COLLABORATIVE FEDERALISM: THE SAGE GROUSE SOLUTION TO THE SAGEBRUSH REBELLION

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ABSTRACT

The federal government manages an estimated 643 million acres of public lands across the United States. Roughly 93 percent of those acres lie in 12 western states: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Starting in Utah in 2012, a movement calling for the transfer of federal lands gained traction in the other western states and with their representatives in Congress. Senator Orrin Hatch (R-UT) vocally supported the Sagebrush Rebellion of the 1970's and has continued to call for the transfer of federal lands to the states. Focusing on two states' legislative actions, this article explores the similarities between the Sagebrush Rebellion and the current transfer movement. It posits that this movement is nothing new, but merely an extension of the decades-old debate over public lands ownership. The article then suggests solutions to the frustration in the West which are less permanent than transferring title to the states.

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> *Generally, land grants by the federal government are construed strictly, and nothing is held to pass to the grantee except that which is specifically delineated in the instrument of conveyance*.[1]

I. INTRODUCTION

The Property Clause of the United States Constitution grants Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[2] This principle is not only enshrined in our Constitution, but James Madison recognized the necessity of state sacrifice in order to preserve a union of states in Federalist Number 14.[3] A distinct population of westerners have been questioning this authority for 40 years. Starting in the 1970's with the Sagebrush Rebellion and continuing today under the name of "wise use," Ammon Bundy and his cohort's 2016 occupancy of the Malheur National Wildlife Refuge was just a more recent - perhaps more heavily armed - instance of civil disobedience in response to the 1976 Federal Land Policy and Management Act (FLPMA).[4] Americans are critical of the federal government for various motivations, but perhaps the most entrenched form of anger exists in the West. Expansion into the far reaches of our country occurred under incredible federal encouragement,[5] but, as populations became established and flourished, the federal government recognized the need to change its land management scheme.[6] In what could be seen as an about-face, the federal government tapped into its Property Clause power to enact

[1] Utah v. Andrus, 486 F. Supp. 995, 1001 (D. Utah 1979).
[2] U.S. CONST. art. IV, § 3, cl. 2.
[3] THE FEDERALIST NO. 14 (James Madison) ("[A]lmost every State will, on one side or other, be a frontier, and will thus find, in regard to its safety, an inducement to make some sacrifices for the sake of the general protection").
[4] 43 U.S.C. §§ 1701-1787 (2012); Assoc. Pres., *Guilty Verdicts for 4 Men in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Mar. 10, 2017), https://www.nytimes.com/2017/03/10/us/wildlife-refuge-guilty-verdicts-takeover-oregon.html.
[5] The Homestead Act of 1862, ch. 75, 12 Stat. 392.
[6] *See* Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934); Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971); Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2743 (1976).

the Federal Land Policy and Management Act and officially end the era of homesteading[7] in the West.[8] The West staunchly opposed, and fights over public lands continue to this day.

This article briefly details the history of the Sagebrush Rebellion from its origins in the 1970's[9] to the current debate occurring in state legislatures across the west.[10] The article then focuses on oil and gas leasing as an example of the difference between federal and state land management schemes, and does so by comparing the competing mandates under which federal and state land managers operate.

This article argues that, while the federal process for opening lands to oil and gas development[11] burdens and slows economic and technological development, the states should stop advocating for the transfer of federal lands.[12] President Trump and Secretary Zinke are on record opposing the transfer,[13] so the odds of the transfer movement being successful are remote. Rather, westerners should advocate for increased collaboration between all stakeholders[14] to increase efficient and effective land planning. The Bureau of Land Management was in the process of promulgating a new rule in 2016, "Land Planning 2.0," which would have addressed many of the

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[7] The practice under the Homestead Act of 1862 of giving settlers in the West a parcel of federal land at no cost.
[8] 43 U.S.C. §§ 1701-1787 (2012).
[9] Depending on the article, the Rebellion started as early as 1971 or as late as 1979. Professor Robert L Fischman locates the beginning of the rebellion at the passage of the Wild Free Roaming Horses and Burros Act of 1971. Robert L. Fischman, *The Story of* Kleppe v. New Mexico*: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 COLO. L. REV. 101, 129 (2011). However, Professor John D. Leshy asserts the Rebellion began in 1979 when the Nevada legislature legitimized the movement by passing federal land transfer legislation. John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).
[10] *See infra* note 59.
[11] The process is similar for most mineral or industrial uses of federal lands, but this article uses the oil and gas lens to provide an example of the problem and the solution.
[12] Kirk Siegler, *Push to Transfer Federal Lands To States Has Sportsmen On Edge*, NAT'L PUB. RADIO (Jan. 5, 2017), http://www.npr.org/2017/01/05/508018599/push-to-transfer-federal-lands-to-states-has-sportsmen-on-edge.
[13] Michelle Nijhuis, *What Will Become of Federal Lands Under Trump?*, NEW YORKER (Jan. 31, 2017), http://www.newyorker.com/tech/elements/what-will-become-of-federal-public-lands-under-trump; *Morning Edition: Rep. Zinke Chosen To Head Interior, Published Report Says*, NAT'L PUB. RADIO (Dec. 14, 2016).
[14] Stakeholders include states, ranchers, industry, environmentalists, and tribes.

issues raised by the Sagebrush Rebellion and its progeny.[15] Unfortunately, the rule was eliminated by the House of Representatives under the Congressional Review Act before it could have a real impact.[16] Although Land Planning 2.0would have been a move in the right direction, more collaborative land management between the federal government and the states is needed to address states' rights concerns in the West without seriously jeopardizing the ecological health of the region.[17]

II. THE SAGEBRUSH REBELLION

The argument over public lands management in the West is nearly as old as the United States itself.[18] When Illinois, Indiana, and Ohio were still considered "western" states, a movement already existed to transfer federal lands to states. As the western reach of the country found its way to the Pacific the debate did not change timbre, only location.[19]

A. The Origins of the Rebellion

In 1976, the federal government enacted FLPMA.[20] Three years later a civil disobedience movement began in Nevada that would become known as the Sagebrush Rebellion.[21] Claiming that the "[t]he exercise of such dominion and control of the public lands within the State of Nevada by the United States works a severe, continuous, and debilitating hardship upon the people of the State of Nevada,"[22] the Nevada State Legislature defined public lands as "all lands within the

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[15] Resource Management Planning, 81 Fed. Reg. 89580 (Dec. 12, 2016).
[16] Sarah G. Vilms & Mallory A. Richardson, *Resolution Repealing BLM's Planning 2.0 Rule Sent to President; Vote on Rescinding Methane Rule Put on Hold*, THE NAT'L REV. (Mar. 13, 2017), http://www.natlawreview.com/article/resolution-repealing-blm-s-planning-20-rule-sent-to-president-vote-rescinding.
[17] *See infra* Part III.
[18] 4 REG. DEB. 151 (1828) (Sen. Hendricks of Indiana introduced an amendment to cede all public lands within existing states).
[19] Arizona, Montana, Nevada, New Mexico, Utah, and Washington have all passed legislation calling for the transfer of public lands.
[20] 43 U.S.C. §§ 1701-1787 (2012).
[21] NEV. REV. STAT. § 321.596 (1979) (The Nevada legislature passed an act redefining public lands and demanding the transfer of most federally-held lands within its borders).
[22] NEV. REV. STAT. ANN. § 321.596(7) (1979).

exterior boundaries of the State of Nevada," except certain lands held by private persons, or various federal agencies including the Departments of Defense and Energy, and the Bureau of Reclamation.[23] Following passage of Nevada Assembly Bill 413, five other western states passed similar legislation.[24] While the Nevada statute only went as far as to redefine the term "public lands," it created a movement that swept across the West.

