected communities.
 1. Federal lands are exempt from taxation and federal activities enjoy a similar exemption. While property taxes support local government services, roughly half of the land in the western states is exempt.
 2. Federal activities from rent, construction, or purchases are all exempt from sales taxes, a major source of revenue for local governments.
 3. The effects are particularly felt where counties are overwhelmingly federal, such as Mohave County, Arizona, (71% of 8.6 million acres); Daggett County, Utah (85%) or Moffat County, Colorado (60%). These counties struggle to provide services, especially where the counties include large geographic areas.
- B. Federal replacement funds are insufficient.

For 40 years, Congress has appropriated funds to compensate the states for the property tax exemption. Corn, M. Lynne, *PILT (Payments in Lieu of Taxes): Somewhat Simplified*, (Cong. Research Service 2015) at 1.

1. PILT payments to local governments in federal land states are calculated using a complex formula that takes into account:
 - a. (1) the number of acres eligible for PILT payments,
 - b. (2) the county's population,
 - c. (3) payments in prior years from other specified federal land payment programs,
 - d. (4) state laws directing payments to a particular government purpose, and

- e. (5) the Consumer Price Index as calculated by the Bureau of Labor Statistics.
- 2. When a state receives mineral lease revenues, generally half of the 12% federal royalty and lease payments, the PILT payments drop proportionally. This reduction applies to other federal revenues as well.
- 3. PILT is appropriated each year and thus subject to sequestration and politics.
- 4. Mineral lease, timber and grazing revenues paid by law to the states are reduced by US government handling fees.
- 5. In 2000, Congress repealed the 25 Percent Act that granted 25% of national forest revenues from timber sales, grazing, and ski areas to counties for roads and schools. 16 U.S.C. §500. The objective was to remove the link between the county revenues to support roads and schools and timber sales. Hoover, K., *Reauthorizing the Secure Rural Schools and Community Self-Determination Act of 2000*, (Cong. Research Service 2015) at 7.
 - a. The Secure Rural Schools Act, which replaced the 25 Percent Act, expired in 2008 but has been reauthorized in a series of emergency and stop gap measures through FY2016. *Id.* at 2. The debate continues regarding how to fund the law and how to distribute the funds.
 - b. It has not been a dollar for dollar replacement for revenues received from ski areas or timber sales because it is tied to appropriations rather than revenues generated from the respective western county.
- 6. Advocates for the new economy contend that extractive industries are not sustainable, and argue for a recreation amenity based economy to replace grazing and mineral development.
 - a. The arguments do not account for the minimum wage jobs typical of recreation economies to staff restaurants, bike shops, ski areas, and hotels.
 - b. Sales taxes from these activities are seasonal and very sensitive to national economic trends.
 - c. The new economy does not address the impacts of replacing an educated work force with seasonal hourly wage-earners.
 - d. In most ski towns, the majority of the work force cannot afford to live there and are segregated in low income housing in nearby communities or on the outskirts of town.

IV. FLASH POINTS ILLUSTRATE PRESENT AND FUTURE CONFLICTS THAT LED STATES TO RECONSIDER THE INEVITABILITY OF FEDERAL LAND OWNERSHIP

Solutions to the current controversies that gave rise to the public lands transfer movement require at least some understanding of the conflicts and frustration felt in the western states. While revenues play a significant role, there are countless land use issues that federal agencies either do not address or where the agencies implement policies inimical to the western communities and their residents.

