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1999

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National Forest Land Exchanges and the Growth of Vail and Other Gateway Communities

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I. Introduction: The Rise of Modern Gateways and the New Relation with the National Forests

A. *The Rise of the Modern Gateways*

IN 1962, WHEN I GRADUATED FROM COLORADO ACADEMY, located just outside of Denver, there was limited full-time residence in the vast Rocky Mountains, which fill two-thirds of the state to the west. There were the recreational opportunities, of course—kayaking, climbing, hunting, fishing, hiking, and especially skiing—but most of the traffic, including ski visitation to the then-smallish areas on the Continental Divide—Arapaho Basin, Loveland, Berthoud, and Winter Park—involved day trips from Denver.

There were, however, the true Colorado Mountain towns, including places like Steamboat Springs, Glenwood Springs, Durango, and Salida. These places had been inhabited since the nineteenth century by ranchers, miners, timber men, railroad workers, and the people who served them. In addition, there were, in 1962, a number of faded old mining towns like Breckenridge, Central City, Telluride, and Crested Butte which held on because of transient summer tourist visitation. One of these semi-ghost towns had in fact re-blossomed as a ski resort. Aspen, Colorado, was, in 1962, the only true example of a year-round, mountain resort town in Colorado, and most of its infrastructure and architecture was not really new. Rather, Aspen featured resurrected

*The author thanks Lisa Ragsdale, Pam Benton, and Debbie Gardner for their help in the preparation of this article.

and refurbished streets and buildings that had originated in the Victorian mining era of the late 1800s.

This all was about to change. In December of 1962, Vail opened as a ski area. The lodges, houses, condominiums, shops, and restaurants at its base became the nucleus of the emergent town of Vail and the prototype of the modern recreational gateway community.[1] The term "gateway community" did not originate in Vail. It had, in fact, been employed throughout much of the twentieth century to describe a far more modest species of back country development. The small outposts on the periphery of the great national parks—Estes Park outside of Rocky Mountain National Park, Cortez adjacent to Mesa Verde, West Yellowstone, Jackson on the edge of the Grand Tetons, Bishop near Yosemite, and Tusayan close by the Grand Canyon's south rim—had for decades provided services and supplies to the seasonal tourists streaming into the parks.[2] These were places passed through, as a peripheral means to the central objective of a national park experience. Few people actually lived there and, in the off season, they were largely dormant. These gateways are undergoing a dramatic transformation that parallels the emergence of new residential phenomena like Vail.[3]

The new gateways, both those by original design such as Vail, Snowmass, Keystone, Copper Mountain, or Avon, and those by revival or transformation like Aspen, Steamboat, Breckenridge, Telluride, Crested Butte, and Durango, as well as the upscaled park gateways, are decidedly different in form and function from the older model of park gateways and from the original, commodity-centered mountain towns. For one thing, the scope of the sobriquet "gateway" is not now limited to national park access points but is applied to places with proximity to the general recreational opportunities of national public lands.[4] Another difference is that the new gateways, in comparison with the old park gateways and the indigenous mountain towns, are far more than commercial strips. These are not outposts or mere pit stops. These are true, complete urban centers—urbane centers. These

1. Vail was incorporated as a town in 1965. For a history of the town and valley, *see* <http://www.travelfacts.com/tfacts/htm/vai/vaihist.htm>.

2. *See* Kurt Culbertson, *National Park or Bust: Gateway Communities Cope with the Crowds*, 63 PLAN. 11 (1997) [hereinafter Culbertson].

3. Ed McMahon & Luther Propst, *Park Gateways*, 72 NAT'L PARKS 39 (May-June, 1998) [hereinafter McMahon & Propst].

4. *See* JIM HOWE, ED MCMAHON & LUTHER PROPST, BALANCING NATURE AND COMMERCE IN GATEWAY COMMUNITIES, 1997 [hereinafter Balancing Nature]. The public lands include national forests, national wildlife refuges, national recreation areas, wilderness areas, wild and scenic rivers, some of the Bureau of Land Management Lands, as well as the national parks and national monuments.

places are upscale, trendy, fully equipped, and expensive; they are ultimate destinations in themselves. There are high-rise hotels, residential condominiums, multimillion dollar "trophy" homes, lavish golf courses, recreation complexes, ice rinks, and convention centers. There are underground parking garages, haute couture shops, ethnic restaurants, medical facilities, and governmental offices. Although a substantial part of the residential capacity—perhaps a majority—is rented by summer and winter visitors or owned by nonresidents,[5] a significant part of the population is permanent, and further increases are likely.[6] The urban character of the new gateways is intensified by the emergence and spread of big-city problems. There is winter smog in the deep mountain valleys, water pollution, crowded streets, inadequate parking, the overuse and aging of infrastructure, discrimination, and crime.[7]

Several factors combined to create the gateway surge on the Colorado western slope. In a physical sense, the opening of the Eisenhower Tunnel in the mid-1960s[8] and the completion of Interstate 70 over Vail Pass in the 1970s made Vail Valley readily accessible to the Denver metropolitan area, only 100 highspeed miles away. This made Vail a practical site not only for day traffic but for second home ownership among wealthier Denverites.[9] The growth, however, was more than just a product of upwardly mobile consumers from the Colorado front range. Indeed, a high proportion of the money being funneled first into Vail and then other subsequent gateways came from outside Colorado—from across the nation and around the world.[10] Thus, there is considerable investment and presence from, for example, Mexico City, Tokyo, and Buenos Aires, as well as Dallas, Los Angeles, New York, and Minneapolis.

There are some general reasons for the state, national, and international investments, both personal and financial, in the modern gateways.

5. In 1997, out-of-staters owned 42% of Vail property, other Coloradans owned 24%, and Vail residents owned 33%. Joanne Ditmer, *Are Absentee Landowners Dangerous?*, DENVER POST PERSPECTIVE, Jan. 12, 1997. [hereinafter *Ditmer*].

6. Suzanne Silverthorn, Vail's public information officer, says that a high percentage of Vail's part-time residents plan to become permanent by relocating businesses or retiring. *See* Ditmer, *supra* note 5.

7. Todd Hartman, *Vail Ski Area Poised to Expand Despite Growth Concerns*, COLORADO SPRINGS GAZETTE TELEGRAPH, July 6, 1997; Stephen Lyons, *Grow Up, Dig In and Take Root*, HIGH COUNTRY NEWS, Sept. 4, 1995.

8. The tunnel enabled travelers to avoid the notorious, above-timber line sections of Loveland Pass where avalanches and white-outs could create fearsome traffic jams and delays in winter.

9. Since Vail Valley is far lower in elevation than the areas perched on the Continental Divide, it is more temperate as well as more level, and, thus, physically more suited to residential development.

10. *See supra* note 5.

The general global prosperity since the early 1980s created discretionary income and fueled the competitive recreational lifestyle that has become, perhaps, as significant a definer of personal status as profession in today's society. Indeed, career and mountain lifestyles may blend, at least locationally, in the new gateways. The computer and the fax machine have enabled many professionals to compete and produce in mainstream channels, while living the best of mountain life and avoiding the problems and confinement of central cities and downtown offices. This economic observation may touch on a social rationale for gateway growth that is somewhat less laudable or presentable. The gateway—young, wealthy, and white—may be flourishing in part as an escape from the modern conundrums of age, poverty, and race.[11]

B. *The New Relation with the National Forests*

Many of the indigenous mountain communities have long been associated with and dependent upon the commodities obtainable from the national forests—timber, forage, minerals, and water.[12] The timber sales and grazing privileges are underpriced by the federal government,[13] many minerals are free for the taking under the Mining Act of 1872,[14] and water rights are procurable under state law,[15] which, in the Rocky Mountain states, involves priority by appropriation and diversion to a beneficial use.[16] Although the National Forest Service has, since the halcyon days of Gifford Pinchot, Robert Marshall, and Aldo Leopold, been acknowledged as one of the most professional and least-capturable of the agencies,[17] it has still been charged with being sometimes overly solicitous of these extractive interests.[18] It seems evident, however, that the Forest Service is less susceptible to such local economic influence than the line officials in the Bureau of Land

11. *See* Ed Quillen, *The Mountain West: A Republican Fabrication*, HIGH COUNTRY NEWS, Oct. 13, 1997.

12. *See generally*, CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN 3-27 (1992) [hereinafter WILKINSON].

13. GEORGE COGGINS & ROBERT GLICKSMAN, PUBLIC NATURAL RESOURCES LAW, ch. 20, 38.2, ch. 19 14-17 (1998) [hereinafter COGGINS & GLICKSMAN].

14. *See generally* JOHN LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1987) [hereinafter LESHY]. Property rights in minerals is established by the discovery of a valuable, marketable mineral deposit. *See* United States v. Coleman, 390 U.S. 599, 602 (1968).

15. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935).

16. *See, e.g.*, Coffin v. Left Hand Ditch Company, 6 Colo. 443 (1882).

17. *See* COGGINS & GLICKSMAN, *supra* note 13, at ch. 20, 4-5.

18. WILLIAM DIETRICH, THE FINAL FOREST 168-77 (1992) [hereinafter DIETRICH]; *see* Ohio Forestry Ass'n v. Sierra Club, 118 S. Ct. 1665, 1669 (1988).

Management who have long been in the thrall of the local advisory boards as far as grazing decisions.[19]

In spite of these entrenched, invasive forces called the "lords of yesterday" by Charles Wilkinson,[20] nonconsumptive interests, like recreation, wildlife, biodiversity, aesthetics, and preservation have emerged in the last several decades as paralleling and sometimes superseding objectives. The legislative authority provided by the Multiple Use and Sustained Yield Act,[21] the National Forest Management Act,[22] and the National Environmental Policy Act[23] enable and perhaps compel the National Forest Service to plan for passive, essentially nonremunerative uses as well as for the utilitarian.[24] More specific preservation legislation like the Endangered Species Act,[25] the Wild and Scenic Rivers Act,[26] and the Wilderness Act[27] clearly mandate National Forest Service planning, action, and regulation to fulfill the protective, preservationist objectives. The irony, or serendipity, of the Forest Service's noncommodity reorientation is that rapidly escalating tourism, increasing recreational visitation, and the expansion of ski areas under permit,[28] have created constituencies that may counter and, on occasion, outweigh the commodity interests in the political arena[29] and have generated monetary returns that may transcend those derived from extraction.[30] Although local extractive interests can still, in given areas, wield substantial power,[31] the recreationists and preservationists (who on oc-

19. *See* Karl Arruda, *The Rise and Fall of Grazing Reform*, 32 LAND & WATER L. REV. 413, 422-23 (1997).

20. *See supra* note 12, at 20-21.

21. 16 U.S.C.A. §§ 528-31 (West 1992).

22. 16 U.S.C.A. §§ 1600-14 (West 1992).

23. 42 U.S.C.A. §§ 4321-61 (West 1992).

24. *See* Ohio Forestry Ass'n, Inc. v. Sierra Club, 118 S. Ct. 1665, 1668-69 (1998); United States v. New Mexico, 438 U.S. 696, 713 (1978).

25. 16 U.S.C.A. §§ 1531-43 (West 1992).

26. 16 U.S.C.A. §§ 1271-87 (West 1992).

27. 16 U.S.C.A. §§ 1131-36 (West 1992).

28. *See* C. Wayne McKinzie, *Ski Area Development After National Forest Ski Area Permit Act of 1986: Still an Uphill Battle*, 12 VA. ENVTL. L. J. 299 (1993).

29. Vail, whose residents and merchants form a constituency dedicated to regional preservation as opposed to extraction, exerted substantial political and legal influence that resulted in the declaration of the Gore-Eagle's Nest Wilderness, the location of the I-70 corridor over Vail Pass instead of Red Buffalo and the limitation of logging on the wilderness periphery. *See* Parker v. United States, 448 F.2d. 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

30. This is certainly true from the U.S. Forest Service point of view as the totality of subsidized timber sales amounts to an average *loss* of $88 million a year. *See Cut Timber Subsidies*, K.C. STAR, Aug. 31, 1998 (Editorial Section), at B-4.

31. Heather Abel, *The Republicans Now Own the West*, HIGH COUNTRY NEWS, Nov. 25, 1996.

casion contest or even detest each other[32] are, at least within the region of the gateway, growing in influence.[33]

Land values are also ascendant, soaring in certain gateways to heights beyond anyone's wildest, pre-1975 fantasies. It is this factor that draws the National Forest Service and its power over land exchanges into the modern era of explosive gateway growth, and allows the Service to play facilitator, or kingmaker, to new development. Land exchanges with the Forest Service have, in another sense, become a principle determinant in the quantity, quality, and form of new growth on the borders of the gateways. To fully appreciate this role, we must look at the reasons for and the extent of the stratospheric land values in the gateways.

C. *The Explosion of Land Values in the Gateways*

Land values, in a developing community, may depend on and vary with the proximity of amenities.[34] The overarching amenity in the new gateway communities is the aesthetic and recreational potential of the adjacent public lands and, in the case of skiing-oriented gateways like Vail, the recreational services and opportunities provided by public land permit holders.[35] Thus, for example, skiing at Vail, and the proximity of the Gore-Eagles Nest wilderness, the Holy Cross wilderness, and the White River National Forest are the paramount draws for the town of Vail; Mesa Verde National Park and San Juan National Forest are the main attractions for Cortez; and Arches National Park, mountain biking on the Bureau of Land Management's Kayenta slickrock, and boating on the Colorado River are the core reasons for the rise of Moab, Utah.