The Sagebrush Rebellion did not just exist in dead letter legislation; it found its way to the Supreme Court[25] and to various other federal district courts.[26] In response to federal legislation restricting open use of the federal public lands,[27] the state of New Mexico filed suit against the Secretary of the Interior in an effort to protect ranchers' priority to federal lands for cattle grazing.[28] The filings in the Supreme Court for *Kleppe v. New Mexico* included 11 *amicus* briefs[29] that advocated a wide variety of positions.[30] New Mexico challenged the Wild Free-Roaming Horses and Burros Act, alleging that the federal government had no authority to control wild animals on public lands unless they were traveling in interstate commerce.[31] The Supreme Court of the United

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[23] NEV. REV. STAT. ANN. § 321.5963(2) (1979).
[24] ARIZ. REV. STAT. ANN. § 37-901 (2017); N.M. STAT. ANN. § 19-15-9 (repealed 1981); UTAH CODE ANN. § 65-11-1-9 (uncodified but still in full force and effect 1988); WASH. REV. CODE § 79.80.020 (2017) (transferred, now WASH. REV. CODE § 79.02.010 (defining "public lands" as "lands of the state of Washington administered by the department…")); WYO. STAT. § 36-12-103 (2017).
[25] Kleppe v. New Mexico, 426 U.S. 529 (1976).
[26] *See* United States v. Nye Cty., 920 F. Supp. 1108 (D. Nev. 1996); United States v. Bundy, No. 2:16-cr-00046-GMN-PAL, 2016 U.S. Dist. LEXIS 182437 (D. Nev. Dec. 20, 2016); S.D. Mining Ass'n v. Lawrence Cty., 977 F. Supp. 1396 (D.S.D. 1997); United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997); United States v. Hage, No. 2:07-cv-01154-GMN-VCF, 2017 U.S. Dist. LEXIS 26992 (D. Nev. Feb. 27, 2017); Wilderness Soc'y v. Kane Cty., 560 F. Supp. 2d 1147 (D. Utah 2008); United States v. Garfield Cty., 122 F. Supp. 2d 1201 (D. Utah 2000); Colvin Cattle Co. v. United States, 67 Fed. Cl. 568 (Fed. Cl. 2005).
[27] Wild Free-Roaming Horses and Burros Act ("WFRHBA"), 16 U.S.C. §§ 1331-1340 (2012).
[28] Fischman, *supra* note 9 (detailed history of the *Kleppe* case).
[29] 426 U.S. 529 (1976) (*Amici curiae* included representatives to some degree from Idaho, Nevada, and Wyoming, as well as the Pacific Legal Foundation.).
[30] Fischman, *supra* note 9. ("The states took a shotgun approach to the case, attacking the [Wild Free-Roaming Horses and Burros Act] on every conceivable front").
[31] *Kleppe*, 426 U.S. at 533.

States rejected this argument, holding that the federal government had the authority under the Property Clause, regardless of the interstate nature – or lack thereof – of the horses and burros.[32]

The rebels voiced three concerns with the trend of federal legislation during the early to mid 20th Century: (1) the restriction on their traditional, relatively free, use of the public lands; (2) their dismissal from decision-making processes; and (3) the observed disconnect between the stated intent, goals, and policy of federal land management and the actual practice.[33] For them, FLPMA marked another move away from the open lands era of the past and further removed federal lands from what they considered the public domain.[34] The succession of federal legislation reserving public lands threatened the rebels' way of life and signaled that environmental concerns would supplant their economic interests.[35] Arguably beginning with the Theodore Roosevelt administration and the passing of the Reclamation Act in 1907, the federal government underwent various public land policy phases.[36] As environmental advocacy increased, all kinds of western, traditional industries saw themselves cut off from public lands and perceived the ejection as permanent.[37]

However, FLPMA did not turn out as preservationist in nature as rebels feared. By signaling that no use was *superior* to another, but that one use may be *more appropriate* to certain parcels of land, the federal government attempted to satisfy western groups that would become

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[32] *Id.* at 546.
[33] R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER, 41-42 (1993).
[34] General Acct. Off., LEARNING TO LOOK AHEAD: THE NEED FOR A NATIONAL MATERIALS POLICY AND PLANNING PROCESS 29-30 (1979) (The rebels had seen the number of available public land acres decrease for at least a decade prior to the passage of FLPMA. "At one time, 90 percent of all Federal lands were available for mineral exploration and development. However, beginning with the passage of the Wilderness Act of 1964, which created 9.1 million acres of federally protected wilderness areas, successively more and more public land throughout the United States has been declared off-limits to mining.").
[35] *See* CAWLEY, *supra* note 33, at 42.
[36] Jeffrey M. Schmitt, The Property Clause in Congress: A Historical Argument Against the Public Land Transfer Movement 4-5 (Feb. 28, 2017) (unpublished manuscript) (on file with author).
[37] CAWLEY, *supra* note 33, at 53 ("At one level, then, the general pattern in the mining area mirrored that in the grazing area: the ascendancy of the environmental movement led to increasing restrictions on commodity use.").

Sagebrush rebels, as well as conservation and environmental interest groups.[38] FLPMA did not divert from traditional federal policy; in fact, the federal government had more or less adhered to the restrictive practices complained of for decades.[39] Additionally, the timing of curtailed access to federal lands may have coincided with negative global economic trends, especially for westerners involved in mineral development.[40]

Similar to the modern day land transfer movement discussed below, the Sagebrush Rebellion received Congressional support in various ways. Representative Manuel Lujan (R-NM) introduced a bill that would have transferred 400,000 acres to New Mexico in exchange for the federal reservation of White Sands Missile Range.[41] Following Congressman Lujan's lead, Senator Harrison H. Schmitt (R-NM) proposed an extension to the White Sands transfer that would have allowed states to select federal lands in exchange for all federal military reservations.[42] Finally, in a strange attempt to resurrect the now officially defunct Homestead Act, Representative Philip M. Crane (R-IL) proposed legislation that would have allowed an applicant to receive not more than 160 acres of federal land after paying a token fee and building a house within three years.[43] None of these bills became law, but they serve as an analogy between the transfer movement of the Sagebrush Rebellion and the transfer movements of the 21st Century.

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[38] H. RPT. 9401163 (May 15, 1976) ("The underlying mission proposed for the public lands is the multiple-use of resources on a sustained-yield basis… The proper multiple use mix of retained public lands is to be achieved by comprehensive land use planning, coordinated with State and local planning.").
[39] *See, e.g.*, Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316o (regulating the use of public lands for grazing); Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (regulating the use of public lands for energy resource development).
[40] CAWLEY, *supra* note 33 (The new mineral sources available following World War II may have led to a decrease in domestic use of domestically produced minerals, which happened to occur as the Outdoor Recreation Resources Review Commission published its first findings on mineral development in areas being considered for the wilderness system that would be set aside under the Wilderness Act of 1965).
[41] H.R. 1137, 97th Cong., 1st Sess. (1981).
[42] S. 254, 97th Cong., 1st Sess. (1981).
[43] H.R. 2951, 97th Cong., 1st Sess. (1981).

B. Current Trends in Old Fights

The tension between states and the federal government over the public lands, as shown above, is not new, but renewed tensions in the 21st century have rekindled the debate. In 2012, Utah began a calculated and elaborate process to not only demand the transfer of federal lands, but also to show the federal government its preparedness to take on the responsibilities of managing these lands.

On January 2, 2016, a group of people protesting federal ownership of public lands took over the Malheur National Wildlife Refuge in Oregon.[44] Ammon Bundy and his fellow occupiers did not reinvent the wheel when they occupied the Malheur National Wildlife Refuge in 2016; they simply did it with a 24 hour news cycle.[45] Some configuration of these occupiers remained in armed control of the refuge until February 11, 2016 when they surrendered to law enforcement.[46] During and following the standoff, occupation leader Ammon Bundy made statements citing federal abuse of power as explanation for the occupation and said the occupation was necessary to secure the rights of ranchers and land users across the West.[47]

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[44] OregonLive, *Oregon standoff timeline: 41 days of the Malheur refuge occupation and the aftermath*, OREGONIAN (Oct. 27, 2016), http://www.oregonlive.com/oregon-standoff/2016/10/oregon_standoff_timeline_41_da.html.
[45] The occupation was covered by arguably every major news source in America, a few examples are: Kirk Johnson & Jack Healy, *Armed Group Vows to Continue Occupation at Oregon Refuge*, N.Y. TIMES (Jan. 3, 2016), https://www.nytimes.com/2016/01/04/us/armed-group-vows-to-hold-federal-wildlife-office-in-oregon-for-years.html; Sarah Kaplan & Mark Berman, *FBI blockades Oregon wildlife refuge after arrests; authorities, occupation leader urge group to leave*, WASH. POST (Jan. 27, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/27/leaders-of-armed-group-occupying-oregon-wildlife-refuge-arrested-one-killed-in-shootout/?utm_term=.ee8ccad01589; Jim Carlton, *Oregon Protesters Show Little Sign of Leaving*, WALL ST. J. (Jan. 6, 2016), https://www.wsj.com/articles/oregon-protesters-show-little-sign-of-leaving-1452121039; *Ammon Bundy: Oregon protesters want to prevent war with the government*, FOX NEWS (Jan. 11, 2016), http://www.foxnews.com/us/2016/01/11/ammon-bundy-oregon-protesters-want-to-prevent-war-with-government.html.
[46] *Id.*
[47] *Id.*

Another revival of the Sagebrush Rebellion debate occurred in 2016, when Aubrey Dunn promoted and sponsored the New Mexico Early Childhood Education Land Grant Act,[48] but lost its momentum during the 2017 legislative session.[49] The House passed the constitutional amendment,[50] but the Senate Rules Committee tabled it.[51] If passed, the Act would have created an early child education permanent fund similar to the permanent fund already used to fund schools in New Mexico.[52] The Act called for the transfer of only federally held mineral interests in the state of New Mexico, not any of the surface estate.[53] This legislation was novel only in the sense that it focused the anger of the Sagebrush Rebellion into one industry – mineral development.[54] The Act failed, but it may be the next phase of western states' claims to state rights. Congress seems, at the least, interested in hearing ideas to limit the federal government's role.[55]