A. Wilderness & Threats of National Monuments

1. National Monuments pursuant to the Antiquities Act.
 - a. The Antiquities Act, 16 U.S.C. §431, authorizes the President to reserve public land for a national monument to preserve antiquities, is the ultimate executive action. There is no public comment, no National Environmental Policy Act (NEPA) review, 42 U.S.C. §4332(2)©; 40 C.F.R. Part 1500; and no discernible limit in size or purpose. *Cameron v. United States*, 252 U.S. 450, 455 (1920) (affirming withdrawal of Grand Canyon under the Antiquities Act); *Cappaert v. United States*, 426 U.S. 128, 140 (1978) (holding national monument reservation included reserved water rights necessary to achieve purposes stated in the proclamation).
 - b. In 2013, Interior Secretary Jewell threatened Utah and other states with national monuments if the states did not support wilderness designation. <http://www.latimes.com/local/la-me-interior-secretary-jewell-20131112-story.html>
 - c. A national monument is not wilderness, because there are roads and development. The reservation is limited to stated objectives, rather than managing the land to preserve pristine scenery. For instance, the purpose of the Mohave Trails National Monument is to protect U.S. Highway 66, an operating federal highway. Proclamation No. 9395, 81 Fed. Reg. 8371 (Feb. 18, 2016).
2. Wilderness is a designation that only Congress makes for federal lands that are roadless and pristine. 16 U.S.C. §§1131-1134. It is defined as:
 A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean

in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. §1131©.

3. The western states contain most of the National Forest and public land Wilderness.
 - a. The Forest Service conducted two national reviews, called Roadless Area Review and Evaluation (RARE) I and II, respectively, and often a third through land use planning, 36 C.F.R. 219.27 (1983). The subsequent legislation was intended to resolve the issue for each state.
 - b. Several wilderness acts, including the Utah Wilderness Act of 1984, contained the proviso that the land not designated wilderness was to be managed for multiple use. 16 U.S.C. §1132 n. Pub. L. 98-428, §102(a). This is called release language.
 - c. The release ended with the 2000 Roadless Rule which imposes roadless or *de facto* wilderness management on about 58.5 million acres of National Forest System lands that were released from wilderness review in the 1980s and other lands that were never classified as roadless in previous inventories. 66 Fed. Reg. 3244, 3245 (2001). The rule prohibits new roads and reconstruction of new roads, 36 C.F.R. §294.12, logging, *Id.* at §294.13; and limits access for mineral development, *Id.* at §294.12(b)(7).
 - d. BLM did a one time study to identify wilderness study areas as prescribed by Section 603 of FLPMA. 43 U.S.C. §1782. It inventoried every acre of the 164 million acres of public lands in a two-step process.
 - (1) The lands identified as roadless and of wilderness character were classified as wilderness study areas. The 12.6 million acres are still managed to not impair their wilderness character, 43 U.S.C. §1782©.

- (2) Following a multi-year study in each state, the wilderness recommendations were submitted to Congress by June 1992 and were either adopted by Congress, e.g. Arizona, Pub. L. 98-406, §301, or are still pending, e.g. Colorado, Wyoming, and Utah.
- e. In December 2010, the Interior Secretary ordered BLM to identify public lands said to have wilderness characteristics and to manage them as wildlands. Secretarial Order 3310, (Dec. 23, 2010). Congress froze all federal funding for the wildlands order in April 2011. Pub. L. 112-10, Sec. 1769 (Apr. 15, 2011); Continuing Appropriations Act, 2012, Sec. 101(a)(2) (Sept. 30, 2011); Continuing Appropriations Act, 2012, Pub. L. 112-36, Sec. 101(a)(2); 4th FY2012 Continuing Resolution, Pub. L. 112-67 (Dec. 16, 2011); 5th FY2012 Continuing Resolution, Pub. L. 112-68 (Dec. 17, 2011); Consolidated Appropriations Act, 2012, Pub. L. 112-74, Div. E, Sec. 125 (Dec. 23, 2011); Continuing Appropriations Act, Pub. L. 112-175, Sec. 101(a)(7) (Sept. 28, 2012); Dep't of Defense, Military Construction and Veterans Affairs, and Full-Year Continuing Appropriations Act, 2013, Div. F, Sec. 1101(a)(3) (Mar. 26, 2013).
- f. BLM nevertheless has implemented the policy using different language. Department Manual (DM) 6310, 6320.
- g. The ad hoc policy places unknown millions of acres under wilderness type management without regard to public land use planning process or other public procedure.
- 4. By including developed land under the roadless rule or citizen proposed wilderness areas, the concept of wilderness has drifted considerably from the law's definition.