There is a derivative or secondary amenity of high significance that inheres in the internal configuration, architecture, and services of the gateway town itself. These features were minimal in the early park gateways and many honkytonks like Estes Park, near Rocky Mountain National Park, and Gattlinburg, Tennessee, outside Great Smoky National Park, have been castigated as eyesores and threats to the quality

32. *See* Sierra Club v. Morton, 405 U.S. 727 (1972); Dan Sullivan, *Environmentalists seek Cat III Injunction*, <http://www.vaildaily.com/In/news6_063098.html>.

33. Wyoming "is Republican and rural, in league with big industry." Paul Krza, *Riding the Wyoming "Brand,"* HIGH COUNTRY NEWS, July 6, 1998, at 1. Ah, but if industrial or mining development threatens a popular gateway such as Story, Wyoming, next to the Bighorn Mountains, then politics, regulation, and judicial perspectives can turn to green. *See* Gulf Oil Corporation v. Wyoming Oil and Gas Conservation Commission, 693 P.2d 227 (Wyo. 1985).

34. *See* DOUGLAS KMIEC, ZONING AND PLANNING HANDBOOK, ch. 5, 83-116 (1991) [hereinafter KMIEC].

35. *See* MCKINZIE, *supra* note 28.

of the parks themselves.[36] The new gateways, however, have been characterized by expensive, if sometimes disingenuous, architecture and considerable planning.[37] They have also been distinguished by extensive, high quality service and recreational infrastructure including roads, public parking structures, recreational complexes, parks, and aesthetic enhancement. These capital expenditures are provided in large part by hefty property taxes that are generated by the rapidly rising assessed valuations.[38] They are generally borne without serious complaint as the residents and property owners realize that in-town facilities and amenities will not only add to their lifestyle, but to the economic viability of residential and commercial property.[39] Thus, collective expenditures are viewed more as an investment than as a redistribution or a penalty.

Private land values not only depend on the proximity of recreational and scenic attractions, and the quality of internal city planning and construction, but also on the availability of private land. Limited amounts of development property in a compressed setting, like Jackson, Wyoming, Vail, Aspen, and Telluride, have resulted in stupifyingly high land prices with lots and houses running into the millions.[40] These towns are like pressure cookers with national forest ownership and topographical considerations drastically limiting the supply of buildable land and simultaneously driving the demand for it to spectacular heights. If the setting is less constricted, legally and physically, there may be a dramatic range in the price of offerings. Steamboat Springs, for example, which is nestled against Mount Werner and the national forest on

36. RONALD FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS, 235 (1985); Mark Squillace, *Common Law Protection for Our National Parks*, in OUR COMMON LANDS (David Simon ed.,) 95-96 (1988) [hereinafter Squillace].

37. Vail's detractors will occasionally suggest that it, and other prominent gateways like Aspen, are "glitzy." *See* Staff Report, *You're Moving Where?*, MEN'S J., Sept., 1998, at 83. Vail's architecture has also been criticized as being a little too much of a Tyrolean send-up. It is also of note that the original core of Vail, which evolved without much planning, has more charm and durability than Lionshead, which was constructed later and after heavy planning, and which is now being remodeled. *See* Whitney Childers, *Height and Weight Options Presented for Lionshead Redevelopment Plan*, <http://www.vaildaily.com/pastpages/02.11.98/news4_021198.html>.

38. Ronnie Lynn, *Edwards to Reduce Mill Levy*, <http://www.vaildaily.com/pastpages/01.12.98/news2_011298.html>; *see* JOHN WRIGHT, ROCKY MOUNTAIN DIVIDE: SELLING AND SAVING THE WEST 91-92 (1993) [hereinafter WRIGHT].

39. *See* Whitney Childers, *Vail Council to resume following break*, <http://www.vaildaily.com/pastpages/01.05.98/news6_06010598.html>; The heavy property tax rate can force the conversion of open space and ranch land into development. *See* WRIGHT, *supra* note 38, at 92.

40. *See* TIMOTHY EGAN, LASSO THE WIND: AWAY TO THE NEW WEST 8 (1998) [hereinafter EGAN]; *see* Melissa Coleman, *The High End of Home Economics: Aspen's Trophy Home Phenomenon*, HIGH COUNTY NEWS, Aug. 17, 1998 at 12.

the east, has the Yampa Valley opening wide to the west. Thus, there are million dollar sites on the forest service boundary near the ski area, and considerable lower-end properties to the west, with prices declining along with distance from Mount Werner and the national forest.[41]

It seems somewhat ironic that these giddy private land values are generated by the adjacency of federal forest land which is not, like a park, dedicated strictly to public enjoyment or preservation[42]; instead, it is reserved for "multiple usage" which is statutorily described as "outdoor recreation, range, timber, watershed, and wildlife and fish."[43] These uses, in general, produce relatively low economic returns and market values per acre or, at least, low in comparison with the land prices generated by the potential for high density residential or commercial utilization.[44] It is worth restating that the National Forest Service is itself not authorized to develop the federal lands for residential or commercial purposes.[45] There are, however, at least two clear exceptions where a portion of the federal land on the perimeter of a gateway community may be capable of a high return while still in federal ownership. A private entity might have a permit for an occupational use such as a ski area with tows, trails, operational facilities, service centers, and restaurants.[46] This, in fact, is a prototypical situation in many of the most vibrant gateways, and the commercial recreational complex on the national forest land base clearly adds to the land values of the adjacent private owners.

Another less symbiotic scenario may occur if a private party claims to have made a valuable mineral discovery on the national forest land that borders a public amenity like a national park, or a private amenity

41. *See, e.g.*, Mitch Cantel, *You Can Afford to Invest in Steamboat* (real estate listings), <http://www.steamboatproperties.com/purchasing.html>.

42. United States v. New Mexico, 438 U.S. 696, 717 n.23 (1978). The National Parks, in contrast are dedicated wholly to public enjoyment and intergenerational preservation. *See* 16 U.S.C.A. § 1 (West 1992).

43. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C.A. § 528 (West 1985).

44. *See, e.g.*, the ranch and timberland values as listed in the *Colorado Farm and Ranch Net*, <http://www.webcitypress.com/rej/res/colloc.html>; the *Wyoming Farm and Ranch Net*, <http://www.webcitypress.com/rej/res/wyocatl.html>; the *Montana Farm and Ranch Net*, <http://www.webcitypress.com/rej/res/monttimb.html>.

45. Ed Ryberg, an official of the Forest Service says, "The mission of the Forest Service isn't providing housing. There are no regulations that allow us to pursue that role." Deborah Frazier, *Ski Areas Ask Forest Service for Housing*, ROCKY MOUNTAIN NEWS, Oct. 26, 1996.

46. *See* 16 U.S.C. §§ 497, 497b (West 1985). The permit holder is the primary recipient of ski area revenues, but the federal government receives a permit fee, which is based on gross fixed assets. *See* Meadow Green-Wildcat Corporation v. Hathaway, 936 F.2d 601, 603 (1st Cir. 1991).

like the Town of Vail. The Mining Act of 1872[47] grants, to the discoverer of valuable minerals on public lands, the right to occupy the discovery site, build facilities necessary for operation, and extract the minerals without payment of royalty.[48] In 1996, a Texas company staked out a number of mining claims on national forest land bordering some Vail neighborhoods that featured houses costing up to $2.5 million.[49] The prospect of mining operations on forest land adjacent to their back yards was, needless to say, "a really scary prospect" to local residents.[50] Vested rights in valuable mineral deposits are, however, difficult to establish under federal administrative and judicial standards,[51] and the likelihood of a widespread proliferation of valuable mines near developing gateways or of the particular success of the Texas claims is low.[52] In sum, the high-value operations on national forest land, such as ski areas under permit or vested mining operations, are possible but isolated in occurrence. Their presence on the national forest boundaries of developing gateways is minimal in proportion. By far the most common circumstance with respect to gateway-Forest Service relations is the situation where private land values within the gateway have escalated in substantial part because of the immediate proximity of public lands that are limited by statute to low-return endeavors such as commodity harvesting, nonintensive recreation, or environmental preservation. The forest service land, spatially and qualitatively, is generating private land values, and dictating the nature of private land uses.[53] The question arises: could the Forest Service exercise some of the leverage that it seems to possess here and either capitalize on the values it engenders or guide the nature and form of the growth that ensues? As we will see, the Forest Service can do both, somewhat indirectly, through the power of exchange rather than the power of disposition.

47. 30 U.S.C.A. §§ 21-42 (West 1986).

48. *See* LESHY, *supra* note 14. *See infra* at notes 154-57.

49. Mark Obmascik, *Firm's Mining Stakes Alarm Vail Neighbors*, DENVER POST, Sept. 5, 1996, at 1 [hereinafter Obmascik].

50. *Id.*

51. *Id. See also* United States v. Coleman, 390 U.S. 599 (1968).

52. Though the likelihood of success is low, it is not impossible. In 1983, a mining claim near Keystone was deemed valid, and the land was patented for $400. The land was thereafter valued at $1.8 million for residential purposes. *See* Obmascik, *supra* note 49 at 2. In addition, a low probability of success in claims does not mean a low incidence of attempts. Indeed, another mining claim has also been filed near Vail's Big Horn Park. It is likely that some or most of the claims are not made by bona fide mining interests, but they are made by developers desirous of coercing either a buyout or a land trade. *See* Obmascik, *supra* note 49. *See also infra* at Part IV.

53. Sky-high land values preclude low-return uses. *See* Erika Gonzalez, *Ski Country Urges Land Swap for Housing*, ROCKY MOUNTAIN NEWS, July 24, 1997.

II. Land Dispositions and Exchanges by the United States Forest Service

The course of U.S. public land policy, from the late eighteenth to late nineteenth centuries, was largely one of unrestrained and uncompensated land and resource disposition.[54] The Land Ordinance of 1785,[55] the Preemption Act of 1841,[56] the Homestead Acts,[57] the railroad land grants,[58] the Mining Act of 1872,[59] and the Desert Lands Act of 1877[60] typified and manifested the federal government's general policy to get land, minerals, and water into the hands of the people and the decentralized governments, quickly and cheaply. The era of easy disposition or, as some called it, "the great barbecue,"[61] began to close a bit in 1872 when Congress set aside the Yellowstone area as the first national park.[62] The practice and process of reservation of lands in the public domain for public purposes accelerated substantially with the Forest Reserve Amendment to the General Revision Act of 1891. This authorized the president to set aside timber lands which later became national forests, to be managed under the standards of the 1897 Organic Act.[63]

In 1976, the Federal Land Policy and Management Act[64] made express what had been implicit since the Taylor Grazing Act of 1934:[65] the public lands of the United States were, in general, to be retained and managed, and wholesale (or fire sale) disposition was a thing of the past.[66] Some limited powers of disposition on the part of the Forest Service still remain. The Forest Service can sell small tracts of land that have been classified as chiefly valuable for agriculture rather than

54. *See* PAUL GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968) [hereinafter Gates].

55. *See id.* at 59-74.

56. 5 Stat. 453.

57. Homestead Acts, 43 U.S.C.A. §§ 161-64 (*repealed* 1976); 43 U.S.C.A. § 291 (*repealed* 1976).

58. *See* GATES, *supra* note 54, at 341-87.

59. 30 U.S.C.A. §§ 21-42.

60. 43 U.S.C.A. §§ 321-39 (West 1986).

61. T. H. WATKINS & CHARLES WATSON, THE LANDS NO ONE KNOWS: AMERICA AND THE PUBLIC DOMAIN 45-71 (1975) [hereinafter Watkins & Watson].

62. JOSEPH PETULLA, AMERICAN ENVIRONMENTAL HISTORY 230 (1977).

63. 16 U.S.C.A. § 473-81 (*repealed in part* 1976). *See* ALFRED RUNTE, THE NATIONAL FOREST IDEA (1991).

64. 43 U.S.C.A. §§ 1701-84 (West 1986).

65. 43 U.S.C.A. §§ 315-315r (West 1986).

66. 43 U.S.C.A. § 1701(a)(1) (West 1986) declares the policy of the United States to be retention of the public lands unless a particular disposition will serve the national interest. *See* Robert Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647, 650-52 (1997).

forestry,[67] and can sell up to 640 acres to local governments for town site purposes.[68] The Forest Service does not, however, have the delegated power to operate as a competitive realtor, developer, or speculator.[69] If the Forest Service is to play a role in the growth, and growth control, of the developing gateways, it must look to its power of exchange.

Congress, with its plenary constitutional authority over the pubic lands and their disposition provided by the Property Clause,[70] could legislatively authorize or execute a particular exchange of national forest land. This, indeed, was the usual method of exchange prior to 1922,[71] and it remains a possibility today in spite of legislation generally authorizing the administrators to make exchanges within certain rather generous standards.[72]

The National Forest General Exchange Act[73] authorized the Secretary of Agriculture to, after notice, make exchanges for private lands lying within national forest boundaries when, in his discretion, such lands would be beneficial for public and forest service purposes and would be of at least equal value to the lands conveyed.[74] The Act and resultant exchanges were rarely challenged in the courts, but the one leading case, *National Forest Preservation Group v. Butz,*[75] did hold, significantly, that Forest Service compliance with the acts' procedures and standards was judicially reviewable, even if the substance of the basic

67. 16 U.S.C.A. § 519 (West 1985).