1. An Incredibly Brief Primer of Federal Oil & Gas Complexities

Allan K. Fitzsimmons summarized the complexity of oil and gas development on the federal lands in a series of estimates provided by the Departments of the Interior, Agriculture, and Energy in their *Inventory of Onshore Federal Lands' Oil and Gas Resources*.[56] With these kinds

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[48] The Early Childhood Land Grant Act, S. Bill 182, 53rd Leg. (N.M. 2017) (introduced by Mary Kay Papen in the New Mexico Senate on Jan. 25, 2017).
[49] Andrew Oxford, *Panel delays vote on early childhood ed initiative*, SANTA FE NEW MEXICAN, Mar. 13, 2017, http://www.santafenewmexican.com/news/legislature/panel-delays-vote-on-early-childhood-ed-initiative/article_c1d33b7d-ed1b-58ab-8ccc-014c57738773.html.
[50] H.R.J. Res. 1, 53rd Leg. (N.M. 2017).
[51] The Early Childhood Land Grant Act, H.R.J. Res. 1, 2017 Sess. (N.M. 2017), https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=182&year=17.
[52] S. Bill 182, 53rd Leg., § 3 (N.M. 2017).
[53] S. Bill 182, 53rd Leg., § 2 (N.M. 2017).
[54] S. Bill 182, 53rd Leg. (N.M. 2017) (The Act only calls for the transfer of federally owned mineral interests in the state of New Mexico, and does not call for the transfer of any federally owned surface interests.).
[55] Schmitt, *supra* note 36.
[56] Two hundred seventy-nine million federal acres lie astride technically recoverable oil or gas resources; Sixty percent of the 279 million acres are inaccessible for oil and natural gas exploration and development for one legislative or administrative reason or another; Twenty-three percent of the 279 million acres can be reached only under various conditions that exceed the requirements of standard lease terms; The remaining 17 percent of the 279 million acres are available using standard leasing provisions; Federal lands overlay an estimated 30.5 billion barrels of oil and 231 trillion cubic feet of natural gas; The restrictions put 62 percent of the country's potentially exploitable oil resources and 41 percent of the natural gas resources completely out of bounds; Thirty percent of the oil and 49 percent of the

of restrictions on oil and gas development on federal lands, the timeline between starting to create a land use plan and production can take up to three decades.[57] These restrictions make the states wait to receive their 50 percent[58] of revenue much like industry must wait to begin production. In response to these restrictions, delays, and other controls on the use of federal lands for grazing, recreation, and access, many western states have either passed legislation or considered legislation that would demand a federal transfer.[59]

2. Utah

In 2012, Utah passed its Transfer of Public Lands Act (TPLA), redefining "public lands" to include all lands within its exterior borders, except certain lands already designated for various purposes by the federal government.[60] Similar to Nevada's legislation at the beginning of the Sagebrush Rebellion, Utah's legislation demands the transfer of most federal lands within its borders.[61] Any transfer of federal lands requires Congressional action, per the Constitution,[62] but the state has support lobbying Congress.[63] The Republican National Committee issued a resolution in support of the movement, albeit while wildly mischaracterizing the original transfers of land

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natural gas resources are available only under conditions that exceed those contained within standard leases; and Eight percent of the oil resources and ten percent of the gas resources might be tapped under standard lease provisions. ALLAN K. FITZSIMMONS, REFORMING FEDERAL LAND MANAGEMENT: CUTTING THE GORDIAN KNOT, 5-6 (2012) (citing to *Inventory of Onshore Federal Lands' Oil and Gas Resources* (no longer available online)).

[57] PATRICK H. MARTIN ET AL., THE LAW OF OIL AND GAS; CASES AND MATERIALS 1035-36 (10th ed. 2017).

[58] 30 U.S.C. § 191(c)(2)(A) (2012); *but see* 30 U.S.C. § 191(b) (2012) (reducing the amount of payments to States by two percent starting "fiscal year 2014 and for each year thereafter").

[59] H.R. Con. Res. 22, 62nd Leg., 1st Reg. Sess. (Idaho 2013) (adopted); H.R. 228, 62nd Leg., Gen. Sess. (Wyo. 2013) (adopted); A.B. 227, 77th Reg. Sess. (Nev. 2013) (enacted); S.J.R. 15, 63rd Reg. Sess. (Mont. 2013) (adopted).

[60] UTAH CODE ANN. §§ 63L-6-101-104 (2016) (explicitly not claiming any state rights to lands held by private parties, lands held in trust by Utah, common school lands, national parks, national monuments, historic sites, wilderness areas, lands already ceded to the United States, and Indian lands).

[61] H.R. 148, 2012 Gen. Sess. (Utah).

[62] U.S. CONST. art. IV, § 3, cl. 2.

[63] ROBERT B. KEITER & JOHN C. RUPLE, A LEGAL ANALYSIS OF THE TRANSFER OF PUBLIC LANDS MOVEMENT 1 (Stegner Center White Paper No. 2014-2, 2014).

contained in the various enabling acts.[64] Much like the fervent spread of the Rebellion in the 1970's and 80's, various western states passed some form of public lands legislation in the wake of the Utah TPLA.[65]

The date of the demanded transfer has come and gone,[66] and as of this writing the federal government has yet to act upon Utah's demands.[67] Similarly, Utah has yet to pursue any legal action to compel federal land transfers.[68] Various legal scholars have provided commentary on the potential (and likely) failure of any legal challenge to federal ownership of these lands,[69] and in fact that question has already been litigated.[70] Utah seems poised to continue to legitimize its claim to federal lands through policy and Congressional action.[71] Among the efforts undergone by the state in this debate are a number of well-researched and oft-cited reports looking at the economics, legal bases, regulatory requirements, and logistics of taking over ownership and management of the federal lands as defined in the Utah TPLA.[72]

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[64] The RNC release alleges a promise to transfer public lands to states in various enabling acts, however just looking at the Arizona and New Mexico Enabling Act, Congress explicitly limited the public land transfer to specific sections in all townships. Republican National Committee, Resolution in Support of Western States Taking Back Public Lands, adopted Jan. 24, 2014 ("WHEREAS, the federal government promised all newly created states–in their statehood enabling contracts–that it would transfer title to all public lands").
[65] H.R. Con. Res. 22, 62nd Leg., 1st Reg. Sess. (Idaho 2013) (adopted); H.R. 228, 62nd Leg., Gen. Sess. (Wyo. 2013) (adopted); A.B. 227, 77th Reg. Sess. (Nev. 2013) (enacted); S.J.R. 15, 63rd Reg. Sess. (Mont. 2013) (adopted).
[66] UTAH CODE ANN. §§ 63L-6-103 (2012) (Utah demanded transfer by December 31, 2014.).
[67] John C. Ruple, The Transfer of Public Lands Movement: Taking "Back" Lands that were Never Theirs and other Examples of Legal Falsehoods and Revisionist History (Jan. 2017) (unpublished manuscript) (on file with author).
[68] *Id.*; *but see* Brian Maffly, *Republicans OK $14M land-transfer lawsuit, say Utah must regain sovereignty*, SALT LAKE TRIB. (Dec. 9, 2015), http://www.sltrib.com/home/3287281-155/utah-commission-votes-to-sue-feds (the Utah Commission for the Stewardship of Public Lands has approved a lawsuit expected to cost $14 million).
[69] *See* Ruple, *supra* note 67; Keiter, *supra* note 63; ROBERT B. KEITER & JOHN C. RUPLE, THE TRANSFER OF PUBLIC LANDS MOVEMENT: TAKING THE 'PUBLIC' OUT OF PUBLIC LANDS (Stegner Center White Paper No. 2015-01, 2015); Andrea Collins, *To Transfer or Not to Transfer, That is the Question: An Analysis of Public Lands in the West*, 76 MONT. L. REV. 309 (2015); Michelle Bryan et al., *Cause for Rebellion? Examining How Federal Land Management Agencies & Local Governments Collaborate on Land Use Planning*, 6 GEO. WASH. J. OF ENERGY & ENVTL. L. 1 (2015); ROBERT B. KEITER & JOHN C. RUPLE, ALTERNATIVES TO THE TRANSFER OF PUBLIC LANDS ACT (Stegner Center White Paper No. 2016-01, 2016).
[70] United States v. Nye Cty., 920 F. Sup. 1108 (D. Nev. 1996).
[71] Ruple, *supra* note 67.
[72] *Id.*

The most relevant and important of these reports is the economic report.[73] It shows that only under the most optimistic forecast would the state of Utah make money by taking over ownership and management of public lands.[74] The report concludes that unless oil and gas prices remain high or increase and the federal-state royalty split is renegotiated, "oil and gas royalties would never be sufficient to cover the state's costs" of managing the lands.[75] Utah's reports and experience with this debate are telling for other states considering similar moves. While state land management of public lands would generate more revenue than the state currently receives from federal leasing[76] and payments in lieu of taxes (PILTs),[77] such a transfer would also massively increase management costs.[78] For many states, the new management costs would often exceed the new revenue.[79]