B. Access to Private Land and Public Road Controversies

- 1. FLPMA repealed R.S. 2477, which provided for a grant of a right-of-way for any road established by public use. 43 U.S.C. §1701, n. 702. The law preserved all roads previously established. 43 U.S.C. §1761(c)(2)(A).
- 2. In 1980, recognizing the potential for loss of access to inholdings, Congress enacted Section 1323 as part of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §3210.
 - a. ANILCA was intended to preserve rights of access to inholdings when previous laws did not expressly grant a right-of-way to land originally patented.
 - b. If a road is not a public road, then agencies issue a permit under Title V of FLPMA to the person who needs to use the

- road. Rentals must reflect fair market value and administrative overhead for processing the permit, 43 U.S.C. 1761(g).
- c. Landowners face charges of thousands of dollars a year to use an unresolved road or road segment, even when the county road crews have routinely maintained the road. This is true just to remove snow.
- 3. BLM and Forest Service refuse to acknowledge public roads even when the history of maintenance and past dealings support the conclusion that the road is public. The agencies will close the road arbitrarily, without comment or notice, on the basis that general language in a land use plan written several years earlier or even a map not showing all of the roads was sufficient.
- 4. There is also a moratorium on recognizing public roads absent litigation. This gives the states or counties no choice but to file suit or risk the loss of public access permanently.
- 5. States and counties must pursue Quiet Title Act litigation just to protect public access. If a lawsuit is not filed within 12 years, then any claim is barred. 28 U.S.C. §2409a.
 - a. Utah filed to quiet title on roughly several thousand roads between 2008 and 2012.
 - b. Other states and counties have followed suit.
- 6. The litigation involving these roads has spawned creative defenses from the United States.
 - a. In one Utah case, the United States successfully argued a case was not ripe unless the United States actually closed the road or classified it as closed in a land use plan. *Kane County v. United States*, 772 F.3d 1205, 1213 (10th Cir. 2014).
 - b. The United States also argued that roadless designation triggered the 12-year statute of limitations. *Bd. of Cty. Commrs. of Catron County v. United States*, 934 F. Supp.3d 1293, 1305 (D. N. Mex. 2013). The Tenth Circuit overruled the New Mexico precedent in *Kane County*, 772 F.3d at 1212.
 - c. The United States will also discount public use by ranchers or oil company contractors claiming the use has been authorized and it is therefore private not public. *San Juan County v. United States*, 754 F.3d 787, 800 (10th Cir. 2014). This view was also rejected in *Kane County v. United States*, 2013 WL 1180764, pp. 45-47 (D. Utah 2013), *rev'd and remanded on other grds.*, 772 F.3d 1205 (10th Cir. 2014).

C. Lack of Due Process & Pattern of Agency Retaliation

- 1. In 1994, Congress directed the Forest Service to mediate all grazing decisions. 7 U.S.C. §5101(c)(1)(E).