68. 16 U.S.C.A. § 478a (West 1985). The price is not to be less than fair market value, and the sale can be conditioned on the government's agreement to provide zoning that will ensure that use of the transferred area will not interfere with ongoing Forest Service activities. This provision, as well as the agricultural disposition provision, *supra* note 67, have been used only occasionally and neither Cogins nor Glicksman could find any reported decisions construing the acts. *See* COGGINS & GLICKSMAN, *supra* note 13, at ch. 10C-12 and 10C-32.

69. *See* Frazier *supra* note 45.

70. U.S. CONST. art. IV, § 3, cl.2. It states that "Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States." *See* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

71. COGGINS & GLICKSMAN, *supra* note 13, at ch. 10C-36.

72. Some proponents of exchange may proceed directly to Congress desirous, perhaps, of more speed, more finality, or perhaps more political leverage. *See, e.g.*, Adriel Bettelheim, *Colorado Land Issues Vexing Congress* . . ., DENVER POST, Nov. 5, 1997, at CO1, which describes several efforts in Colorado to push land exchanges through Congress when negotiations with the Forest Service appeared to have stalled.

73. 16 U.S.C.A. § 485 (West Supp. 1998).

74. *Id.* The provision also limits exchanges to lands within the same state to avoid any state or local concerns over diminishment of the tax base. *See also* 36 C.F.R. § 254.3(d) (1998).

75. 343 F. Supp. 696 (D. Mont. 1972), *rev'd. & remanded*, 485 F.2d 408 (9th Cir. 1973).

exchange was within the Service's delegated discretion.[76] Congress updated the exchange authority of the National Forest Service, and created a separate authority for the Bureau of Land Management in the Federal Land Policy and Management Act of 1976.[77] The Forest Service exchange process was further particularized with the promulgation of final administrative regulations in 1994[78] and the publication of the National Forest Service Handbook.[79] Under its statutorily delegated and administratively self-circumscribed power, the Forest Service can make land exchanges to serve the overarching purpose of the "public interest,"[80] which can include better management of federal land and resources, the meeting of legitimate state and local needs, and the achieving of established objectives set forth in the multiple use purposes and planning statutes.[81] More particularly, the Forest Service is authorized to use the exchange mechanism to facilitate management that might be impaired either by private inholdings within national forest boundaries or by the scattering or noncontiguity of particular units of a national forest, to protect federal land features or uses that might be threatened by inconsistent private uses, and to facilitate state, local, or private planning and land-use activities that may have legitimate spatial needs.[82]

There are some key legal standards that qualify the public interest and the Forest Service's delegated discretion to proceed with an exchange,[83] perhaps the most precise of which is that the lands to be exchanged

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76. *Butz*, 343 F. Supp. at 702, 485 F.2d at 413-14. The Ninth Circuit felt that the Forest Service had failed to provide sufficient notice and, therefore, the issue was remanded for further proceedings in accordance with "specific Congressional restrictions." *Butz*, 485 F.2d at 414.

77. 43 U.S.C.A. § 1716 (West Supp. 1998). Congress also passed the Federal Land Exchange Facilitation Act of 1988, Pub. L. No. 100-409, 102 Stat. 1086 (1988) as an amendment to FLPMA. It was designed to provide more uniformity in land appraisals and procedure for resolving appraisal disputes. *See* COGGINS & GLICKSMAN, *supra* note 13, at ch. 10-36.

78. 36 C.F.R. § 254 (1998).

79. *See Exchanges*, FOREST SERVICE MANUAL (FSM) ch. 5430 (1990).

80. 43 U.S.C.A. § 1716(a) (West Supp. 1998); 36 C.F.R. § 254.3(b) (1998); FSM ch. 5430.3.

81. 43 U.S.C.A. § 1716(a) (West Supp. 1998); *see* COGGINS & GLICKSMAN, *supra* note 13, at ch. 10C-39.

82. *See* Mark Blando, *Land Exchanges Under the Federal Land Exchange Facilitation Act Department of Agriculture Forest Service*, 1 ENVTL. L. 327, 328-29 (1994) [hereinafter Blando].

83. The Forest Service had the unappealable power *not* to go forward with an exchange if refusal or withdrawal is made before any notice of decision. 36 C.F.R. § 254.41(9) (1998).

be of approximately equal value.[84] The value to be equalized is market value rather than the value as restricted by Forest Service multiple use objectives. Thus, the regulations call for an appraisal, under uniform standards, to determine the highest and best (and most profitable) use of the federal property, as if it were private and marketable.[85] Of increasing public interest significance, with the completions and revisions of land and resource management plans under the National Forest Management Act of 1976, are the requirements that the exchange proposals be consistent with the Forest Service plans,[86] and that the Forest Service make an environmental analysis of the exchange under the National Environmental Policy Act (NEPA).[87] The planning process, the consistency requirement, and the NEPA analysis all tend to involve other agencies, interest groups, local governments, and the general public, making the exchange process considerably more open, flexible, and political, than in the pre-FLPMA era.[88]

III. Advantages and Disadvantages of Land Exchanges in Gateway Growth Areas

Though the National Forest Service is not authorized to directly speculate with national forest lands, it can still, through the exchange process, participate in the great private land values generated by the position and proximity of its restricted lands, or by the services and facilities available on its property. This potential springs from the statutory requirement that private land received in an exchange by the federal government be approximately equal in value to transferred public lands.[89] If the Forest Service transfers acreage on the border of a boom-

84. 43 U.S.C.A. § 1716(b) (West Supp. 1998). It is possible for either party to pay up to 25 percent of the valuation needed for equality in cash. *Id. See also* 36 C.F.R. § 254.12(b) (1998).

85. 36 C.F.R. § 254.9(b)i, ii (1998). It is always difficult to determine whether existing zoning and its impact on value is likely to continue. *See* Lodge Tower Condominium Ass'n v. Lodge Properties, Inc., 880 F. Supp. 1370, 1381 (D. Colo. 1995).

86. 16 U.S.C.A. § 1604(a) (West Supp. 1998); *see* Ohio Forestry Ass'n, Inc. v. Sierra Club, 118 S. Ct. 1665, 1668 (1998).

87. 42 U.S.C.A. § 4371 (West Supp. 1998). *See* 36 C.F.R. § 254.3(q) (1998). *See also* Restore: The North Woods v. U.S. Department of Agriculture, 968 F. Supp. 168 (D. Vt. 1997).

88. *See* James R. Lyons, Undersecretary, National Resources and Environment, United States Department of Agriculture, Statement before the Subcommittee of Forests and Public Land Management, Committee on Energy and Natural Resources, United States Senate, regarding S. 1253, the Public Lands. Management Improvement Act of 1997, (June 17, 1998); <http://www.fsfed.us/intro/testimony/1980617.html>.

89. *See* 43 U.S.C.A. § 1716(b) (West Supp. 1998). *See also* C.F.R. § 254.12(b) (1998).

ing gateway, the lands in the hands of a private developer may be worth hundreds of thousands, or even millions, of dollars an acre.[90] The recipient of the high-value public lands would have to transfer a considerably greater amount of private acreage, located in or near the national forest at points probably not proximate or affected by the growth dynamics of developing gateways, in order to achieve equalization.[91] The deal may be sweeter for the private party in actual practice, as the approval process may be skewed or weighted in favor of deal-making and mandatory equalization.[92] Thus, the federal land to be exchanged may be appraised at less than its actual market potential, and the private lands to be received by the Forest Service may be overvalued.[93] The deal is still potentially a good one for the Forest Service, as it gives up land it cannot develop or, often, even use and acquires a greater amount of land that may be strategic or particularly valuable for forest service purposes.[94]

A further potential benefit for the Forest Service, and the general public, stems from its ability to condition the exchange and retain control or influence over the nature, quality, quantity, and impact of new growth on the exchanged lands. By conditioning the exchange and resulting deed, the Forest Service can influence the design, types of use, and environmental impact.

One vivid, ongoing example is provided by the dealings surrounding the gateway of Tusayan, Arizona, an inholding of 144 acres lying six miles from Grand Canyon National Park within the Kaibab National

90. In a land exchange made final on June 26, 1989, the National Forest Service transferred a two-acre parcel of national forest land that lay within the boundaries of the town of Vail to Lodge Properties, Inc. *See* Lodge Tower Condominium Ass'n v. Lodge Properties, Inc., 880 F. Supp. 1370, 1375 (D. Colo. 1995), *aff'd by*, 85 F.3d. 476 (10 Cir. 1996) [hereinafter *Lodge Properties*]. The overlap and concurrency of federal and state or local jurisdiction over federal property is tolerated to the extent that federal purposes are not substantially frustrated. *See* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580-81 (1987). The forest service parcel was zoned for residential use and was appraised at $915,000, although the Eagle County assessor, who did not take zoning into account, found a fair market value, based on commercial potential, of $3,606,000. *See* Lodge Properties, 880 F. Supp. at 1375, 1381. In return, the Forest Service received a 385-acre private inholding, in Gore-Eagles Nest Wilderness area, which was appraised at $770,000, and $145,000 in cash. *See Lodge Properties*, 880 F. Supp. at 1375. *See also* 43 U.S.C.A. § 1716(b); 36 C.F.R. § 254.12(b) (1998).

91. *See Lodge Properties*, 880 F. Supp. at 1375.

92. *See* Steve Lipsher, *Showdown at the Canyon*, DENVER POST, Apr. 20, 1997, (Empire Section), at (9) [hereinafter Lipsher].

93. *Id. See also Lodge Properties*, 880 F. Supp. at 1380-82; and Kelly Hearn, *On the Offensive: Developer Tom Chapman*, HIGH COUNTRY NEWS, Feb. 16, 1998, at 10 [hereinafter *Hearn*].

94. *Id.*

Forest. Millions of visitors each year pass through Tusayan on their way to the park, and their service demands make the location an extremely valuable venue. Tusayan has, however, also been described as a garish tourist trap.[95]

Problems exist within the park as well. At the height of the summer tourist season, traffic jams can extend all the way from Tusayan into the park, and drivers must compete for parking spaces, which are grossly inadequate for the volume.[96] Since all indications are that visitation and overcrowding problems are likely to increase, park officials wish to curtail personal automobile traffic in the park and substitute a lightrail mass-transit system.[97] This would necessitate a staging and collection point, and Tusayan is the logical place for such a terminal.[98] Park planners also want to upgrade services for visitors and local residents, increasing housing opportunities for park employees, while easing in-park congestion.[99] All of these goals pointed toward development or redevelopment in the Tusayan vicinity.

Land exchanges to expand Tusayan have been offered by Tom Depaolo, a private developer from Scottsdale, Arizona, who has acquired 2,184 acres of private inholdings scattered about the Kaibab National Forest and who desires to either develop them[100] or trade them for acreage next to Tusayan.[101]

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95. [T]his hamlet of 1600 people is a model for what federal planners don't want near a natural treasure. The main street takes millions of visitors a year past an Imax Theater opposite an RV park, Babbit's General Store, motels and fast-food restaurants that tourists overwhelm during summer. If they venture off main street, they find worker slums—battered mobile homes owned by employers like McDonald's and Best Western.

Peter Chilson, *The Grand Canyon Struggles with Reality*, HIGH COUNTRY NEWS, Mar. 2, 1998, at 1. *See also* Lipsher, *supra* note 92, at 2-3.

96. Michelle Rushlo, *Big Rift Over Grand Canyon Project "Village" Proposed South of Park*, DENVER POST, Sept. 14, 1997 (Denver and the West Section), at 1 [hereinafter Rushlo].

97. *See* Lipsher, *supra* note 92, at 2-3. A 1995 master plan for the park adopted a goal of limiting or eliminating cars in favor of mass transit. *See* Culbertson, *supra* note 2, at 4.

98. Associated Press, *New Option May Aid Canyon Rail Plans*, TUCSON CITIZEN, Feb. 6, 1968 (Tucson and Arizona Section), at 1.

99. These goals were also addressed in the 1995 master plan. *See* Culbertson, *supra* note 2, at 4.

100. Most people do not take De Paolo's threat to develop the scattered sites as serious, as they are generally remote, from an economic standpoint, or hard to access. Tusayan tried, unsuccessfully, to incorporate and zone the tracts against development. *See* Lipsher, *supra* note 92, at 9.

101. *See* Rushlo, *supra* note 96, at 2. DePaolo originally wanted 672 acres, *id.*, but he has since scaled down his request to about 270 acres. *See Our Opinion Grand Canyon: Least Disruption is Best Choice*, TUCSON CITIZEN, July 8, 1998 (Editorial Section), at 1 [hereinafter Editorial, July 8, 1998].