3. New Mexico

The Early Childhood Education Land Grant Act[80] would have requested that the federal government transfer all of its mineral estate holdings in New Mexico to the state.[81] The bill never left the Senate Education Committee,[82] but will likely be introduced in future state legislative

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[73] UNIV. OF UTAH, UTAH STATE UNIV. & WEBER STATE UNIV., AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH (2014), http://publiclands.utah.gov/wp-content/uploads/2014/11/1.%20Land%20Transfer%20Analysis%20Final%20Report.pdf (*hereinafter* UTAH ECONOMIC ANALYSIS) ("Based on our analysis, the land transfer could be profitable for the state if oil and gas prices remain stable and high and the state negotiates a change in the royalty revenue share from 50 percent to 100 percent.").
[74] *Id.* at xxviii.
[75] *Id.*
[76] 30 U.S.C. § 191 (2012).
[77] 31 U.S.C. §§ 6901-6907 (2012).
[78] *See generally* UTAH ECONOMIC ANALYSIS, *supra* note 73.
[79] UTAH ECONOMIC ANALYSIS, *supra* note 73, at xviii; Y2 CONSULTANTS, STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING (2016).
[80] *See supra* Section II(B) *Current Trends in Old Fights.*
[81] S. Bill 182, 53rd Leg. (N.M. 2017).
[82] S. Bill 182, 2017 Leg., 53rd Sess. (N.M. 2017), https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=182&year=17.

sessions.[83] This bill proposed a new spin on an old debate. The Sagebrush Rebellion and its progeny focused on the federally-owned surface estate contained within public lands, while this bill focused solely on the subsurface. The recent trend[84] has been for the federal government to retain rights to mineral interests below conveyed surface lands.[85] By focusing solely on the mineral estate, the New Mexico State Land Office's management costs most likely would not exceed new revenue.[86] Although Congress is unlikely to convey these mineral interests under the Property Clause as a gift of millions of dollars of future revenue, the idea is novel and worth debate.

New Mexico State Land Commissioner Aubrey Dunn's support for the Early Childhood Land Grant Act[87] is simply another round in a centuries-old fight over the well-settled question of public land ownership. While Commissioner Dunn takes the fight to the mineral estate, there is not a sufficiently new spin on the debate to cause real concern. What may be a cause for concern with this renewed fight is the current administration and Congressional makeup. The push for federal land transfer has been garnering support in Congress recently,[88] and while President Trump has said he is against transfer, it is nearly impossible to be certain which of his campaign statements will be advanced by his administration.[89]

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[83] Aubrey Dunn, *There is no great sell-off of NM's state trust lands*, ABQ J. (Apr. 17, 2017), https://www.abqjournal.com/988706/there-is-no-great-selloff-of-nms-state-trust-lands.html.
[84] *See* Stock Raising Homestead Act of 1916, ch. 9, 29 Stat. 862 (This has been the trend for the past century since the passage of the Act).
[85] Brian Maffly, *Legal Scholars: Public-lands transfer to Utah would not include rights to coveted minerals*, SALT LAKE TRIB., Dec. 9, 2015, http://www.sltrib.com/home/3286480-155/utah-legal-scholars-land-transfer-would.
[86] *See infra* Section III.
[87] Fact Sheet, Aubrey Dunn, Early Childhood Education Land Grant Act, https://www.scribd.com/document/320000043/Fact-Sheet-Early-Childhood-Education-Land-Grant-Act (last visited Sept. 9, 2017).
[88] Schmitt, *supra* note 36.
[89] Nijhuis, *supra* note 13; *See* Brooke Singman, *Trump's first 100 days: Did he keep his promises?*, FOX NEWS, Apr. 29, 2017, http://www.foxnews.com/politics/2017/04/29/trumps-first-100-days-did-keep-his-promises.html (During the campaign, President Trump said he "want[s] to keep the lands great," and "do[esn't] like the idea" of transferring federal lands to the states, but as with many of his statements during the campaign, it is hard to say whether he will keep this sentiment in office or not.).

III. COMPETING MANDATES

As part of its calculated effort to take over management of federal lands, Utah also passed the Utah Public Land Management Act (UPLMA). UPLMA requires the state land manager to adopt the federal multiple-use and sustained yield mandates.[90] This explains why the economic analysis for a transfer of federal lands to Utah simply adopted the management costs provided by the various federal land managers.[91] According to the language of the UPLMA, the state would balance conservation with production much the same way BLM has done for the past 50 years.[92] This section will briefly explain the different competing mandates under which western states and federal land managers must manage public lands.

A. Multiple-Use and Sustained Yield

The federal government owns approximately 643 million acres of onshore lands.[93] The Bureau of Land Management (BLM) manages 248 million acres of these lands[94] and the U.S. Forest Service (Forest Service) manages another 193 million acres,[95] accounting for the vast majority of public lands. Moreover, most oil and gas development that occurs on federal lands

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[90] UPLMA, H.R. 276, 2016 Gen. Sess. (Utah) (to be codified at UTAH CODE ANN. §§ 63L-8-101–602), was passed as part of a line of laws enacted by the Utah legislature beginning with the TPLA, and including the Utah Wilderness Act (UTAH CODE ANN. §§ 63L-7-1-1 through-109 (2014)) (It seems Utah passed these laws as a sign of good faith to the federal government that the state is prepared to handle the increased management demands without jeopardizing the ecological quality of the newly transferred federal lands.); *See* Ruple, *supra* note 67.

[91] Wyoming's corollary report notes that management costs under its revenue maximization mandate are considerably lower than federal costs under their respective mandates. STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING, *supra* note 79, at iii; *see also* HOLLY FRETWELL & SHAWN REGAN, DIVIDED LANDS: STATE VS. FEDERAL MANAGEMENT IN THE WEST (2015), https://perc.org/sites/default/files/pdfs/150303_PERC_DividedLands.pdf ("State trust lands, which are governed by a different set of laws, demonstrate that land management agencies can be fiscally responsible. Unlike the federal government, states consistently produce generous financial returns while managing similar resources. For every resource that we examined…states generated, on average, more revenue per dollar spent than the federal government.").

[92] H.R. 276, 2016 Gen. Sess. (Utah); *see also* 2013 Bill Text ID H.C.R. 22 (Idaho).

[93] Bureau of Land Mgmt., PUBLIC LAND STATISTICS 2015, 7-8 (May 2016).

[94] Making up 38% of federal public lands. *Id.*

[95] Making up 30%. United States Forest Serv., *Fiscal Year 2016 Budget Overview* (Feb. 2015).

happens either on BLM or Forest Service lands, pursuant to either FLPMA[96] or the National Forest Management Act of 1976 (NFMA).[97] Both the BLM and the Forest Service work under dual mandates: multiple-use and sustained yield. [98] Multiple-use means that lands are managed "so that they are utilized in the combination that will best meet present and future needs . . . ."[99] When the manager determines that public lands should be used for resource development, sustained yield means that "the achievement and maintenance . . . of a high-level annual or regular periodic output" is maintained "in perpetuity."[100] These mandates, combined with myriad other federal regulations surrounding the various land uses contemplated by FLPMA, demonstrate how the transition from non-use to full utilization of a parcel of federal public land could take decades.[101] The current statutory framework presumes that BLM lands will remain unused in federal ownership[102] until they are designated – legislatively or executively – for other uses.[103] Under FLPMA, these land use plans must: "provide an integrated consideration of all potential public land uses; be prepared

[96] 43 U.S.C. §§ 1701-1787 (2012).
[97] 16 U.S.C. §§ 1600-1614 (2012).
[98] 43 U.S.C. § 1701(7) (for the BLM); 16 U.S.C. §§ 583-583(i) (2012) (for the Forest Service).
[99] 43 U.S.C. § 1702(c) (2012).
[100] 43 U.S.C. § 1702(h) (2012).
[101] Especially in the realm of energy resource development, the process includes developing a land use plan, developing a resource management plan, conducting proper NEPA analyses, consulting with the Fish and Wildlife Service under the ESA, meeting all of the requirements of the MLA as amended by Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), holding a public auction for the lease sale, permitting the type of resource development appropriate to the parcel, determining what kinds of rights-of-way or easements are required and acquiring those rights-of-way or easements, and eventually resource development can begin. For a detailed account of the mineral development process on Forest Service lands, *see* Jan G. Laitos, Note, *Paralysis by Analysis in the Forest Service Oil and Gas Leasing Program*, 26 LAND & WATER L. REV. 105, at 109-110 (1991); MARTIN, *supra* note 57.
[102] 43 U.S.C. § 1701(a)(1) (2012).
[103] BLM lands can be withdrawn from lease consideration by the agency itself or by reserving the lands as some type of park, forest, wilderness area, monument, etc. by Congress or the President. *See* 43 U.S.C. § 1714 (2012) (Withdrawals of land); 54 U.S.C. § 320301 (2012) (National Monuments); Nat'l Park Servs., *History*, https://www.nps.gov/aboutus/history.htm (last visited Apr. 28, 2017) ("Additions to the National Park System are now generally made through acts of Congress…"); BLM is also charged with creating land use plans for tracts under their administrative control, and through these plans will determine whether tracts should be closed to leasing, open to leasing, or open to leasing with conditions.