- a. The Forest Service rules implementing mediation exclude virtually all grazing decisions, 36 C.F.R. §222.6 (2012).
 - b. The agency routinely refuses to honor mediation requests from state agriculture agencies.
- 2. In 2012, Congress repealed the Forest Service Decision and Appeals Reform Act to limit appeals of timber sales to a pre-decision objection process. Sec. 428, Pub. L. 112-74, 125 Stat 1046.
 - a. Repealing administrative appeals to short circuit timber sale appeals also repealed appeal rights for grazing permittees, special use permittees and those holding rights-of-way permits.
 - b. Unless able to pursue the case against Forest Service in federal court, these users of the National Forests have no administrative recourse.
 - c. This immunity from administrative review encourages poor and arbitrary decisions. Only a month ago, a forest supervisor closed five grazing allotments on the basis it was not convenient to manage them due to conflicts with predators.
- 3. Retaliation – an increasing problem.
 - a. *Robbins v. BLM*
 - (1) BLM tried to intimidate landowner to convey BLM an administrative easement across his land. Robbins refused to grant an administrative right-of-way.
 - (2) BLM employees in Cody, Wyoming office then embarked on a well-documented campaign of retaliation. *Robbins v. BLM*, 252 F. Supp.2d 1286, 1301 (D. Wyo. 2003) (denying dismissal of retaliation claims).
 - (3) While the Supreme Court held that BLM employees enjoy quasi-sovereign immunity, *Wilkie v. Robbins*, 551 U.S. 537 (2007), no one disputed the fact that one man became the target of a vicious campaign.
 - b. The underlying facts of the Hammond prosecution that led to the Malheur Wildlife Refuge controversy reflect a similar campaign of retaliation and intimidation.
 - (1) The history of the wildlife refuge since World War II reveals a decades-long campaign to oust settlers and ranchers.
 - (a) The USFWS unsuccessfully challenged the validity of the homestead patents on grounds that the survey was wrong or the lake was navigable. *United States v. Otley*, 127 F.2d 988 (9th Cir. 1942) (denying cancellation of patents and finding errors in survey not sufficient grounds to set aside the land transfer).

- (b) USFWS used declarations of taking and condemnation proceedings to take private land within the boundaries of the Malheur Wildlife Refuge. *United States v. Carey*, 143 F.2d 445 (9th Cir. 1944) (upholding condemnation proceedings to acquire land in refuge); *United States v. Hayes*, 172 F.2d 677 (9th Cir. 1947) (setting aside jury's award for more money in land condemnation).
 - (c) More recently, the USFWS canceled grazing permit in the refuge and removed the Mahon Dam, that further devalued ranches. *Maupin v. Opie*, 964 P.2d 1117, 1121 (Or. App. 1998).
- (2) USFWS condemnation practices continued despite scathing criticism of federal agency acquisition practices. *The Federal Drive To Acquire Private Lands Should Be Reassessed* (CED-80-14) (December 14, 1979).
- (3) The BLM and USFWS denied the Hammonds a right-of-way to divert water rights certificated by the State of Oregon.
- (4) The arson charges arose from a private land controlled burn that escaped and burned 120 acres of public land in 2006. The second fire was a backburn started on private land in 2010 that involved less than one acre of public land. The government rarely if ever prosecutes anyone for arson on these facts.
- (5) The sentencing enhancement for domestic terrorism deviates from case authority. Underlying conviction was conspiracy to kill non-Muslims, *U.S. v. Hassan*, 742 F.3d 104, (4th Cir. 2014), cert. denied 134 S.Ct. 2737, cert. denied 135 S.Ct. 157, cert. denied, 135 S.Ct. 192. There was no evidence that the criminal activity was intended to change the conduct of the government or was connected to terrorism acts. 18 U.S.C. §2332(g)(5)(B). *U.S. v. Stewart*, 590 F.3d 93 (2nd Cir. 2009), rehearing en banc denied 597 F.3d 514, cert. denied 559 U.S. 1031 (2009) (affirming denial of terrorism sentence enhancement when there was no evidence of intent to affect government's conduct.).
- c. If the Hammonds can be sentenced for terrorism then anyone acting to disagree with federal agency and faces similar threat. For instance, Tim DeChristopher gained notoriety when he bid on several oil and gas leases in Utah with no intention of

paying for them. He was convicted of perjury and interference with a federal mineral lease auction. *United States v. DeChristopher*, 695 F.3d 1082 (10th Cir. 2012). Based on his own defense and testimony, he committed the felonies to change the conduct of the government. This fits squarely within the domestic terrorism sentencing enhancement applied to the Hammonds and also demonstrates how easily the law can be misused.