DePaolo aspired to build a $670 million development called Canyon Forest Village which would be, in his words, "environmentally sustainable" and the "epitome of a model gateway community."[102] The original plan called for 3,500 hotel rooms, 2,700 housing units for area workers, a natural history center to be managed by the Museum of Northern Arizona, over 400,000 square feet of retail commercial space, and a staging complex for the proposed mass-transit system including parking.[103] The plan was controversial from the outset, with significant opposition from local and statewide economic competitors, and from many environmentalists.[104] However, Dennis Lund, a Forest Service planner, exemplifies support for the exchange, saying, "[G]rowth is unavoidable. The goal is to capture growth and keep it from spreading."[105]

The landowners in Tusayan, seeking to outflank DePaolo and the threat of Canyon Forest Village, have begun to remove some of towns most egregious eyesores, renovate structures, and make their own plans for expansion and national forest land acquisition.[106] DePaolo, due to the political and economic pressure and the environmental questions, scaled down the extent of his vision to less than half of the original.[107]

Tusayan has recently announced a further alternative to acquire land[108] that would insulate its existent and improving private commercial foothold, and cut off the Canyon Forest Village economic threat. Tusayan suggests purchase or trade for around forty acres of adjacent land that would be dedicated to noncommercial public service, including employee housing, mass transit, and community facilities.[109]

Though a final resolution in Tusayan has not been achieved, development of some form seems inevitable, and Forest Service dispositions or land exchanges and Forest Service involvement in the planning process is central. Since the United States owns the surrounding land, has

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102. *See* Chilson, *supra* note 95, at 1-2.

103. Rushlo, *supra* note 96, at 1; Lipsher, *supra* note 92, at 2.

104. Rushlo, *supra* note 96, at 2; Lipsher, *supra* note 92, at 6-8.

105. Chilson, *supra* note 95, at 3.

106. Lipsher, *supra* note 92, at 7. Tusayan has suggested land acquisition to fulfill their plan under the townsite sale provisions of 16 U.S.C.A. § 478a. *See* 16 U.S.C.A. § 478a, 519; *see also* COGGINS & GLICKSMAN, *supra* note 13, at chs. 10C-12, 10C-32.

107. DePaolo now is willing to trade his 2,184 acres of private inholdings for 270 acres of forest land on which he will build 900-1200 hotel rooms, 200,000 to 270,000 square feet of commercial retail space, and mass transit facilities. The Forest Service recommended the less intensive range of commercial development. *See* Joel Nilsson, *Alternative F has possibilities for Canyon Development*, ARIZ. REP., July 25, 1998 (Editorial/Opinion Section), at 1 [hereinafter Nilsson].

108. *See* Lipsher, *supra* note 92, at 7. *See also* 16 U.S.C.A. §§ 478a, 519 (West Supp. 1998); COGGINS & GLICKSMAN, *supra* note 13, at chs. 10C-12, 10C-32.

109. *See* Editorial, July 8, 1998, *supra* note 101, at 1-2; Nilsson, *supra* note 107, at 1-2.

the ultimate power over land transfers, and has key objectives including out-of-park services, employee housing, traffic control, and environmental compatibility, it seems clear that the National Park Service, and the National Forest Service with its land-based leverage will drive the negotiations, the planning, and the outcome.

Another current example of the Forest Service's land-linked influence over local planning and socio-economic patterns involves the town of Vail's desire for low-cost housing within the municipal boundaries. Let's be candid here. This is not a true manifestation of local concern over social, economic, or racial distributions, over fair-sharing of difficult uses or over the regional general welfare.[110] Rather, this is an employee-work force issue that has come to bedevil the developing gateways with their high-octane land values. Simply put, the land values, housing prices, and costs of living within the gateways are so high that necessary community workers—carpenters, school teachers, commercial employees, police people, firepersons, government clerks, maids, waiters, and sports instructors cannot afford to live in or even near the town.[111] Thus, there may well be a labor shortage at given times, and the work force that does exist may have to commute long distances and, possibly, live in mediocre accommodations or trailer parks in unzoned areas.[112] Private provision of low-cost housing would be economically implausible in places like Vail where housing prices average in the millions.[113] Municipal condemnation of development sites would likewise be discouraged by the astronomical prices. Finally, the town could not downzone valuable but as yet undeveloped land for an exclusive use as low-cost housing without incurring, almost inevitably, a regulatory taking challenge.[114]

The Forest Service and the land exchange process can theoretically break the developmental determinism currently fostered by the free market, eminent domain, police power deadlock. Though the Forest Service is not authorized to develop private housing opportunities on

110. For a strong statement that there is a local responsibility on a municipality to use its police power to include a fair share of low-income housing and to further the regional general welfare, *see* South Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975), *appeal dismissed*, 423 U.S. 808 (1975).

111. *See* Jane Alison West, *An American Dream Gets Evicted*, HIGH COUNTRY NEWS, August 17, 1998 at 11 (hereinafter West).

112. *Id. See also* Heather Abel, *Public Lands for Needy Ski Resorts*, HIGH COUNTRY NEWS, October 16, 1995.

113. Home prices in Vail average $1.5 million dollars. *See* Deborah Frazier, *Ski Areas ask Forest Service for Housing*, ROCKY MOUNTAIN NEWS, October 26, 1996, at 2.

114. *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and Dolan v. City of Tigard, *see* 512 U.S. 374 (1994).

federal lands,[115] it would exchange lands with the deeds conditioned as to future allowable uses.[116] It is noteworthy that such conditional exchanges can work both ways. A city or private party may be desirous of exchange only if the Forest Service agrees to limit its future actions on the lands acquired and, for example, to avoid more intensive actions such as clear cutting or permitting for occupation.[117]

A further theoretical advantage of the Forest Service's exchange method lies beyond its clear potential for dealing with the nature and impact of particular uses and within the more complex, sometimes ethereal domain of comprehensive growth control. When cities like Vail and Tusayan are completely surrounded by national forest lands, the federal ownership and exchange power could be used to time and sequence growth as well as deal with its nature and environmental impact.

In the early days of city planning before the Standard State Zoning Enabling Act and *Village of Euclid v. Ambler Realty Co.*,[118] it was thought by many that control of the pace of nonnuisance land usage by zoning was an unconstitutional interference with property,[119] and that a local government could dictate high quality urban form only through the use of eminent domain and public ownership.[120] Even condemnation was constitutionally problematic until the Supreme Court liberalized the public use requirement of the Fifth Amendment and paved the way for urban renewal.[121] Beyond constitutionality, however, eminent domain and public purchase fail as general tools of public planning and land use control because of great cost, delay, public opposition, and impacts on the tax base.[122]

115. *See* Grazier, *supra* note 45; *see* West, *supra* note 111, at 1-2.

116. *See* West, *supra* note 111, at 2; *see* COGGINS & GLICKSMAN, *supra* note 13, at ch. 10C-37, 40.

117. *See* Whitney Childers, *Forest Service, Vail land swap cuts risk of private land trade*, <http://www.vaildaily.com/postpages/01.19.98/news7_011998.html>, <http://www.vaildaily.com/postpages/01.19.98/news7_011998.html>

118. 272 U.S. 365 (1926).

119. *See* Robert Williams, Jr., *Euclid's Lochnerian Legacy, in* ZONING AND THE AMERICAN DREAM 280 (Charles Haar & Jerold Kayden, eds. 1989) (hereinafter Williams).

120. *See id.* at 281.

121. *See* Berman v. Parker, 348 U.S. 26 (1954).

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

348 U.S. at 33.

122. *See* FRANK SCHNIDMAN, HANDLING THE LAND USE CASE 424-28 (1984); Steve Stueber, *Counties Want to Develop Public Land*, HIGH COUNTRY NEWS, Feb. 16, 1998, at 1-2 (hereinafter Stueber).

The ultimate approach to growth control and the sequencing of development has long been assumed to be public or unified ownership of land in advance of development pressures and across a large enough area to circumscribe the economic forces and prevent leapfrogging or sprawl beyond the parameters of constraint.[123] There could thus be a complete central power over the pace of new development. It would proceed only in accord with prior planning, solid finances, necessary infrastructure, capital expenditures, and ongoing land-use controls.[124] An additional benefit of such timed release of centrally held lands is that the assessed valuation of a community's taxable property base and, thus, its financial capacity, increase in direct proportion with development and local responsibilities.[125]

The use of the land exchange mechanism could permit the federal government to exercise similar influence over the nature, quality, extent, and pace of land development, without the costs and disruptions of eminent domain, and without the serious constitutional questions surrounding downzoning in the face of developmental pressures. Additionally, land exchanges, due to the equal value and same state requirements,[126] maintain the overall tax base of the state and, if exchanged lands all lie within it, the county.[127]

To fully realize the potential for the timing and sequencing of growth, the Forest Service's comprehensive planning process, compelled by the National Forest Management Act,[128] would have to extend beyond the federal proprietary concerns and deal with state, local, and private issues on the periphery. It is submitted that, because of the inherent interrelationships, such extraterritorial focus is warranted and legally

123. *See* JAMES CLAPP, NEW TOWNS AND PUBLIC POLICY 4-8 (1971) (hereinafter CLAPP).

124. *See id.* at 148-51. A noted and largely successful attempt at sequencing growth without unified ownership and, instead, through means of the police power was accomplished by the town of Ramapo, New York. *See* Golden v. Planning Bd. of Ramapo, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

125. Central holding in a manner unresponsive to internal growth dynamics and service needs can have a negative effect on the property tax base. *See* Stueber, *supra* note 122, at 1-2.

126. *See supra* notes 74, 84.

127. It is possible for exchanges to involve lands in different counties, which would result, for the county, in a net loss in taxable private lands. Federal property is, in general, immune from state and local taxation. *See* Van Brocklin v. Anderson, 117 U.S. 151 (1886).

128. *See* 16 U.S.C.A. § 1604(a) which requires coordination with other state, local, and federal planning and 16 U.S.C.A. § 1604(b) which mandates a "systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." *See also* 16 U.S.C.A. § 1607 which requires the Secretary of Agriculture "to take such action as will assure the development and administration of the renewable resources . . . in full accord with concepts of multiple use and sustained yield."

permissible;[129] but, it is also recognized that such extended perspective and involvement may create some serious political issues.

Another potential advantage of the federal land exchange method is that the process, though politically sensitive, is not politically subservient. The Forest Service, as an agency with considerable delegated discretion,[130] is not directly controlled by voters and can, thus, condition land exchanges on the decision-maker's best substantive vision. This, of course, can be a basis for abuse as well as enlightened innovation. In fact, politics do enter the federal land management processes indirectly but significantly, through media coverage, public hearings, and administrative changes in personnel.[131] Beyond this, one can observe a strong and ongoing state and local reaction in the west to federal ownership and discretion, a reaction that has affected congressional representation, policy, and ultimately, the exercise of administrative powers.[132]

In short then, although federal exchange powers could be the basis for comprehensive growth control in those gateways surrounded by federal lands, and even though the federal land administrators are not directly checked by state and local governmental processes, it is still true that politics count. The indirect, but powerful, voices of local interest will probably preclude some of the grander visions of federal land exchanges.

Setting aside the heady and contentious suggestion that the federal land management agencies could use their delegated powers to comprehensively control private growth on their peripheries, a more immediately pertinent question is whether any objections are mounted or mountable against the more ad hoc exchange practices currently employed? With happy private traders picking up choice development sites at conservative appraisals, well below actual market levels,[133] and with the federal government increasing usable public land holdings at

129. *See, e.g.*, Free Enterprise Canoe Renters Assoc. v. Watt, 549 F. Supp 252 (E.D. Mo. 1982), *aff'd*, 711 F.2d 852 (8th Cir. 1983). *See also* Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*,. 455 U.S. 1007 (1982), and Columbia Gorge United—Protecting People and Property v. Yeutter 960 F.2d. 110 (9th Cir. 1992).

130. *See* George Coggins & Robert Glicksman, *Evolution of Federal Public Land and Resource Law*, *in* PUBLIC LAND LAW II paper no. 1, at 46-47 (1997) (hereinafter *Evolution*).

131. *See, e.g.*, Karl Arruda & Christopher Watson, *The Rise and Fall of Grazing Reform*, 33 LAND & WATER L. REV. 413, 442-55 (1997). *See infra* at notes 162-66.

132. *See id.* at 415-16. *See also* Robert Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647, 648-49 (1997); WILLIAM PENDLEY, WAR ON THE WEST 187-209 (1995).

133. *See supra* note 90.

no additional cost, who can object? Is this a serendipitous win-win situation? Are there any clearcut disadvantages or problems in the generation of federal land exchanges?

In fact, there are some potential complainants, although generalization is not precise. The most likely opponents of a trade on the periphery of a developing gateway are the residents or commercial landowners who thought they had—and perhaps paid a premium for—untouchable federal open space adjacent to their lots. An exchange of the leading protective edge of this forest greenway to private hands and the ensuing construction of an intervening, multimillion dollar project will certainly evoke some apoplectic responses.[134]

Competitors often voice a concern with exchanges that benefit commercial or extractive interests, especially if the appraisal process has apparently undervalued the tract to be exchanged or overvalued the lands to be received by the public.[135] Skewing—or subsidizing—of front-end costs would be a decided economic advantage for the private entity

134. Michael and Suzanne Tennenbaum of Los Angeles, who already owned a $3 million modernistic house in Vail, decided they wanted to be able to ski to their door. Thus, they began a quest to induce a Forest Service exchange of one acre on Vail Mountain. The Tennenbaums bought up over 2,000 acres of private inholdings in Colorado national forests and offered to trade them for one acre of national forest land located between some of Vail's fanciest homes on Rockledge Road and the Beartree ski run on lower Vail Mountain. *See* Allen Best, *2000 for 1 Land Swap Seen as Threat in Vail*, DENVER POST, Mar. 18, 1990, at 1 (hereinafter Best). The proposal, which was very popular among Colorado environmentalists due to the strategic wilderness character of the offered lands, was virulently opposed by the affected residents and the Vail Town Council, which feared the setting of an erosive precedent. *See* Associated Press, *Vail Wants Law Makers to Oppose Resident's Proposal for Land Swap*, COL. SPRINGS GAZETTE TELEGRAPH, Mar. 22, 1990, at 1. The donnybrook moved from an administrative setting to a legislative one in Washington. Vail residents hired a lobbyist and the town officials promised to donate $50,000 a year toward the purchase of Forest Service wilderness if land exchanges were banned in the area. *See* Jon Van Housen, *Vail Officials Denounce $1 Million Land Swap*, Denver Post, June 11, 1990, at 1 (hereinafter Van Housen).