with public involvement; be coordinated with other federal, state, and local planning efforts; and incorporate available inventories of public land resources."[104]

In addition to the statutory requirements placed upon federal managers, the disposition and leasing processes can be prolonged by litigation brought by environmental groups. In *National Wildlife Federation v. Burford*, a nonprofit group brought suit against the Secretary of the Interior and the Department of the Interior (DOI) alleging DOI had improperly lifted restrictions on 180 million acres of land.[105] The court affirmed a preliminary injunction enjoining DOI from implementing its Land Withdrawal Review Program until it had created land use plans which met the statutory requirements of multiple-use and sustained yield.[106]

National Wildlife Federation is a useful illustration of the adversarial stature of public land use advocates and environmental advocates. On one side, public land use advocates applauded DOI's Program because it meant streamlined access to public lands.[107] On the other side, environmental advocates demanded DOI fulfill its statutory duty of making land use determinations while considering multiple uses for the land.[108] Additionally, this case is a perfect example of why Congress determined that federal lands must be managed for multiple uses,[109] as well as why the management process can take so long.[110]

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[104] Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 378 (1994).
[105] National Wildlife Federation v. Burford, 835 F.2d at 306-307 (D.C. Cir. 1987).
[106] *Id.* at 327.
[107] *Id.* at 307; *see also* MOUNTAIN STATES LEGAL FOUNDATION, https://www.mountainstateslegal.org/home#.WO2QQxIrKHo (last visited Apr. 11, 2017) (MSLF supported the Department's actions in this case, with a mission statement committing to the "fight for the right to own and use property, limited and ethical government, individual liberty, and the free enterprise system.").
[108] *National Wildlife Federation*, 835 F.2d at 307.
[109] 43 U.S.C. §§ 1701(7)-(8) (2012) (The entire "Congressional declaration" section of FLPMA mandates that federal managers consider environmental and conservation impacts of land use decisions while also receiving fair market value for any land sales or leases while also providing for resource development in perpetuity. The complexity of federal land management does nothing to aid in streamlining BLM's processes.).
[110] MARTIN, *supra* note 57.

Public land use advocates are not uniformly opposed to the federal land management mandates, especially advocates who utilize the public lands for grazing, hunting, fishing, or recreation.[111] Stronger pushback against the federal mandates comes from industry users, who utilize the lands for oil and gas, timber, or hard-rock mining development.[112] The process for oil and gas development on federal lands is one of the most arduous processes, and has been briefly detailed above.[113] Fossil fuel energy development on public lands requires in-depth NEPA analyses[114] and is perhaps the most closely watched by environmental groups. Moreover, it is the most likely to be challenged throughout the administrative process or in court, both before and after the land manager has granted all the necessary permits, licenses, and approvals.[115] Transfer advocates argue that state land managers are more acutely aware of the budgetary demands of the state and would provide a more straight-forward process.[116] Transfer opponents, on the other hand, argue that state land managers would likely manage the lands with solely industry in mind, because most western states are experiencing budget problems.[117]

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[111] Juliet Eilperin, *Facing Backlash, Utah Rep. Jason Chaffetz withdraws bill to transfer federal land to the states*, WASH. POST, Feb. 2, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/02/02/facing-backlash-utah-rep-jason-chaffetz-withdraws-bill-to-transfer-federal-land-to-the-states/?utm_term=.1409fb3fa8aa (One of the more recent Congressional moves to transfer federal lands to the states was resoundingly pushed back by outdoorsmen and hunters.).

[112] Western Energy Alliance, *Red Tape Nation*, https://www.westernenergyalliance.org/RedTapeNation (last visited Oct. 31, 2017).

[113] *See* Laitos, *supra* note 101.

[114] In fact, BLM will redo environmental impact statements periodically to meet their responsibilities under the multiple-use and sustained yield mandates. *Oil & Gas Development on Public Lands: Oversight Field Hearing Before the H. Comm. on Energy and Mineral Res.*, 108th Cong. (2003) (statement of Dru Bower, Vice President, Petroleum Association of Wyoming).

[115] *See e.g.*, Press Release, Center for Biological Diversity, "Keep it in the Ground" Movement Delievers 1 Million Signatures to White House Calling for End to New Federal Fossil Fuel Leasing (Sept. 15, 2016) (on file with author).

[116] *See* FRETWELL, *supra* note 91.

[117] The quick influx of cash would help solve these problems. Thus the state would permit more resource development faster in order to make money sooner. Both of these would result in environmental degradation and resource depletion, leaving the state in a similar or worse budgetary situation eventually with no possibility of recovery with no resource development to offer.

B. Revenue Maximization

While the federal land managers are working under the multiple-use and sustained yield mandates, most western state land managers work under a mandate of revenue maximization.[118] For example, such a revenue mandate is contained within the Arizona and New Mexico Enabling Act[119] and further reflected in the constitutions of those states.[120] Generally, the language of the various enabling acts and state constitutions requires state land managers to dispose of state trust lands for no less than the appraised value, with proceeds generally going into a permanent fund for common schools.[121] Conservation is not a consideration in land management decisions. Other statutory requirements may force the land commissioner to consider reclamation necessities or other environmental remediation, but this varies state-to-state and is not a requirement ensconced in the enabling acts or constitutions of the various states.[122] For this reason, state lands are used more often for resource-depletion activities than other activities like grazing or recreation.[123]

There are limits to state land commissioner authority, but these limits are often imposed either by direct election of the land commissioner, or through new appointments under new

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[118] *See e.g.* Lassen v. Ariz., 385 U.S. 458, 468 (1967); *see also* Erin Pounds, *State Trust Lands: Static Management and Shifting Value Perspectives*, 41 ENVTL. L. 1333, 1357 (2011).
[119] Enabling Act of 1910, ch. 310, 36 Stat. 557, § 10.
[120] N.M. CONST., art. XII, § 2, art. XIII, §§ 1 and 2, art. XXI, § 9; ARIZ. CONST., art. 10, §§ 4-12.
[121] Enabling Act of 1910, § 10. In most cases, the federal disposition of lands to the state trusts were done so with specific beneficiaries in mind, like common schools, colleges, or universities. In all cases the state must dispose of land for no less than the appraised value or for a Congressionally set minimum value. *See* ARIZ. CONST., art. 10, §§ 4-5. *See also* New Mexico *ex rel.* King v. Lyons, 248 P.3d 878 (N.M. 2011) (hereinafter *Lyons*) (explaining the requirements of the State Land Commissioner under the Enabling Act).
[122] N.M. STAT. ANN. § 19-9-12 (2017) (In New Mexico, the State Land Commissioner must secure a bond from the lessee to "ensure that all aspects of mining operations and reclamation operations are conducted in conformity with the approved mining plan.").
[123] The New Mexico State Land Office says that only 2.5% of its revenue generated comes from non-resource depleting activities. Overview, New Mexico State Land Office, http://www.nmstatelands.org/overview-1.aspx (last visited Apr. 12, 2017).

gubernatorial regimes.[124] Limits are also enforced through litigation when the state land commissioner abuses his or her authority.[125] For example, when the former New Mexico Land Commissioner sought to execute four land exchanges without putting the tracts up for public auction, as required by the Enabling Act and the state constitution, the Attorney General sought an injunction.[126] The New Mexico Supreme Court granted the injunction, finding that, while the Land Commissioner had held an auction, he had done so while dealing in private negotiations, creating an unfair playing field for any competitors.[127] The Court further held he had "targeted" the specific tracts of land and did not seek the "highest financial gain" in exchange for those lands.[128]

While states are able to make land use determinations and sales much faster than the federal government, public land use is not necessarily easier on state trust lands. For example, the conservative Property and Environment Research Center (PERC) staunchly supports transferring lands to the states, and uses data showing that states are better at generating revenue from trust lands than the federal government.[129] Their report, however, fails to mention that the cost of grazing permits from state land managers is substantially higher than the cost on federal lands,[130] or the difference between lower federal and higher state royalty rates.[131] Similarly, transfer