- d. Public land users face the risk of retaliation daily.
 - (1) An elderly permittee was thrown to ground by BLM SWAT Team when he arrived for an appointment with Field Manager to discuss the reasons he was found cleaning up trash on public lands.
 - (a) BLM admitted that this action was designed to intimidate other permittees in the same Field Office.
 - (b) Notwithstanding sweeping accusations of dumping trash on federal lands and excavating, the parties entered into a plea agreement to grazing livestock without a permit.
 - (2) People plowing a road during the winter are threatened with similar treatment just to get home from work every day.
 - (3) Federal land managers threaten permittees if they exercise their appeal rights. Ranchers routinely find themselves subject to campaigns of intimidation and harassment if they file an appeal or protest.

D. Wildfire and Wildfire Control

The past 16 years have seen significant wildfire activity. Regardless of whether the cause is fire suppression, failure to manage vegetation, i.e. logging and the buildup of fuel loads, disease and insect infestations, or climate change, or some combination of the above, the fact remains that millions of acres of timber have burned each year.

- 1. Wildfire at the current scale has significant adverse environmental impacts to soils, vegetation, wildlife and wildlife habitat, and water and air quality.
- 2. The western states are increasingly alarmed at the size and intensity of the fires and the federal agencies inability to adopt measures that will address the extent and intensity of wildfire.
- 3. The promises of the Healthy Forest Restoration Act with selective harvests and removal of diseased and dead timber have not been fulfilled.

- a. Vegetation projects cover a few thousand acres when tens of thousands of acres in the watershed are at risk. Approval takes as long as five years or more.
 - b. Many municipal watersheds are at risk due to the extent of disease, dead timber, and inability of agencies to act.
- 4. Federal agencies demand control over fire suppression efforts, even when local agencies can respond quickly. The Forest Service canceled long-standing permission for third parties to suppress wildfire.
- 5. Federal agencies deny responsibility when their controlled burns escape.
 - a. 2013 Pautre Fire Grand River controlled burn escaped when predictions of high winds were ignored.
 - (1) It burned more than 10,679 acres of mostly private land and burned out ranching families who lost fences, calves, and entire herds due to smoke inhalation.
 - (2) The Forest Supervisor initially said that the agency would pay for the damage because it was liable.
 - (3) The Supervisor then recanted and after more than two years of deliberation, the Forest Service denied the claims on the basis there was no negligence in proceeding with the fire despite the high wind warning.
 - (4) The landowners filed suit in South Dakota federal court in December 2015. *Casper v. United States*, Civ. No. 15-05087-V (W.D. S.D.)
- 6. Arson incidents: the dirty secret in the firefighting community.
 - a. Several Arizona and southern California fires were linked to Forest Service arson investigator. The fires stopped once he was arrested for threatening Senator Boxer.
 - b. The 2002 Hayman Fire in Colorado was started by Forest Service part-time employee.
 - c. The Forest Service collaborated with California Forestry Department to use a fraudulent fire investigation to secure payment from the timber companies in the 2007 Moonlight Fire. *Cal. Fire and Forestry Dept. v. Howell*, No. GNCV0900205, (Plumas County, Cal. Supr. Ct.).
 - (1) The California court found state and federal fire investigation was fraudulent because Forest Service and state investigators covered up the points of origin that negated the theory that the timber companies were liable.
 - (2) The state court set aside action by California Forestry Department to collect against timber companies, including Sierra Pacific Industries and awarded costs

and sanctions against Cal Fire for prosecuting the case using fraudulent investigation. *Id.* 2104 WL 8774725 (Plumas County Cal. Supr. Ct. Feb. 4, 2014).

- (3) Timber companies sued to set aside the federal settlement on the basis that it was procured by fraud. It failed in District Court and is on appeal. *United States v. Sierra Pacific Industries*, No. 15-15799 (9th Cir. pending).