The controversy, with the Tennenbaums and area environmentalists pitted against the town council and residents, reached a fever pitch before Congress. The Forest Service, which had been bypassed in favor of the political avenue, remained neutral. *See* id. at 3.

Finally, in this critical land use stare-down, the Tennenbaums blinked. The Tennenbaums, who had already incurred area resentment when they built their $3 million modernistic ski home amidst the Tyrolean and Bavarian uniformity, decided that the animosity was too high. They withdrew their offer of exchange. *See* Allen Best, *L.A. Investor Withdraws Vail Land Swap Offer*, DENVER POST, Apr. 4, 1991, at 1.

135. A Telluride dude ranch, whose customers made direct use of the adjacent national forest, opposed a land exchange which would cut off their access to the forest and based their objection largely on the appraisal of the site. The appraisal fixed the value of the Forest Service exchange parcel as $640,000, while complainants offered testimony that it was worth over $4 million. *See* Steve Hinchman, *Agency Leans Toward Controversial Land Trade*, HIGH COUNTRY NEWS, Oct. 18, 1993, at 1.

who builds, mines, or trades.[136] Furthermore, regardless of the economics of the trade itself, established businesses may resist inroads into the advantages of their position.[137]

Urban planners and environmental groups may have shifting stances. Sometimes they may strongly support an exchange when the federal lands provide room deemed necessary for city growth or when the private lands contain distinct wilderness or recreational values.[138] On other occasions, planners and environmentalists may resist an exchange, which enables development on national forest lands counted on for open space.[139]

A final general area of opposition to or disadvantage from federal land exchanges that can be noted involves individuals or groups that may have fundamental interests of a nonlegal or nonproprietarial nature in the federal lands that are to be traded. In particular, Native Americans may have spiritual or cultural interests of aboriginal origin in the lands subject to trade and, thus, oppose deal-making.[140] The Muckelshoot Tribe of Washington, for example, unsuccessfully opposed a Forest Service trade of pristine Huckleberry Mountain, a place used by the tribe for religious purposes for centuries, to Weyerhauser for 30,000 acres of logged over private lands.[141]

Though some opposition to and disadvantage from land exchanges are possible, and though occasional deals are controversial, it seems clear that, in general, the exchange mechanism has had and will continue to have distinct advantages, extensive use, and considerable effect on the consolidation of lands, federal management, and the growth and

136. *See* National Coal Ass'n v. Hodel, 825 F.2d. 523 (D.C. Cir. 1987). Associations representing coal mine operators challenged a three-way exchange whereby Princeton University sold inholdings within Teton National Park to an energy company which then exchanged them for federal coal lease lands. Plaintiffs felt this resulted in an unfair, anti-competitive result. The court felt, however, that the Secretary had considered the anti-competitive effects and that the decision to proceed with the exchange was within the range of allowable discretion. *See id.* at 532.

137. The biggest objection that Tusayan businesses had to the proposed exchange of Tom DePaolo was that "[s]imply put, CFV (Canyon Forest Village) would compete for business with Tusayan." Lipsher, *supra* note 92, at 6.

138. *See* Chilson, *supra* note 95, at 1; Van Housen, *supra* note 134, at 1-2.

139. *See* Best, *supra* note 134, at 1.

140. Under *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the aboriginal, nonrecognized interests of Indian tribes are not considered private property subject to protection under the Fifth Amendment. *Lyng v. Northwest Indian CemetaryProtective Ass'n*, 485 U.S. 439 (1988), held that the U.S. Forest Service could manage government lands and indirectly burden Indian religious interests without the triggering of strict judicial scrutiny and without the necessity for demonstration of a compelling government interest.

141. *See* Rea Howarth, *Land Swap Rankles Tribe*, AM. INDIAN REP. 26 (Jan. 1998).

quality of the modern gateways. Congress favors the method,[142] and it seems likely that its use and influence will grow. There is, however, beyond direct opposition or disadvantage, a vulnerability to the process and a potential for subversion that may offset, if not overshadow, many of its potential and actual advantages. Just as the Forest Service can exert leverage on the nature, quality, and extent of much of the new gateway growth, it may, in turn, be subject to pressure, and the exchange mechanism conscripted to private advantage.

IV. Subversion of the Exchange Process: The Holdups

One of the reasons for and main advantages of the federal exchange power also represents a basis for private pressure and misuse. This irony stems from the circumstance of inheld private lands and the desire of the federal government to eliminate them, consolidate federal ownership, and, thereby, unify and regularize management. Federal ownership of lands within national forest boundaries has never been absolute or uniform. Within almost all proclamation areas of national forest, wilderness areas, and national parks are numerous private holdings of land created by grants, sales, and locations that preceded the official federal reservation of the lands late in the nineteenth and early in the twentieth century. The railroad construction grants, for instance, which gave the developing companies twenty to forty alternating 640 acre sections per mile of tract land created numerous, continuing problems of access, ownership, management, and usage.[143] Homesteading and preemption provisions, mining claims, and state land grants in advance of federal reservation also created literally millions of acres of inheld lands.[144]

The exchange provisions gave the National Forest Service a tool to acquire inholdings, consolidate lands, and coordinate management.[145] However, pending exchange, purchase, or eminent domain, the in-

142. *See* COGGINS & GLICKSMAN, *supra* note 13, at ch. 10C-35.

143. *See* GEORGE COGGINS, ET AL., FEDERAL PUBLIC LAND AND RESOURCE LAW 97-103 (3d. ed. 1993).

144. *See id.* at 80-97. *See also* Steven Quarles & Thomas Lindquist, *The Alaska Land Acts' Innovations in the Law of Access Across Federal Lands: You Can Get There From Here*, 4 ALASKA L. REV. 1 (1987); Steplen Stueber, *Private Rights vs. Public Lands: Thousands of Inholdings, Create Conflicts Inside Federal Lands*, HIGH COUNTRY NEWS, Feb. 16, 1998, (hereinafter *Private Rights*) It is estimated that there are 45 million acres of inholdings within national parks, forests, wildlife refuges, and wild and scenic river corridors. *See id.* at 3.

145. *See* Elizabeth Jones, *Acquiring Federal and State Lands Through Land Exchanges*, 9 UTAH BAR J. 19 (June-July 1996).

holder has not only rights of access,[146] but may have rights of profitable use as well[147] and the lightly scrupled may use these rights to decisive personal advantage, and at significant public expense. Consider the escapades of Tom Chapman.

Chapman, a Colorado land developer, has made a fortune out of, in essence, extorting land trades from the government. In one of his more successful—or notorious—endeavors, Chapman bought 240 acres of private land inheld in the middle of Colorado's West Elk Wilderness Area. Using helicopters to transport building tools and materials, he began the construction, in 1992, of a huge log building, high on a prominent, visible part of his property.[148] Chapman vowed that the $1 million house was just the start and that he would build a luxury subdivision before he was through unless the federal government came forth with cash or lands in exchange.[149] He had used a similar strong-arm tactic at Colorado's Black Canyon National Monument. In 1985, he threatened to bulldoze an inholding on the canyon rim, directly across from the visitor center, unless the National Park Service bought the property at a price of over twice its assessed valuation.[150] In the West Elk caper, the Forest Service ultimately capitulated and agreed to give Chapman 105 national forest acres located a mile south of Telluride, Colorado, in exchange for his 240 wilderness acres, and his promise

146. The inholder may conceivably have rights of access under common law theories of easement by implication or necessity. *See* Montana Wilderness Ass'n v. U.S. Forest Service. 496 F. Supp. 880, 885-86 (1980). The inholder has been also held to have a general statutory right of access under the provisions of the Alaska National Interest Lands Conservation Act (Alaska Land Act), 16 U.S.C.A. § 3210(a), which states:

> Not withstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

This provision, 16 U.S.C.A. § 3210(a), was held to provide for access to inholdings throughout the national forest system, even though the Alaska Land Act itself was directed toward national interest lands in Alaska. *See* Montana Wilderness Ass'n v. U.S. Forest Service, 655 F.2d. 951, 957 (9th Cir. 1981).

Finally, an inholder within a designated wilderness area has a statutory right of reasonable access under the provisions of the Wilderness Act, 16 U.S.C.A. § 1134(a).

147. *See generally Lucas*, 505 U.S. at 1003. *See infra* Section VI., however, for a conflicting analysis.

148. *See* Hearn, *supra* note 93, at 10.

149. *See* Steve Hinchman, *Wilderness Inholding Swap Riles Town*, HIGH COUNTRY NEWS, July 26, 1993, at 1 (hereinafter Hinchman).

150. Mark Pearson, *The Private Parts of Paradise*, WILDERNESS 22 Spring 1993 (hereinafter *Pearson*).

to remove the log palace.[151] Chapman's West Elk parcel and the Telluride lands were both appraised at $640,000—very high for wilderness forest lands[152] and remarkably low for prime development land adjacent to a booming gateway community.[153] In spite of public outcries, Chapman later sold the Telluride tract for $4.2 million and shrugged off the criticisms with assertions about both the sanctity of property and about the dereliction of duty by a government which could have paid him even more.[154]

The game goes on in Colorado. Chapman, unmollified by the firestorm of environmentalist criticism, has purchased more inholdings in the Southern Colorado Spanish Peaks Wilderness Study Area, and in the Holy Cross Wilderness Area, southwest of Vail. Additionally, Crested Butte Mountain Resort has recently made a deal to buy $5 million of inholdings and turn them over to the National Forest Service in exchange for 500 acres that critics claim is worth $20 million, a misappraisal that has raised comparisons with Chapman.[155] The difference, however—and it is a significant one—is that Chapman pressured the government into exchanges it didn't want to make, but had to. Crested Butte Mountain Resort has apparently engineered an exchange that both traders feel good about—even if some third parties have objections.[156] This situation is generically different from those trades involving Chapman, where the Forest Service's discretionary power was subverted from an active pursuit of acquisitions enhancing the public interests into a defensive posture where the Forest Service was forced to use its power and resources merely to defend the status quo against willful assault.

One of the most nationally noted of the holdups involved the Crown Butte Mining Company's proposal to develop the New World Mining District. The massive complex was to be located in an environmental nerve center: near the Absoraka Wilderness Area, close to the headwaters of Clark's Fork, Wyoming's only inclusion in the Wild and Scenic

151. Steve Hinchman, *Agency Leans Toward Controversial Land Trade*, HIGH COUNTRY NEWS, October 18, 1993, at 1.

152. *See* Pearson, *supra* note 150, at 22, where wilderness land in the Black Canyon National Monument was appraised at $200 an acre. *See also* Steve Hinchman, *Wilderness Developer Accused of Fraud*, HIGH COUNTRY NEWS, April 18, 1994, at 1 (hereinafter, *Wilderness Developer*).

153. HEARN, *supra* note 93, at 10.

154. *Id.*

155. Greg Hanscom, *Proposed Land Trade Riles Crested Butte*, HIGH COUNTRY NEWS, Sept. 14, 1998, at 5.

156. *See supra* notes 134-41. *See also* Steve Hinchman, *The Forest Service Sells Out*, HIGH COUNTRY NEWS, May 2, 1994, at 1-2 (hereinafter *Forest Service Sells Out*).

River System and a scant two miles from Yellowstone National Park's northern border.[157] The mining operation, though a legitimate vested property interest, was one with a huge potential for impact on public environmental, recreational, and preservational values. The federal government, under fierce pressure, agreed to buy out Crown Butte for $65 million worth of property interests which were initially assumed to take the form of land exchanges.[158] However, when insufficient lands were identified to complete the deal, the government agreed to furnish cash derived from mineral leasing royalties.[159]

The buyout of Crown Butte's interest seems a valid, if costly, response to the threat of a highly disruptive use. The transaction does not possess, perhaps, the unpleasant aroma that surrounds the Chapman robberies because Crown Butte seemed to have a legitimate, nonpretextual development interest. It does, however, dramatize the conflicts that arise when an active, intensive, and inconsistent use is planned within or adjacent to sensitive federal resources. It shows graphically how the exchange power can be transformed from a positive instrument of land consolidation, management, and growth control into a weakness subject to manipulation. The question is thus presented: are there adequate constraints on the exchange process to guard against both disadvantage to neighbors and competitors, and misuses by exploiters?[160] Or, in another sense, would additional constraints on the process sacrifice the vitality and clear advantages of the exchange process that now enable the improvement of public management, the influence over new growth, and the participation in the skyrocketing values of mountain development?

V. Constraints on the Exchange Process

In the extorted exchange, the Taking Clause is the real predicate for the legislative or administrative concession. Checks, restraints, and reviews over the substantive desirability of the exchange, which might otherwise be sought by interested third parties, are blunted by the consti-

157. Murray Feldman, *The New Public Land Exchanges: Trading Development Rights in One Area for Public Resources in Another*, *in* PUBLIC LAND LAW II paper no. 14, at 2-11, 12 (1997) (hereinafter Feldman).