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[124] In New Mexico, the State Land Commissioner is an independently elected office while in Arizona the State Land Commissioner is appointed by the governor. *Compare* Aubrey Dunn campaign website, http://aubreydunn.com/ *with* ARIZ. REV. STAT. ANN. § 37-131 (2017).
[125] *Lyons*, 248 P.3d 878.
[126] *Id.* ¶ 1.
[127] *Id.* ¶ 73.
[128] *Id.*
[129] FRETWELL & REGAN, *supra* note 91.
[130] CHRISTINE GLASER ET AL., COSTS AND CONSEQUENCES: THE REAL PRICE OF LIVESTOCK GRAZING ON AMERICA'S PUBLIC LANDS 21 (2015) (In 2014, the federal government charged $1.35 per animal unit month (AUM) to graze on federal lands, about 28% of the $4.80/AUM charged by New Mexico in 2015.); Staci Matlock, *New Mexico ranchers' state grazing fees are increased by 25 percent*, SANTA FE NEW MEXICAN, Feb. 12, 2016, http://www.santafenewmexican.com/news/local_news/new-mexico-ranchers-state-grazing-fees-are-increased-by-percent/article_7c25a85a-9b26-572f-9560-330b109e6705.html.
[131] *Compare* Government Accountability Office, *Report on Mineral Extraction on Federal Lands*, 32 (Nov. 15, 2012), http://www.gao.gov/assets/660/650122.pdf (onshore federal public lands, oil and gas producers pay a consistent 12.5% royalty rate) *with* Center for Western Priorities, *A Fair Share: The Case for Updating Federal*

supporters often cite data showing that states would stand to make significantly more money as managers of the public lands, as opposed to being gifted 50% of federal revenue from public land use. [132] The PERC study also fails to factor in the difference in management costs under the different mandates. In fact, the study argues that despite the different mandates, both state and federal managers effectively manage for multiple-use.[133] While state public lands are available for many uses, state land managers must accept the highest and best bid at public auctions, regardless of environmental or conservation concerns.[134] If Congress transfers federal lands, the revenue maximization requirement could result in higher revenues for states. However, the revenue boost would be short-lived and detrimental to state budgets. Even if the federal government agreed to transfer lands to states still operating under the revenue maximization mandate, states would only make money under the *most optimistic* forecast of resource markets after considering the substantial increase in management costs.[135] States would need to codify multiple-use and sustained yield mandates into their land management practices before the federal government would transfer these lands. Under these mandates, it is nearly impossible for the states to benefit financially from a mass land transfer from the federal government.[136]

C. Accountability

Consider also the different structures of accountability imposed upon state and federal land managers. Because of the stringent and detailed regulations governing BLM land manager decision

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Royalties, 7 (Jun. 20, 2013) (varying royalty rates by state across the west where the royalty rate is between 16.67 and 18.75%).

[132] 30 U.S.C. § 191 (2012).

[133] FRETWELL & REGAN, *supra* note 91, at 9-10 ("Like federal multiple-use agencies, state agencies lease land for timber, grazing, and mineral development, as well as manage for recreation").

[134] Enabling Act of 1910, § 10, cl. 3. (New Mexico); § 28, cl. 3 (Arizona).

[135] UTAH ECONOMIC ANALYSIS, *supra* note 73; STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING, *supra* note 79.

[136] UTAH ECONOMIC ANALYSIS, *supra* note 73.

making, the public has many opportunities for involvement in the land use and resource-management planning processes and in management decisions.[137] Additionally, the BLM must follow NEPA regulations, and is subject to Administrative Procedure Act challenges for failing to do so.[138] When making land use plans, permit decisions, or land sale determinations, the BLM must determine whether its actions will have a significant impact on the environment, thus requiring an environmental assessment and possibly an environmental impact statement.[139] In addition, because the use of the public lands is an action authorized by a federal agency, the BLM must go through Section 7 consultation with the Fish and Wildlife Service (the Service) to identify potential impacts on endangered and threatened species.[140] If the BLM fails to fulfill its nondiscretionary duties under the Endangered Species Act, a person may file a citizen suit in order to force compliance with the Act.[141]

In contrast to these numerous public checks on federal land managers, the New Mexico State Land Commissioner's decision can only be checked by an aggrieved applicant or by a civil enforcement action brought by the Attorney General.[142] Public involvement in state land management is substantially less meaningful than it is in federal land management. This lack of accountability is largely ignored by transfer-advocates, yet without this accountability in land management, there would be no mechanism to ensure the ecological health of public lands.

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[137] Public Involvement Rule, 43 C.F.R. § 1610.2 (2017).
[138] *Id.* at 1610.2(1).
[139] *See generally* 42 U.S.C. §§ 4321-4335 (2012); 42 U.S.C. § 4332(c) (2012).
[140] 16 U.S.C. § 1536(a)(2) (2012).
[141] 16 U.S.C. § 1540(g) (2012).
[142] N.M. STAT. ANN. 19-7-67 (1999); *see also Lyons*, 248 P.3d 878 (there is no express language in the statutes showing that the Land Commissioner's powers can be checked, but the jurisprudence shows that a court heard and found in favor of the Attorney General).

IV. Potential Benefits and Problems of State-Managed Multiple-Use and Sustained Yield

Utah's new land management regime is more burdensome for land managers than that of New Mexico or Arizona.[143] The Utah legislature codified its preference for land exchanges - rather than sales - and created a complex set of requirements for the newly created Division of Land Management.[144] Among these requirements is the mandate to manage lands for multiple uses and for a sustained yield of resources.[145] Much of Utah's Public Land Management Act (UPLMA) reads similar to FLPMA, enabling Utah to manage state lands in a manner similar to the BLM.[146] This shift in the usual milieu of Sagebrush Rebellion rhetoric and policy-making is significant, but it is unclear why Utah would adopt this mandate. In addition to taking on the additional costs associated with multiple-use and sustained yield management, Utah has created an entirely new state department to manage any federal lands that may be transferred as a result of their lobbying efforts.[147]

Utah may be signaling to the federal government its flexibility through its Public Land Management Act. By adopting multiple-use and sustained yield, Utah is showing that it would manage federal lands with environmental and conservation interests in mind.[148] But while making

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[143] H.B. 276, 2016 Gen. Sess. at 6-7 (Utah) (to be codified at Utah Code Ann. §§ 63L-8-202(ii)).
[144] *Id*.
[145] *Id.* at § 63L-8-103.
[146] *Id.* at 63L-8-104(1)(d) ("public land be managed in a manner that will:…(ii) protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.").
[147] H.B. 276, 2016 Gen. Sess. (Utah); *see also* Mar. 6, 2017 meeting of the Utah Senate Natural Resources, Agriculture, and Environment Standing Committee. In the audio file, at 44 minutes, Representative Noel explained that the new department was necessary as there are "literally thousands of rights" including rights-of-way, oil and gas leases, grazing permits on federal lands. Utah would need to consider each of these permits/licenses individually for any parcel of federal land conveyed.
[148] *See* Mar. 6, 2017 meeting audio. Rep. Noel goes on to explain that "Utah is a public lands state and will always be a public lands state," to quell any fears that the state would immediately "sell off" any conveyed federal lands. 46:20.

federal land transfers more likely, this mandate undercuts the entire cost-generating argument raised by western states for the past 40 years.[149]

The UPLMA contains similar enforcement authority language to other state land management statutes, authorizing only the attorney general to file a civil complaint should the statute be violated.[150] There are, however, no public involvement mandates contained within UPLMA sufficient to allow the kinds of process checks available under federal management laws. This lack of accountability creates fear in environmentalists across the West, who continue to argue against federal land transfers.[151] Even as the transfer movement begins to lay roots in Washington, D.C., environmentalists, outdoorsmen, and conservationists successfully compelled Representative Chaffetz (R-UT) to withdraw his house bill, which would have been the first step to transferring federal lands to states.[152] The transfer movement is thus stalled for the time being.[153]

V. Solutions that Are not as Irreversible as Land Transfer[154]

[149] FRETWELL & REGAN, *supra* note 91.
[150] H.B. 276, 2016 Gen. Sess. at 6-7 (Utah) (to be codified at Utah Code Ann. §§ 63L-8-202(ii)).
[151] Backcountry Hunters and Anglers, *Public Lands & Waters*, http://www.backcountryhunters.org/public_lands (last visited Apr. 13, 2017); *see also* Annika Kristiansen, *This Land Was Made for You and Me*, THE PLANET (SIERRA CLUB) (Feb. 6, 2017), http://www.sierraclub.org/planet/2017/02/land-was-made-for-you-and-me; Press Release, Center for Biological Diversity, Report Identifies Top 15 'Public Lands Enemies' in Congress (Mar. 14, 2017) (Center for Biological Diversity, https://www.biologicaldiversity.org/news/press_releases/2017/public-lands-03-14-2017.php); Press Release, The Nature Conservancy, The Nature Conservancy Responds to Proposals to Transfer Federal Lands (Jul. 18, 2016) (https://www.nature.org/newsfeatures/pressreleases/nature-conservancy-responds-to-proposals-to-transfer-federal-lands.xml?redirect=https-301).
[152] Eilperin, *supra* note 111; H.R. 621, 115th Cong. (2017).
[153] Nijhuis, *supra* note 89 (It is difficult to say whether President Trump will support or oppose transferring federal lands to the states.) ; *Morning Edition: Rep. Zinke Chosen To Head Interior, Published Report Says*, NAT'L PUB. RADIO (Dec. 14, 2016) (The Secretary of the Interior opposes the transfer).
[154] This section will cover three proposed ideas: *A. Reduce the Regulatory State*; *B. The Sage Grouse Solution*; and *C. Planning 2.0*. An additional idea that has yet to garner national attention is actually "giving the lands back," through the Indian Self-Determination Act, 25 U.S.C. §§ 5361-5368 (2012). Though this legislation is most often used to give management responsibilities to tribes for educational or medical facilities, it has been used to give management responsibilities to tribes for public lands.