E. Water Rights

1. Objections to water diversions.
 - a. BLM denies right-of-way to divert water for reasons that attempt to regulate the use of water, such as denying right-of-way to divert water on grounds that it would adversely affect vegetation. *Stewart Hayduk*, 133 IBLA 346 (1995). Neither BLM nor the Forest Service has authority to regulate the use of water, which is vested in the state.
 - b. Under the Appropriation Doctrine, the owner of a water right is entitled to use his water, including a diversion. Without the ability to divert water, agency policy effects a taking of the water right.
2. The Forest Service conditioned ski area permit renewal on transfer of ski area water to agency as a condition of the permit renewal.
 - a. The Forest Service in 2004 added a clause that water rights would be jointly owned by ski area permittee and the United States.
 - b. In 2011, the Forest Service issued directive that required transfer of water rights for all new and reissued/modified special use permits and also required this to include water originating on non-federal lands but passing through federal lands or being used on federal lands. In 2012 the FS issued revised directive with somewhat clearer language.
 - c. The Forest Service justified the policy as necessary to prevent a ski area from selling water rights to third-party developers, rather than 'keeping the water with the land.'
 - d. The National Ski Areas Association sued the FS in 2012. The District Court vacated the directive because the Forest Service failed to adopt the policy in accordance with rulemaking procedures. *National Ski Areas Assn. v. Forest Service*, 910 F. Supp.2d 1269, 1286 (D. Colo. 2012).
 - e. A new directive was drafted with public comment and took effect January 29, 2016. The new directive requires that ski areas document the existence or capacity to obtain sufficient

water rights for operation of the ski area for the duration of the permit - but ski areas maintain private (or joint) ownership of the water rights.

F. Wild Horse Management

1. The Wild Horse Act imposes the obligation to manage wild horses on the Interior Department and the BLM.
 - a. Agency internal memos admit BLM cannot manage populations or support gathered wild horses and even recommended euthanasia. Memorandum to Greg Shoop from Joan Guilfoyle August 2013.
 - b. Retired BLM employees have demonstrated the effect of not controlling numbers through gathers.
2. BLM responded by closing holding facilities to control costs and suspending gathers due to the shrinking adoption demand for wild horses.
3. Lawsuits in Utah and Wyoming forced BLM to resume gathers but the impacts on resources remain unaddressed.
4. BLM does not separately monitor the impacts of wild horse grazing.

G. Invasive / Non-native Species Control

1. Post-Fire sites feature extensive weed infestations. The bare ground and lost biological material from the soils will delay return of native vegetation.
2. The Forest Service, in particular, does not spray or hand pull infestations, thus substituting non-native plants for native plants burned in fire.
3. Federal agencies blame user groups, typically recreation vehicles or livestock, even though wind, birds and wildlife are the documented vectors for non-native plants.
4. Agencies introduce species that disrupt ecosystem.
 - a. Prairie dogs in Conata Basin
 - (1) Forest Service originally claimed prairie dog populations would not increase if it removed livestock because the tall grasses would deter breeding.
 - (2) Livestock were removed in 1992.
 - (3) The prairie dogs have exceeded the resource, leaving bare ground.
 - (4) Plague routinely wipes out prairie dog populations but native vegetation will not necessarily return and the bare ground encourages noxious weeds.
 - b. Federal agencies planted crested wheatgrass which is now viewed as non-native species to be eradicated. The agencies

will often blame the livestock industry for the lack of native vegetation i.e. crested wheatgrass, even though the cause is traced directly to the federal agencies.

V. WHAT HAS NOT WORKED

A. Collaboration with Federal Agencies on Projects and Plans

1. Legal Framework

- a. NEPA rules require the federal agencies to grant cooperating agency status to state, tribal and local governments, 40 C.F.R. 1501.6, when local government has either jurisdiction or special expertise.

- (1) In 1999 the Council on Environmental Quality (CEQ) directed all federal agencies to extend invitations and to grant requests. *Designation of Non-federal Agencies to Be Cooperating Agencies In Implementing the Procedural Requirements of The National Environmental Policy Act* (1999).

- (2) To resolve conflicts and clarify obligations the CEQ issued a second directive in 2002. *Factors for Determining Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status* (2002).

- (3) BLM adopted a Handbook to facilitate cooperating agency process. *A Desk Guide to Cooperating Agency Relationships* 2005.