158. *Id.* at 2-16.

159. *Id.* at 2-19. *See also* Janine Blaeloch, *Land Exchanges Threaten Public Lands*, RAILROADS & CLEAR CUT NEWS ¶ 37 (June 1997), <http://www.wildwilderness.org/aasq/landexch.htm>. The money for the buyout came specifically from the Land and Water Conservation Fund. *See* Jon Margolis, *The Land and Water Fund Waits to be Tapped*, HIGH COUNTRY NEWS, Feb. 16, 1998, at 11.

160. *See Forest Service Sells Out*, *supra* note 156.

tutional necessity of recognizing the trader's right to a reasonable economic use.[161] When, however, an exchange is freely bargained for and when the parties are trading lands that are useful and desirable to each other rather than threatening, there may well then be no immediate constitutional compulsions. At this point, the existence of constraints over process and substance, and the ability to assert them, assumes greater potential utility.

The Forest Service, as an administrative agency within the Department of Agriculture is, of course, not directly responsible to the voters and, thus, there is no opportunity for a binding referendum on particular exchanges or administrators. Politics, however, does play a significant role in the overall course of exchanges. Changes in national administration and new appointments in key positions within the Departments of Interior and Agriculture can change the climate for and overall policy on exchange.[162] Likewise, new lawmakers and shifts in the balance of partisan political power can create legislative and administrative pressures on the practices of local foresters.[163]

At the local level the people, organized interests groups, and the media can, even if not capable of dictating results or controlling general policy, certainly play a significant role in the processes of particular exchanges. Notice and the opportunity for public commentary are not only part of the exchange process itself,[164] but part of associated legislation such as the National Environmental Policy Act.[165] The comments, complaints, and suggestions of the public, local governments, and various interest groups can, thus, influence whether an exchange takes place and in what manner.[166]

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161. *See generally Lucas*, 505 U.S. at 1003.

162. The Reagan Administration was more interested in privatization through exchanges and land dispositions than either its predecessors or its successors. *See* GEORGE COGGINS, ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW, 3211-22 (3d ed. 1993). The Clinton Administration has wanted to use " 'mega exchanges' to acquire environmentally sensitive lands perceived to be threatened by development." COGGINS & GLICKSMAN, *supra* note 13, at ch. 10C-36.

163. The Republican-dominated House Resource Committee is pressuring local Forest Service officials who favor endangered species over livestock. *See* Keith Easthouse & Greg Hanscom, *Southwest Cows Have Friends in High Places*, HIGH COUNTRY NEWS, September 14, 1998, at 7.

164. *See* Blando, *supra* note 82, at 330.

165. 42 U.S.C.A. § 4321 *et seq. See also* Feldman, *supra* note 157, at 2-9.

166. The extensive public response to the original DePaolo proposal for the Tusayan land exchange led to a proliferation of options on the form of the exchange as well as counter proposals from Tusayan itself. *See supra* notes 107-09. The Town of Vail and the Forest Service completed an exchange in 1997 of 74 acres of town land for 62 acres of forest land. The deal, designed to regularize boundaries and reduce the risk of future private land exchanges, took seven years to negotiate and involved considerable public and private input. *See* Rob McCallum, *TOV,*

Beyond politics, the exchange process is legally confined by the scope of the statutory delegation to the Forest Service, by the dictates of collateral acts, and by the administrative regulations and handbook provisions that emanate from the agency itself.[167] The Forest Service initiative, responses, procedure, and discretion are, in accord with the principles of constitutional delegation, to be exercised within these legal and administrative parameters.[168] The National Forest General Exchange Act,[169] and the Federal Land Policy and Management Act[170] expressly delegate the power of exchange to the Forest Service and provide substantive and procedural standards that must be observed by the administrator.[171] Collateral acts that compel all federal administrators and effect all federal agency action will bear on and confine land exchanges as well. Thus, environmental assessment, public disclosure, and consultation under the National Environmental Policy Act,[172] and the Comprehensive Response, Compensation and Liability Act of 1980,[173] and the mandates of national preservation legislation such as the Endangered Species Act of 1973,[174] the Archeological Resources Protection Act of 1979,[175] the Native American Grave Protection and Repatriation Act,[176] the National Historic Preservation Act,[177] the Wil-

USFS Land Swap Finalized, <http://www.valdaily.com/pastpages/1997/03_97/03.11.97/news1_031197.html>. Some have criticized the Forest Service as being less than forthcoming on the particulars of some trades and have sued to prompt fuller disclosure. *See* Lockhart v. Kenops, 927 F.2d. 1028, 1031-32 (8th Cir. 1991). Stephanie Fasano charged that the Forest Service, in order to meet Tom Chapman's demands, kept the appraisal and other information secret and, thereby, violated the rules for public disclosure and comment. *See* Hinchman, *supra* note 151, at 2.

167. *See supra* notes 77-79.

168. The constitutional delegation requirements necessitate some discernible standards which indicate that the essential legislative discretion originated with and remains with Congress, and which can provide a basis for judicial determination that the agency has acted within the "perceptible boundaries" of its empowerment. South Dakota v. U.S. Department of the Interior, 69 F.3d 878, 882 (8th Cir. 1995), *judgment vacated*, 117 S. Ct. 286 (1996).

169. 16 U.S.C.A. § 485 (West 1998).

170. 43 U.S.C.A. § 1716 (West 1998).

171. Under 43 U.S.C. § 1716(a), the Forest Service is authorized to make exchanges when the Secretary determines that the "public interest will be well served by making that exchange." In determining this public interest, the Secretary must consider the impact of the exchange on federal land management, and the needs of state and local people. This is admittedly a very broad delegation, but it is confined to some degree by ensuing requirements that the exchanged properties be in the same state, § 1716(b), that they be of equal value, § 1716(b), and that the value be determined by specified appraisal methods. § 1716(d). *See generally* Feldman, *supra* note 157, at 2-6 to 2-9.

172. 42 U.S.C.A. § 4321-61 (West 1995).

173. 42 U.S.C.A. § 9620-75 (West 1995). *See* BLANDO, *supra* note 82, at 337.

174. 16 U.S.C.A. §§ 1531-43 (West 1985).

175. 16 U.S.C.A. §§ 470aa-470ll (West 1985).

176. 25 U.S.C.A. §§ 3001-3013 (West 1998).

177. 16 U.S.C.A. §§ 470-470w-6 (West 1985).

derness Act of 1964,[178] and the National Wild and Scenic Rivers Act of 1968[179] are binding in the exchange cases as well as in the more active situations of resource extraction or landscape transformation. Finally, administrative promulgation from the agency itself, including regulations covering the process of exchange, the Forest Service Handbook, and the Land and Resource Management Plan for the particular forest require exchanges to meet certain guidelines and standards.[180]

There is another type of legal constraint on exchange to note—not one manifested by present legislative standards or internally promulgated administrative guidelines, but rather one effectuated by legislative preemption of the particular transaction. Congress is the overarching sovereign and proprietor of the public lands, and has powers accordingly that qualify the usual roles and practices of delegation.[181] If Congress wants to exchange lands by special legislative action[182] and allow proponents to effectively bypass the administrative process, then that is its prerogative. Thus, congressional action remains a potential resolution for controversial exchanges and, possibly, a nonjudicial route around administrative denial.[183]

A decision by the Forest Service to go forward with an exchange can be administratively appealed, although a discretionary decision not to go forward with an exchange may not be;[184] either side is, thus, free to withdraw from the exchange prior to the execution of a binding exchange agreement.[185] After the completion of a binding exchange agreement, a withdrawal for modification would have to be in accord with the laws of contractual obligation.[186]

178. 16 U.S.C.A. §§ 1131-36 (West 1985).

179. 16 U.S.C.A. §§ 1271-87 (West 1985).

180. An agency is bound to follow its own official pronouncements until or unless they are amended or waived in a regular fashion. *See* Sierra Club v. Lujan, 716 F. Supp. 1289, 1293 (1989). In a substantive sense, the regulations and the plan demand that the lands received serve important public objectives and that the lands traded not be useable in way to substantially conflict with management plans or values. *See* Lodge Properties, Inc., 880 F. Supp. 1370, 1378 (D. Colo. 1995). It is significant that the administrative regulations, which are mandated under FLPMA, 43 U.S.C.A. § 1716(f)(1), can add duties beyond those specified in the statutory delegation. For example, the regulations on exchange call for public notice and comment, 36 C.F.R. § 254.8, even though these are not called for in 43 U.S.C.A. § 1716 itself.

181. United States v. State of California, 332 U.S. 19, 27 (1947).

182. Before the National Forest General Exchange Act of 1922, 16 U.S.C. § 485, land exchanges were usually approved by Congress. *See* COGGINS & GLICKSMAN, *supra* note 13, at ch. 10c-36.

183. *See* John Brinkley, *Feds OK Land Swaps Within State*, ROCKY MOUNTAIN NEWS, June 19, 1997, at 8; Adriel Bettelheim, *Colo. Land Issues Vexing Congress*, DENVER POST, Nov. 5, 1997, at 1.

184. 36 C.F.R. § 13(b) and 36 C.F.R. § 254.4(q).

185. 36 C.F.R. § 14(d); 36 C.F.R. § 254.4(f).

186. 36 C.F.R. § 254.14(c).

Other parties than the contractors may have a stake in the exchange process, and, therefore, an interest in having particular decisions checked by the processes of review and appeal. Administrative review of Forest Service exchange decisions is not only provided specifically for by the *Code of Federal Regulations*[187] and generally provided for by the Administrative Procedure Act,[188] but it may be regarded as a necessary procedural step before federal judicial review can occur.[189] If contestants have exhausted their administrative appeals they can then attempt judicial review in the federal district courts where results for third-party complainants have been fairly minimal.

In the case of *Lodge Tower Condominium Association (LTCA) v. Lodge Properties, Inc.*,[190] the defendant acquired interests in a 385 acre private inholding in the middle of the Gore-Eagles Nest Wilderness area and sought to exchange this acreage for about two acres of National Forest timber land lying within the Vail city limits.[191] Before LTCA and the Town of Vail proceeded into the federal courts, they opposed the exchange at the administrative level for almost five years.[192] Every Forest Service notice of decision on environmental and appraisal matters was administratively appealed until, on June 26, 1989, the Assistant Secretary of Agriculture declined any further review on the local Forest Service's decision to proceed with the exchange. On that same day, the resolute plaintiffs filed an action in federal district court that would presage seven more years of futile review.[193] On June 3, 1996, the Tenth Circuit Court of Appeals briefly and tersely sustained the district court's dismissal of the action, and, in effect, allowed the exchange to go forward.[194]

The plaintiffs made some legitimate arguments, even though the courts were ultimately unsympathetic. They contended that this exchange was not in the public interest and that the appraisal process had been manipulated.[195] Indeed, since the Town of Vail joined the challenge by the homeowners and competitors, it would seem that land-use plan-

187. 36 C.F.R. § 254.13(b).
188. 5 U.S.C.A. § 701-6. *See* Lodge Tower Condo. Ass'n v. Lodge Prop., Inc. 880 F. Supp. 1370, 1376 (D. Colo. 1995).
189. *See* COGGINS & GLICKSMAN, *supra* note 13, at ch. 8, 70-75.
190. 880 F. Supp. 1370 (D. Colo. 1995), *aff'd*, 85 F.3d 476 (10th Cir. 1996).
191. *See supra* note 90. The acreage was, as a practical matter, unusable for Forest Service purposes, and served primarily as aesthetic open space for the ski area and adjacent town residents.
192. 880 F. Supp. at 1375-76.
193. 880 F. Supp. at 1376.
194. 85 F.3d 476 (10th Cir. 1996).
195. 880 F. Supp. at 1376, 1380-82.

ning and growth control objectives in Vail were not, in fact, substantially promoted by the exchange. This issue highlights a fundamental unclarity about the central substantive standard of the exchange process: which segment of the public is to be served, and with regard to what interests? Though "public interest" can include local planning, economics, and growth control, it need not hold these paramount. "Public interest" might also include a number of federal land and resource management or protection issues, and these might be deemed of primary significance even if in conflict with the local public needs.[196] The Tenth Circuit has held that Forest Service adherence to a multifaceted standard like "public interest" does not necessarily compel a prioritization; rather, "the agency need only demonstrate that it considered relevant factors and alternatives after a full ventilation of issues and that the choice it made was reasonable based on that consideration."[197]

The U.S. Forest Service and the general public were well-served by the exchange of two acres, essentially not useable for forest purposes, for 385 acres in the heart of a popular wilderness. No Tom Chapman-like episodes could thereafter emerge in that particular inheld tract. The local public may have taken a bit of a beating, however, as the planning objectives of the Town of Vail, the ambience of some residences and certain ski runs, and the competitive advantages of several business people were adversely affected.

In general, the, judicial review based on agency adherence to broad delegations like "exchanges in the public interest" is likely to be highly deferential.[198] This does not necessarily mean that judicial review is an ineffective means to constrain the exchange process. Though decisional discretion is in large measure entrusted to the administrator, procedural compliance remains an enforceable prerequisite and a clearly justiciable issue. Courts will require the administrator to observe all the legislatively and administratively established steps not only in the exchange process,[199] but in the collateral processes such as those mandated by

196. *See* 36 C.F.R. § 254.3(b)(1) (1998).