A. Reduce the Regulatory State

The modern debate over public land ownership is in many ways fueled by federal bureaucratic obstacles contained within myriad applicable federal laws and their underlying regulations. However, the very basis of the frustration provides but one avenue to address the problem without taking the "nuclear option." The federal government could remove red tape without jeopardizing the health of our public lands, while at the same time creating a streamlined process for public lands users to obtain permits or leases.[155] Federal land managers could better collaborate[156] with local and state governments.[157] Similarly, state land managers could better collaborate amongst each other and involve federal managers in land management decisions from the bottom-up.[158] Transferring federal lands to the states is a short-sighted solution to an incredibly complex problem, and should not be considered lightly. Federal and state land managers should work together, along with all interested parties, to make cooperative federalism work rather than scrap the entire system.

A single oil and gas well on federal land must go through NEPA analysis, but only after the BLM has designated a parcel for oil and gas development. The potential lessee must then apply for a permit to drill, but only after submitting the winning bid at a competitive lease sale under the Federal Onshore Oil and Gas Leasing Reform Act ("FOOGLRA"). Before drilling can start, consultation must happen with the Fish and Wildlife Service pursuant to the Endangered Species

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[155] FITZSIMMONS, *supra* note 56, at 113.
[156] Anthony S. Cheng, *Build It and They Will Come? Mandating Collaboration in Public Lands Planning and Management*, 46 NAT. RESOURCES J. 841, 842 (2006) ("[A] process in which diverse individuals who see different aspects of a situation constructively explore their differences and search for ways to improve the situation that go beyond their limited visions of what is possible.").
[157] FLPMA requires collaboration between state and federal governments, but this does not always happen. When it does, it does not always happen in a satisfactory way to many states.
[158] Much of the conversation focuses on what federal land managers should do to fix the problem. The author asserts that perhaps state land managers could be more proactive in demanding collaboration rather than demanding transfers.

Act.[159] A reduction in the regulatory state is not a nuanced idea, but seems overlooked by transfer advocates. Creating one streamlined regulation for management of public lands and all of their uses could cut down on the onerous time periods required under federal laws. And of course, if this solution does not create a streamlined federal process, the transfer-advocates position would become that much stronger.

Repealing regulations has been a talking point of the new administration and Congress since inauguration.[160] This idea comes at a cost, of course, and that is less federal wildlife, landscape, and pollution protection, coupled with less federal oversight in public lands sales and leases. Any kind of federal regulatory change or transfer of public lands would face significant opposition from myriad groups, and should be made with care. It would be prudent for the federal government to bring together interested parties to strategically develop solutions that balance the interests of as many groups as possible. Taking from the now defunct Land Planning 2.0 rule, federal agencies should bring in groups before any planning or process has taken place. This ensures that those groups can help shape the policy from the ground up, rather than from the outside while searching for a seat at the table.

B. The Sage Grouse Solution

In 2015, the Greater Sage Grouse (*Centrocercus urophasianus)* was being considered for endangered species listing. To avoid the onerous regulations under the Endangered Species Act (ESA), western states collaborated with each other, the Fish and Wildlife Service (the Service), and the BLM to create a solution by which the sage grouse would be protected but would remain

[159] MARTIN, *supra* note 57; Laitos, *supra* note 101.
[160] *See, e.g.* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

off the endangered species list.[161] Touted as an "unprecedented, landscape-scale conservation effort," the collaboration between the federal government and the various states shows that cooperative federalism can work.[162] Despite varying landscapes, circumstances, and politics, these states crafted a plan that would satisfy both the need to protect this symbolic bird and serve the states' economic interests.[163] Ultimately, the Service determined that listing of the sage grouse was not warranted.[164]

The ESA requires the Service to consider state conservation plans in its listing determinations.[165] The states concerned with the sage grouse listing showed the Service that their conservation plans would be successful in preserving the bird and its habitat.[166] The "Not Warranted" finding contains strong praise of the state action that precluded a listing the sage grouse,[167] as well as what should be considered an optimistic signal of regulatory change in regard to land management planning. DOI used landscape level planning to collaborate with states and local interests,[168] an approach that should influence the future of land management.[169] While the listing determination is an exclusive function of the ESA regulatory scheme, there are corollaries between the ESA and FLPMA that illustrate a future that might partially assuage the transfer-advocates' concerns without unnecessarily sacrificing the ecological health of federal public lands.

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[161] Elizabeth A. Schulte, *All Is Not Quiet on the Western Front: An Overview of the Greater Sage-Grouse Proceedings*, 29 NAT. RESOURCES & ENV'T 22 (2015).
[162] Press Release, U.S. DEPARTMENT OF THE INTERIOR, *Historic Conservation Campaign Protects Greater Sage-Grouse* (Sept. 22, 2015).
[163] Schulte, *supra* note 161 at 23.
[164] 12-Month Petition Finding, 80 Fed. Reg. 59,858 (Oct. 2, 2015) [Hereinafter 12-Month Finding].
[165] 16 U.S.C. § 1533 (2012).
[166] 12-Month Finding, 80 Fed. Reg. 59,858.
[167] *Id.* at 59,871.
[168] *Id.* at 59,872.
[169] *See infra* Section V(C) "Land Planning 2.0."

Under FLPMA, the BLM must provide the opportunity for public involvement when crafting land use plans.[170] Included in this public involvement is input from "Federal, State, and local governments."[171] While Land Planning 2.0, discussed below, would have substantially increased the amount of involvement from state and local governments – indeed elevating it to required collaboration[172] – there remains the potential for increased input without Land Planning 2.0's regulatory framework. As evidenced by the sage grouse conservation effort, when the stakes are high enough, states find ways to collaborate with each other and the federal government to protect their economic interests.[173] With a tremendous amount of up-front investment,[174] states avoided major economic losses. While the federal government is unlikely to transfer public lands to the states, states continue to pour money into the movement.[175] Instead, they should reconsider their approach and spend resources on collaborative planning.

A more realistic and reasonable approach than transfer would be to demand more collaboration from both the federal and state governments. Congresspersons and state legislators have been supportive of the transfer movement, despite the waste of time, money, and energy it has proven to be. A potential solution to this problem would mirror the type of collaboration seen in the sage grouse conservation effort.

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[170] 43 U.S.C. § 1712 (2012).
[171] *Id.* § 1712 (f).
[172] Resource Management Planning, 81 Fed. Reg. 89,582 (Dec. 12, 2016).
[173] Darryl Fears, *Decision not to list sage grouse as endangered is called life saver by some, death knell by others*, WASH. POST, Sept. 22, 2015, https://www.washingtonpost.com/news/energy-environment/wp/2015/09/22/fewer-than-500000-sage-grouse-are-left-the-obama-administration-says-they-dont-merit-federal-protection/ (Utah would have lost $40 billion in oil and gas revenues alone if the sage grouse had been listed.).
[174] U.S. Fish & Wildlife Service, *2015 Endangered Species Act Finding, About the Conservation Effort and Plans*, https://www.fws.gov/greatersagegrouse/findings.php (Colorado spent $53 million purchasing fee titles or conservation easements in order to protect the sage grouse and its habitat.).
[175] Jessica Goad & Noah Caldwell, *Politicians Have Spent $816,000 to Study Giving Away Our Public Lands and are Proposing to Spend $2.9 Million More*, CTR. FOR WESTERN PRIORITIES (Mar. 12, 2015), http://westernpriorities.org/2015/03/12/politicians-have-spent-816000-to-study-giving-away-our-public-lands-and-are-proposing-to-spend-2-9-million-more/ (western states had spent an estimated $815,000 on transfer studies). As discussed above, Utah has authorized $14 million to be spent in litigation costs. Maffly, *supra* note 68.

Federal land managers are often less familiar with the cultural, societal, and economic nuances of individual tracts of land than state land managers. However, under the revenue maximization mandate, state land managers do not need to manage in the most ecologically-responsible ways. This inherent conflict does not present an unworkable situation in the West. Instead, it illustrates the complexities of land management.