- b. NFMA and FLPMA both require the federal land agencies to coordinate with states, tribes, and local governments on land management and land use planning.

- (1) 16 U.S.C. 1604(a) "As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies."

- (2) 43 U.S.C. §1714(c)(9) "coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments. . ."

2. States and counties routinely ask to participate as cooperating agencies.

- a. Forest Service has no cooperating agency direction and denies requests with excuses like another government agency can represent the local government's interests, it would violate the Federal Advisory Committee Act, 5 U.S.C. App. §2; there is no jurisdiction, or they just do not feel like it.
 - b. BLM has adjusted to cooperating agency process but generally does not extend invitations. Local governments instead must follow NEPA projects, many of which are not consistently disclosed.
3. As cooperating agencies, local governments are often treated as second class citizens.
 - a. Arizona withdrawal counties were excluded from most of the meetings, were not allowed to review materials except in the meeting room, and were told they could not secure expert review of technical documents.
 - b. In North Dakota, the Forest Service never met with the affected county, did not provide access to most of the plan revision documents, and made it as uncomfortable as possible to even get copies of the relevant files to prepare meaningful comments.
 - c. Local governments often lack the staff and are outnumbered at meetings where federal and state agencies will send five or six people to a single local government official. BLM has attempted to limit local government participation to only one elected official even though the other participants send more people. BLM also tried to exclude consultants hired instead of a full time employee on the grounds it violated the Federal Advisory Committee Act.
4. Elsewhere BLM and Forest Service, to a lesser extent, have come to accept the cooperating agency participation but there are limits.
 - a. Local government suggestions, comments, and data are rarely, if ever used.
 - b. This is particularly true for roads where counties produce maps and shape files that are discarded.
 - c. This is true even when local governments tie their comments to the agencies own requirements.
5. After 15 years of concerted effort collaboration is not working.

B. Better Local Government Plans

1. For past 20 years, counties and conservation districts have been developing plans relevant to federal lands.
2. State agencies were less likely to have land use plans because land use planning jurisdiction is vested with local governments. Utah

adopted state land use planning title to directly address the gap. Utah Code §§63J-8-101-108.

3. FLPMA requires BLM to be consistent with state, tribal, and local plans so long as not contrary to federal law. 43 U.S.C. §1712(c)(9). The consistency review however occurs between BLM and the state, thereby excluding the local governments. 43 C.F.R. §1610.3-2.
4. Notwithstanding these requirements, in no case has BLM modified a land use plan to be consistent with a state or local government plan.
 - a. BLM may conclude it is generally consistent but dismisses inconsistencies.
 - b. The Wyoming Sage Grouse land use plan revision is a case in point where the state plan treats grazing as a *de minimus* impact and the federal plan imposes mandatory 7 inch stubble height. The federal plan doubled the land to be protected.
5. NFMA has no similar requirement and the Forest Service does not incorporate local government objectives into plan revisions.

VI. ALTERNATIVES: So if collaboration and better land use plans are not the answer, then what is?

- A. The United States and the federal land agencies in particular need to become a better neighbor.
 1. There needs to be a wholesale culture change within the federal land management agencies. No more threats or retaliation.
 2. The Forest Service needs to rescind its administrative appeal rules and initiate a process provides for meaningful due process.
 3. Both agencies need to enter into agreements that allow for public access and better management of vegetation, wildfire, and wildlife.
 4. All federal agencies need to work in good faith with state and local governments, rather than selective coordination while ignoring the issues that are the backbone of local governments.
- B. If the federal agencies do not make this cultural shift, then the western states will proceed to pursue land transfer: litigation or Congress or both
- C. Secession: The question of secession is usually the punch line but it was seriously debated in Alaska in 1981 and has enjoyed a resurgence.

VII. CONCLUSION

The extent of the problems and conflicts cannot be understated. The lack of equity is obvious. The western states cannot function effectively without equitable land ownership base. The time is long past for Congress or the courts to make this right.