197. Thomas Brooks Chartered v. Burnett, 920 F.2d 634, 643 (10th Cir. 1990).

198. Some authors have suggested that, on the ultimate issue of whether an exchange should take place, there should be no review, because the government is acting in a proprietary capacity, rather than a sovereign or regulatory role. GEORGE COGGINS & CHARLES WILKINSON, FEDERAL PUBLIC LAND AND RESOURCE LAW (1981).

> It could be argued that land exchanges should be exempt from judicial review because the government is acting in a solely proprietary capacity. No court would review an exchange by private owners, at least at the behest of third parties not directly involved or affected.

Id. at 224-5.

199. *See* National Forest Preservation Group v. Butz, 485 F.3d 408, 414 (1973).

the National Environmental Policy Act.[200] Close judicial scrutiny of the procedure set by Congress is not the same as the usurpation of the administrator's delegated discretion. Rather, such review can be regarded as the judicial observation and confirmation of the will of a co-equal branch.[201]

Complainants must expect that strict procedural review will be a two-way road, and that courts will demand procedural rigor with respect to the challengers of exchanges as well as the facilitating agencies. The federal courts have shown an increasing tendency to demand that plaintiffs demonstrate personal harm and issue redressability in land management actions[202] and to avoid the expansive approaches to standing that allowed private attorneys general to invoke the courts' aid in challenges to federal land and environmental policies.[203] In the exchange cases, there have been some recent rejections of plaintiff standing, both in a general sense,[204] due to lack of causality and redressability, and with respect to particular issues such as the equal value determination.[205]

In addition to standing issues, plaintiffs may, in the future, face problems with ripeness. The federal courts are increasingly using ripeness to derail challenges to policy decisions that have not yet manifested finality or concrete harms.[206] Thus, fears about future municipal rezonings, Forest Service reclassifications, or private resales may be held speculative (even if seemingly likely) and not ripe for judicial review or redress.

In sum, then, judicial review presents a constraint on the exchange process primarily with respect to procedural regularity, but even then, only at the behest of appropriate parties and only at the proper time. Judicial review has been a minimal presence in the area of substantive discretion and the Forest Service has remained basically free to identify

200. Lockhart v. Kenops, 927 F.2d 1028, 1033 8th Cir. 1991); Restore: The North Woods v. U.S. Dept. of Agric., 968 F. Supp. 168, 177 (D. Vt. 1977).

201. The line between discretion and procedure is, of course, not a bright one and activist courts can attempt substantive review by holding that certain results were not the products of delegated discretion but instead the consequence of a procedural failure to consider the proper variables. *See, e.g.*, Wilkins v. Lujan, 798 F. Supp. 557, 563-64 (E. D. Mo. 1992), *rev'd*, Wilkins v. Secretary of the Interior, 995 F.2d 850 (8th Cir. 1993).

202. *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990).

203. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973), *vacated*, Mountain States Legal Foundation v. National Wildlife Fed'n, 497 U.S. 1020 (D. Colo. 1990).

204. Desert Citizens Against Pollution v. Bisson, 954 F. Supp. 1430, 1434-36 (S.D. Cal. 1997).

205. *Lodge Tower Condominium Ass'n v. Lodge Properties, Inc.*, 880 F. Supp. at 1381.

206. Ohio Forestry Ass'n, Inc. v. Sierra Club, 118 S. Ct. 1665, 1670-73 (1998).

the components of public interest, to weigh them, and to decide on whether and what to exchange. "Basically free" does not, however, mean totally free or that no review is ever warranted. There is, at least, a modicum of precedent that suggests that an outrageous or literal misstatement of valuations or objectives will not, even after deference, be deemed action in the public interest.

In the case of *National Audubon Society v. Hodel*,[207] the administrator undertook an exchange wherein the United States received nondevelopment easements on tracts of land that were already protected by covenants against such incompatible uses.[208] The court found that the interests acquired were redundant, that the interests conveyed by the United States would be subject to serious environmental impacts and that, even under a deferential standard, the exchange could not be considered in the public interest.[209]

This precedent, indicating at least a base level judicial concern with the genuine advancement of the public interest, and the substantial body of case law reflecting an interest in procedural compliance and the particulars of delegation, represent real if not chafing constraints on the exchange process. Administrators are not free to craft deals in private or crudely dissipate the public trust. However, they do remain free to consider a wide variety of variables, to weigh and balance them, to make planning and management decisions, and to execute exchanges. This, as noted, lays the foundation for creative and effective growth control in developing gateways, as well as for the improvement of federal land management and the protection of valuable or fragile resources. It also opens the door to extortion, manipulation, or the extraction of concessions by inholders.[210] The fact that the affirmative and voluntary use of the exchange process is not closely confined by judicial review may not be of overriding concern to the public; the fact that extortion has not been checked effectively by political, legislative, or judicial means is, however, a significant residual problem. It may, however, be possible to deal with situations of inholder extortion other than by appeasement or by the legislative or judicial ratcheting down of administrative discretion. In other words, it may be possible to pre-

207. 606 F. Supp. 825 (D. Alaska 1984).
208. *Id.* at 838.
209. *Id.* at 846.
210. Giving in to extortion would clearly serve the public interest, but it would be in the sense of saving present values rather than advancing them. Even though such exchanges are defensive rather than voluntary, it would seem unlikely that a court would overturn the decision as unauthorized or arbitrary. *See generally supra* notes, 190-98.

serve the opportunities for affirmative innovative administrative approaches to exchange while reducing administrative vulnerability. This will be explored in the next section.

VI. Alternative Approaches to the Problems of Inholders

If the legal standard of public interest and the deferential approach to judicial review represent rather modest impediments to the exercise of administrative discretion over the property, purpose, and form of the land exchange, they may also be seen as fragile shields against hardball efforts of calculating inholders. The goose-gander-sauce principle holds sway and the forest administrators generally have enough room within the legislative and judicial ropes to pursue their own ends—or to be set astride a barbed-wire fence and have their legs shortened by manipulators. It is submitted that control over the extortion by inholders or developers can be achieved without concession and without over constriction or transformation of the exchange process. It may be possible for the Forest Service to keep its repository of discretion over exchange for affirmative use without the necessity of tightened standards or heightened scrutiny to guard against the threat of highjackers.[211]

There are several approaches available to the Forest Service other than capitulation to a threat-backed request for an exchange. The most obvious and ultimately problematic approach is a public buyout, such as that employed with the New World Mine.[212] If Congress decides to put up cash and pay the extortionist, then the inholding can be acquired without the forfeiture of public lands or interests. The nature of the national political process and the finite limits to the funding provided by the Land and Water Conservation Fund[213] probably limit this approach to extreme cases, such as threats to national treasures like Yellowstone Park.[214] Other measures are still necessary to deal with the

211. *See supra* note 210.

212. *See* Feldman, *supra* note 157, § 2, 11-31. *See also* supra notes, 159-60.

213. The Land and Water Conservation Act of 1964, 16 U.S.C. §§ 4601-4 to 4601-11 established a fund, 16 U.S.C.A. §§ 4601-5, to be composed of revenues from surplus property sales, motorboat fuels taxes, and royalties collected from offshore oil leases. *See* Jon Margolis, *Land and Water Fund Waits to be Tapped*, HIGH COUNTRY NEWS, February 16, 1998, at 11 (hereinafter Margolis). The Fund can and has been used to buy out inholders and threatening uses like the New World Mine. *Id.* at 11. Critics have charged that Congress has been unduly parsimonious with the fund, spending only a portion for land acquisition and using the surplus for deficit reductions. *Id.* at 11.

214. Margolis, *supra* note 213, at 11.

immense problems posed by the millions of acres of private property inheld within the national lands.[215]

The private resources of concerned individuals like Leo Drey of St. Louis,[216] or not-for-profit land acquisition associations like the Wilderness Land Trust, the Nature Conservancy, the Trust for Public Land, and Colorado Open Lands,[217] have been directed at sensitive lands and inholdings, either for permanent protection in private hands, or temporary protection pending federal acquisition. These private efforts have clearly added to the federal financial capabilities, but funds still fall short of the problems or the potential for continued developer abuse. The acquisitions of the private groups have been, primarily, ranch lands and critical inholdings within wilderness areas or national parks.[218] Other nonmonetary approaches may be necessary to more completely address the extensive scope of the inholding problems in national forest lands.

One might be tempted to deal with real estate speculators and developers on sensitive inholdings by denying them access across the public land to their inholdings; or by putting restraints on the scope and manner of access that effectively preclude intensive activities. One finds, however, the burdens of access between inholders, the public, and the federal government are not shared in an equal or correlative fashion. The government land managers and probably the citizens are not automatically or impliedly accorded access across inholdings to other public holdings, even when such access can be characterized as necessary.[219] Thus, the United States must purchase or condemn such access.[220]

The inholder, on the other hand, as the successor in a chain of title stretching back to usually the nineteenth century, has access through national forest or BLM lands to his or her property, possibly as a matter

215. *See Private Rights, supra* note 144, at 3.

216. When Greer Spring, the major water source for Missouri's Eleven Point River, an inclusion in the National Wild and Scenic River System, was threatened by plans for inconsistent development, Leo Drey bought the private inholding, along with the spring, and held it until the federal government could muster the will and the money to buy it from Drey at a discount and add the land and water to the protected corridor of the river. *See* John Ragsdale, *Greer Spring*, _____ UMKC L. REV. _____ (1998).

217. *Private Rights, supra* note 144, at 3. *See also* Jason Lenderman, *A Ranch Rescued*, HIGH COUNTRY NEWS, November 24, 1997, at 1; Katherine Collins, *Ranchers Protect Land in Wyoming*, HIGH COUNTRY NEWS, December 26, 1994, at 1; Bulletin Board, *Preserving Open Spaces*, HIGH COUNTRY NEWS, November 13, 1995, at 1.

218. *Id.*

219. *See* Leo Sheep Co. v. United States, 440 U.S. 668, 680-84 (1979).

220. COGGINS, *supra* note 162, at 155.

of common law implication[221] and definitely as a matter of statutory interpretation.[222] In addition, there are clearcut access provisions for mining claims and other occupancies within designated natural forest wilderness areas.[223] Thus, access to private inholdings within national forests exists as a possible incident of common law property and also as an aspect of statutory entitlement. In sum, the constitutional strictures of the Fifth Amendment[224] are implicit along with the proprietarial prerogatives and sovereign preemption of Congress, and Forest Service agents would seemingly be ill-advised to attempt retribution against recalcitrant inholders through willfull impositions or unreasonable restraints on their vested right of access.

The Forest Service has resisted any temptation to assert a right or power of retaliation against obstructionist inholders.[225] It does, however, claim the ability to regulate access with respect to its impact on national forest lands and with respect to the reasonable use and enjoyment of the tract itself.[226] These are linked, but severable, concepts,[227] and Forest Service regulation along with ensuing litigation has focused primarily on the former. In general, the courts have sustained the Forest Services' discretion in imposing reasonable restrictions on the mode of inholder access, in order to protect the species and environment of the surrounding forest.[228]

If the Forest Service claims the power to regulate the inheld tract itself, as well as the easement of access, a different, broader, and more controversial issue is presented. The 1976 landmark case of *Kleppe v. New Mexico*[229] confirmed the federal government's sovereign and proprietary powers over the public lands, and hinted that the United States could protect its interests with regulations that extended to adjacent private lands.[230]

221. Montana Wilderness Ass'n v. U.S. Forest Service, 496 F. Supp. 880, 884-87 (D. Mont. 1980).

222. Montana Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d. 951, 957 (9th Cir. 1981).

223. 16 U.S.C. § 1134(b).

224. *See* First Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304, 318-19 (1987), for the proposition that excessive regulation can be both constitutionally invalid as a taking and a basis for liability.

225. *See* COGGINS, *supra* note 162, at 155.

226. 36 C.F.R. § 251.114(a). These regulations were promulgated under the Federal Land Policy and Management Act, 43 U.S.C. § 1761(a).

227. *See infra* notes 234, 247.

228. *See, e.g.*, United States v. Jenks, 804 F. Supp. 232, 234 (D. N.M. 1992). *See also* COGGINS, *supra* note 13, at ch. 10E, 23-25.

229. 426 U.S. 529 (1976).

230. *Id.* at 546-57.

The Eighth Circuit has fleshed this potential out with a series of cases involving national interest lands and extraterritorial powers.[231] These cases suggest that legitimate objectives in federal land can be fulfilled by regulatory means reaching adjacent state or private uses that pose threats to the federal interests.[232] In essence, the Eighth Circuit has suggested that the roomy contours of rational basis due process analysis will be used to evaluate these extraterritorial exercises of the federal property powers.[233] The way seems clear for regulation beyond spot responses to isolated problems. It seems reasonable to consider general federal zoning of inholdings, or even of adjacent developing gateways, in order to prevent the threat of incompatible uses even arising.[234]

There is a way, but is there a will? It has been observed that, although Congress will occasionally provide for general extraterritorial zoning in special places like Columbia River Gorge,[235] the federal agencies are, for political and institutional reasons, reluctant to take broad actions against external land use.[236] The overcoming of inertia by the agencies and the land-use regulation of inheld properties is conceivable at least with respect to well-known, politically popular treasures like the Buffalo National River.[237] Whether the agencies could or would use the zoning power as a general approach for the millions of acres of inholdings and the hundreds of developing gateways is far more unlikely. The howls of outrage and threat of law suits and taking claims from private land speculators and conservative legal strike forces like the Mountain States Legal Foundation can be imagined even now at the suggestion.[238]

231. *See* Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); United States v. Brown, 552 F.2d. 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949 (1977); Free Enterprise Canoe Renters Ass'n of Missouri v. Wyatt, 711 F.2d. 852 (8th Cir. 1983).