There is, however, another side to this story that must be considered. The same day the DOI announced this "historic conservation campaign['s]" success, the BLM and the Forest Service introduced new land use plans that severely restricted development and grazing on federal public lands.[176] Anger and lawsuits followed, alleging bad faith on the part of the DOI and the Forest Service.[177] With lawsuits pending, it is impossible to say how successful the sage grouse conservation effort will be. More importantly, it is impossible to say whether or not western land users will see the non-listing decision as successful or an additional burden on their ability to use public lands. Despite these open questions, one can definitively say that with the avoidance of listing the sage grouse as endangered, western states have avoided substantially more burdensome restrictions.[178] The new land use and resource management plans promulgated by Interior do limit use of federal public lands in these states, but not to the same extent as listing the sage grouse. Listing would have meant a prohibition on activities causing "adverse modification of critical

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[176] Liz Edmondson, *Partnership on Public Lands*, THE CURRENT ST. #60 (May 2, 2016), http://www.csg.org/pubs/capitolideas/enews/enewsletter_archive_2016.aspx; Fears, *supra* note 173 (Utah Governor Gary Herbert cautioned that Interior's "actions constitute the equivalent of a listing decision outside the normal process" and opined that Utah was better suited to manage its own sage grouse population.).

[177] Kerry L. McGrath et al., *The ESA Today: Eco-Pragmatism and State Conservation Efforts*, 46 ELR 10827, 10828 (2016).

[178] Bente Birkeland, *Q & A: Gov. Hickenlooper on the Greater Sage Grouse, Fracking Appeals, and Bicycle Infrastructure*, KRCC SOUTHERN COLO'S NPR STATION (Sep. 22, 2015), http://krcc.org/post/q-gov-hickenlooper-greater-sage-grouse-fracking-appeals-and-bicycle-infrastructure (Governor Hickenlooper explained that "listings come with all kinds of basically handcuffs on them.").

habitat," and taking of the species without an incidental take permit.[179] In contrast, the new land use and resource management plans are more narrowly tailored to avoid surface disturbance within and near critical habitat and mating areas.[180] Federal land management is not a perfect system, but this does not mean that it should be scrapped entirely.

Secretary Zinke has recently signaled a desire to amend the sage grouse conservation plan.[181] Secretary Zinke would like to narrow the scope of the conservation plan to an individual state model while also amending the land use and resource management plans created in the process of - and in response to - the conservation plan.[182] Purportedly, Secretary Zinke will soon charge a team within Interior to develop an alternative to the landscape level plan created in 2016.[183] This change would return the sage grouse states to the position they were in before the historic conservation effort began: fighting for time with federal land managers to create individualized conservation plans. Additionally, Secretary Zinke is considering amending the land use plans that were amended as a result of the conservation effort.[184] At least Wyoming and Colorado have signaled to Secretary Zinke that they think these changes "are likely not necessary at this time."[185] While amendments of this caliber would yet again show western states that the federal government is not prepared to modernize its approach to federal land management, there

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[179] 16 U.S.C. § 1538 (2017).
[180] *See* U.S. Forest Serv., *Greater Sage-grouse Record of Decision* 21 (Sept. 2015) (while this is not the ROD for the BLM land use plans, it is useful as an example of the narrow tailoring of federal conservation efforts on behalf of the sage grouse and the BLM RODs have been removed from the internet).
[181] Scott Streater, *Western governors fret as Zinke ponders review of grouse plans*, E&E NEWS (May 31, 2017), https://www.eenews.net.lawproxy.unm.edu:2048/greenwire/stories/1060055357.
[182] *Id.*
[183] According to a letter sent by Governors John Hickenlooper of Colorado and Matthew Mead of Wyoming, Secretary Zinke is considering a model "that sets population objectives for the states." Letter from Matthew H. Mead, Governor of Wyo., & John Hickenlooper, Governor of Colo., to Ryan Zinke, Sec'y of the Interior, U.S. Dep't of the Interior (May 26, 2017), https://www.eenews.net.lawproxy.unm.edu:2048/assets/2017/05/31/document_gw_09.pdf.
[184] *Id.*
[185] *Id.*

is a silver lining contained in the Governors' letter to Secretary Zinke. The Governors said, "[t]he problems we face in dealing with the Greater sage-grouse are not exclusive to the states or the federal government. State and federal partnerships such as the Task Force are important for identifying those problems and developing solutions."[186] Seemingly innocuous, these statements stand as official recognition by two prominent western governors that collaboration is not only a viable option, but an "important" one that could signal a real possibility for increased collaboration moving forward.[187]

C. Land Planning 2.0

BLM had a plan to address many of the concerns raised by transfer advocates called Land Planning 2.0.[188] As mentioned, Land Planning 2.0 was undone by the House of Representatives shortly after the Trump Administration took office,[189] but it would have required the BLM to collaborate with interested parties, including states, tribes, and the public.[190] It would have also required larger scale planning, referred to as "landscape planning."[191] The BLM would have been required to publish a "planning assessment" before any resource management planning began.[192] This planning assessment would have allowed states and local entities to enter the planning process before it even started. This would allow for more substantial collaboration in the initial phases, rather than relying mostly on public comments after a proposed plan was published.[193] The BLM promulgated Land Planning 2.0 to meet its goal of adopting "a proactive and nimble approach to

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[186] *Id.*
[187] *Id.*
[188] Resource Management Planning, 81 Fed. Reg. 89,580.
[189] Devin Henry, *House passes bill to block Obama land planning rule*, THE HILL, Feb. 7, 2017, http://thehill.com/policy/energy-environment/318372-house-passes-bill-to-block-obama-land-planning-rule.
[190] Resource Management Planning, 81 Fed. Reg. at 89,581-82.
[191] *Id.* at 89,584.
[192] *Id.* at 89,582.
[193] *Id.*

planning that allows [it] to work collaboratively with partners at different scales to produce highly useful decisions that adapt to the rapidly changing environment and conditions" as identified by the agency in 2011.[194]

Land Planning 2.0 could have created a more collaborative process to assuage many transfer advocates' concerns laid out in the stated goals of the initiative.[195] The blockage of Land Planning 2.0 causes more concern for anti-transfer advocates than just simply losing a battle.[196] The fear is that under the threat of the Congressional Review Act, BLM and other land management agencies will be wary to promulgate any new management regulations, including land use and resource management plans.[197] For now, transfer and anti-transfer advocates alike will just have to wait and see how the Trump administration and Congress proceed over the next few years.

VI. CONCLUSION

Most western states[198] want full, autonomous control of the public lands within their borders. While the sage grouse solution does not give them this autonomy over federal lands, it does address some of the flaws in the current federal land management system. Time delays are a considerable issue with federal land management, and the sage grouse solution will not immediately reduce the time required to make land use decisions. However, this solution requires an almost entirely up-front investment of time and money. Ideally, in creating landscape-level land

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[194] *Id.* at 89,584 (quoting Bureau of Land Management, *Winning the Challenges of the future: A Roadmap for Success in 2016*, no longer available at https://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/public_affairs/socialmedia.Par.99057.File.dat/2016_report_lowres.pdf).

[195] *Id.* at 89,595 ("Goal 1: Improve the BLM's ability to respond to change in a timely manner; Goal 2: Provide meaningful opportunities for other Federal agencies, State and local governments, Indian tribes, and the public to be involved in the development of BLM resource management plans; Goal 3: Improve the BLM's ability to apply landscape-scale approaches to resource management.").

[196] *Id.*

[197] *Id.*

[198] *See supra* note 65.

use plans in collaboration with state and local governments, along with industry and recreationists, federal land managers can streamline the entire process once the initial hurdle of the sweeping land use plan is completed. Ultimately, some combination of curtailing the regulatory state, creating a scheme based on the sage grouse conservation effort, and resurrecting or promulgating a similar rule to "Land Planning 2.0" will be needed to sufficiently address the transfer-advocates' concerns, without giving away one of the most unique features of United States history.

Nothing is perfect in governing, but collaboration will always lead to more success. States may see themselves as the ideal manager of public lands, but many groups would disagree. Similarly, groups oppose federal management of public lands within the western states. These groups do not need to be diametrically opposed and feuding. Instead we can take the sage grouse conservation initiative as an example of the better option. Collaboration between environmentalists, industry-advocates, western governors, and state and federal agencies has created an environment for the bird's population to grow, without introducing the restrictive regulatory requirements of the ESA. Again, nothing is perfect. State and industry actors feel that the BLM and the Forest Service were not exactly fair in their creation of new land use plans in sage grouse habitat, but these concerns are the growing pains of a new management regime. The BLM is still working on landscape-level planning for the West,[199] and the sage grouse solution should guide the agency to work on a more level playing field with states.

[199] Albeit not under the same kind of structure imposed by "Land Planning 2.0," the BLM's website provides information on current landscape-level plans, https://www.blm.gov/about/how-we-manage.