232. *See, e.g., Minnesota v. Block*, 660 F.2d at 1249-51.

233. *Id.* at 1250.

234. CPR § 251.114(a) authorizes the administrator to regulate access to inholdings as necessary for the reasonable use of the land. It further provides that "[t]he authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria." *See also* The Columbia River Gorge National Scenic Area Act of 1986, 16 U.S.C.A. § 544, which provides for regional zoning of development in a sensitive area with federal, state, and private lands.

235. *See supra* note 234.

236. *See* COGGINS, *supra* note 13, at ch. 14-11.

237. The Town of Boxley, lying within the boundaries of the Buffalo National River, is controlled by police power and property restraints to ensure its compatibility with the park. *See* Joseph Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 506-11 (1984).

238. *See* WILLIAM PERRY PENDLEY, WAR ON THE WEST 157-86 (1995).

One way to defuse the Taking Clause limitations on regulation, and, perhaps, the corresponding agency reluctance to regulate, is through the redefinition of the property interests that are affected. If a private party's property interest can be qualified or, perhaps, even eliminated, through legislative or judicial redefinition, then regulatory impact on such interest would, in the constitutional sense, be simultaneously reduced.[239] The Supreme Court is appreciative of this approach as a potential evasion of the Taking Clause and has limited it by holding that redefinition of property must be essentially consistent with the established state common law and cannot be a bold-faced attempt to define away what the community generally and reasonably regards as a vested interest.[240]

Inconsistent development on an inholding could conceivably be so disruptive and unreasonable with respect to its surroundings that it would rise—or sink—to the level of a common law nuisance.[241] It is not an illogical or overly sensitive stretch to contend that low-grade, strip commercial development on the periphery of pristine jewels like Yellowstone or Rocky Mountain National Parks is an interference with use and enjoyment.[242] The law of nuisance, however, keyed to concepts of unreasonable interference, may require more than a clash with sensitivities; it may, for liability, demand gross assaults on the base land's overall utility through noise, odor, vibration, or threats to health and safety.[243] Commercial and residential development alone, even if inconsistent with other uses, does not usually reach the level of unreasonable interference necessary for the finding of nuisance.[244] This reality was a spur to the evolution of zoning and its confirmation by the Supreme Court as a generally legitimate police power tool in the terrain beyond nuisance.[245]

There remains for consideration a common law approach with interesting potential—but relatively little direct precedent. The doctrine to examine, as a generalized restrainer of inconsistent inholder development, is that of implied reciprocal negative easements—IRNE for those

239. *See, e.g.*, Camfield v. United States, 167 U.S. 518 (1897), (which held that a private fence which willfully enclosed public lands was abatable as a nuisance) 167 U.S. at 523-26.

240. *Lucas*, 505 U.S. at 1026-28.

241. Squillace, *supra* note 36, 87-105.

242. *Id.* at 95-96.

243. *See, e.g.*, Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 590 (Pa. 1973).

244. Squillace, *supra* note 36, at 95.

245. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

that recall this somewhat arcane corner of property law. An IRNE is an equitable covenant, fastened on a particular tract and operating to limit uses on the tract that would be detrimental to a plan or pattern created by the common grantor. The encompassing pattern must be legally binding on the surrounding tracts and must have been noticeable by the grantee even though the deed was not specifically restricted.[246]

In effect, the Forest Service is already claiming a regulatory power that parallels, or perhaps builds off, the concepts or equities of IRNEs. The Forest Service regulations on access for inholders state that the administrator will provide access for inholders subject to reasonable restrictions and subject to a Forest Service determination of the reasonableness of the use on the tract.[247] The determination of reasonable tract use is to be "based on contemporary uses made of similarly situated land in the area."[248] In short, the Forest Service seems to assert a power to maintain the pattern of the area including an inholding, and to limit access rights that would lead to disruptive or inconsistent development.[249]

Neither the Forest Service, the BLM, nor the National Park Service have utilized this land-planning power very forcefully,[250] and have, instead, tended to hope for federal buyouts with money from the Land and Water Conservation Fund,[251] to submit to developer demands for exchange or access,[252] or to suffer the ineradicable clash of inconsistent development.[253] The use of 36 C.F.R. § 251.114(a) has been directed to the impacts of access rather than the compatibility of the proposed tract

246. *See* 20 AM. JUR. 2D. *Covenants, Conditions and Restrictions* § 157 (1995).

247. 36 C.F.R. § 251.114(a). *See supra* note 234.

248. Section 251.114(a) reads in full:

> In issuing a special-use authorization for access to non-Federal lands, the authorized officer shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. The authorizing officer shall determine what constitutes reasonable use and enjoyment of the lands based on contemporaneous uses made of similarly situated lands in the area and other relevant criteria.

249. The presence, if not the application of this provision, may be one reason why Tom Chapman opted to use helicopter access to his wilderness tract, as the preliminary event in his forced exchange. *See supra* at note 148.

250. There are apparently no cases construing the Forest Service power to limit access to uses compatible to those on surrounding lands.

251. *See supra* note 213. *See also* Jon Margolis, *Congress Avoids Buying Public Land*, HIGH COUNTRY NEWS, September 28, 1998, at 5, who feels that a Republican-dominated Congress may be both antipathetic to public land purchase and desirous of using the funds for deficit reduction.

252. *See Private Rights, supra* note 144, at 12.

253. Tony Davis, *In Place of Bigger Park, Tucson Gets Houses*, HIGH COUNTRY NEWS, September 28, 1998, at 6.

use with its surroundings.[254] Perhaps a stronger grounding of the IRNE theory would induce a more affirmative agency use of their available tools.

If the U.S. Supreme Court has refused to imply an easement of necessity for federal land managers and for the public across private lands,[255] how can one begin to make an argument for the validity of the less-well established concept of an IRNE or for the valid application of 36 C.F.R. § 251.114(a) to land use? For one thing, a negative easement involves use restraint but does not involve actual physical invasion.[256] This distinguishes the IRNE situation from cases like *Leo Sheep* which expressly or impliedly raise the Taking Clause when the government attempts to assert the rights of public access over private land.[257] For another thing, an IRNE case in the national forest would involve an active private owner, seeking to make a use divergent from the overarching standards of a common, visible plan, whereas, in *Kaiser Aetna* and *Leo Sheep*, the essentially passive private parties were going to suffer the active intrusion of the general public. The aggressiveness of the private party, the lack of public invasion, and the overall fairness of an IRNE approach do not fully counter the Supreme Court's observation in *Leo Sheep* that there was no express or implied intent by Congress, at the time of the 1862 railroad grants, to burden the grantee's land with an easement of access.[258] This holding was influenced in part by the Court's awareness that Congress, at the time of the nineteenth century land-disposition acts, had no real concurrent intent to retain or manage segments of the public domain.[259] Only later, toward the end of the century, did the United States change in its public land course toward retention, management, and preservation. What this suggests is that the pattern or plan common to the national forests may, as a legal event, have arisen after the making of the private grants that present-day title successors seek to develop. An even harder question thus becomes: can an IRNE be implied in a case where the original

254. *See, e.g.*, Fitzgerald v. United States, 932 F. Supp. 1195, 1204 (D. Ariz. 1996).

255. *Leo Sheep Co.*, 440 U.S. at 680-84.

256. *See* Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENVER U. L. REV. 1977, 1081 (1996).

257. *Leo Sheep Co.*, 440 U.S. at 668. *See also* Kaiser Aetna v. United States, 444 U.S. 164 (1979); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); *Dolan*, 512 U.S. at 374.

258. 440 U.S. at 680-84.

259. *Id.* at 685-86.

grantee was not faced with or on notice of a common plan—but a subsequent grantee was?

It is contendable that an IRNE could arise in this situation by mutual dedication to the public or something akin to custom. The United States, by reserving the forest lands from the public domain and by dedicating them, statutorily and administratively, to retention, preservation, and sustained yield,[260] can arguably be seen as making an implied declaration of public trust.[261] Can one see the grantee of inheld lands and the successors in title as making similar declarations of permanence and nontransformative maintenance? It is arguable that successor grantees of inholdings who are aware of the nondeveloped pattern of the surrounding lands and who do nothing for a substantial length of time, can be seen as dedicating inconsistent development rights to the public,[262] as submitting to a custom of public access of a nondeveloped tract,[263]

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260. United States v. New Mexico, 438 U.S. 696, 713-15 (1978).

261. Charles Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D. L. REV. 269, (1980).

> The modern statutes are premised on the high station that today's society accords to the economic and environmental values of the federal lands and resources. They are rigorous laws designed to protect the public's interest in the public's resources. The legislation requires that public lands and resources not be sold, except in limited and exceptional circumstances; that the public resources are to be nurtured and preserved; that the public is to play a measured but significant role in decision-making; and that the lands and resources are to be managed on a sustained-yield basis for future generations.
>
> The whole of these laws is greater than the sum of its parts. The modern statutes set a tone, a context, a milieu. When read together they require a trustee's care. Thus we can expect courts today, like courts in earlier eras, to characterize Congress' modern legislative scheme as imposing a public trust on the public resources.

14 U.C.D. L. REV. at 299.

262. Some courts have viewed private landowners as making implied dedications of use, access or other rights, including nondevelopment, to the public. Gion v. Santa Cruz, 465 P. 2d. 50 (Cal. 1970) stated:

> Litigants . . . seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. . . . Evidence that the users looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public.

465 P.2d. at 56.

Many private inholdings are not fenced or differentiated from the surrounding forest, and the public is not aware of their private nature until a developer seeks to change them.

263. State *ex rel.* Thornton v. Hay, 462 P.2d. 671 (Ore. 1969), recognized a custom of providing public access to the dry sand beaches, and a restraint on private enclosure and development. The court found that the free, peaceable, uninterrupted, and reasonable public usage of the dry sand can be the basis for a recognition of custom in the law. 462 P.2d at 677. Custom and the particular circumstances of the western public lands can be the basis for a modification of strict principles of common law property and the recognition of greater rights in the public or the public land managers. *See* McKay v. Uintah Dev. Co., 219 F. 116 (8th Cir. 1914); Buford v. Houtz, 133 U.S. 320 (1890). The latter case of *Buford v. Houtz* was recognized by Justice Rehnquist

or as triggering the equitable considerations of the doctrine of laches.[264]

In sum, then, the modern day real estate speculator, who buys an inholding that has been undeveloped and undistinguished from the surrounding national forest for, in most cases, a full century or more, and who threatens to disrupt the tract and the surroundings with inconsistent uses, could arguably be restrained by the doctrine of implied reciprocal negative easements, with the implication stemming from a background of long-time public customary usage, an implied dedication to the public and fundamental fairness. Such an implied reciprocal negative easement could serve as a proprietarial basis for the forest service regulation that limits private inholder access to uses consistent with the surroundings.[265]

A number of the present members of the Supreme Court recognized a variant of this theory in the recent case of *Brendale v. Confederated Tribes and Bands of Yakima*.[266] Nontribal inholders of fee lands within the boundaries of the Yakima reservation sought to make development uses that were inconsistent with the tribe's zoning plan. A majority of the Court sustained the tribe's power to zone nontribal inholdings within the forest areas of the reservation, and Justice Stevens concurring opinion was based on a theory akin to implied reciprocal negative easements.

> . . . [T]he Tribe's power to zone is like an equitable servitude; the burden of complying with the tribe's zoning rules runs with the land without regard to how a particular estate is transferred. . . . Indeed there is strong authority for the proposi-

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as an exception to the general rule of private grant exclusivity announced in *Leo Sheep Co.*, 440 U.S. at 668.

> The appellants there were a group of cattle ranchers seeking inter alia an injunction against sheep ranchers who moved their herds across odd-numbered lots held by the appellants in order to graze their sheep on the even-numbered lots. This Court denied the requested relief because it was contrary to a century-old grazing custom.

440 U.S. at 687.n.24.

264. California was precluded by a variant of the doctrine of laches from asserting a public trust under Los Angeles harbor at time deemed so removed from the trust inception and so long after substantial reliances as to be fundamentally unfair. *See* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 209 (1984).

265. 36 C.F.R. § 251.114(a). *See supra* at notes 247-50. Courts indicate on occasion that the federal government's proprietary powers may lessen constitutional concerns about the reach of the police power. *See* National Wildlife Fed'n v. Watt, 571 F. Supp. 1145, 1157 (D D.C. 1983). In addition, there are cases that suggest that the reach of the police power is extended by the presence of private land uses that bear on the public trust—even if such lands are not themselves directly burdened by the trust. In Just v. Marinette County, 201 N.W. 2d. 761 (Wis. 1972), the Wisconsin Supreme Court sustained a regulation that, though not limited by the public trust in navigable waters, directly affected it. Likewise, a Forest Service regulation on private tract development may get added reach and legitimacy because the exercise of the police power is combined with a nonpossessory negative easement in the regulated property.

266. 492 U.S. 408 (1989).

> tion that equitable servitudes fall within the same family of property law as easements. . . . The Tribe's power to control the use of discrete, fee parcels of land is simply incidental to its power to preserve the character of what remains almost entirely a region reserved for the exclusive benefit of the tribe.[267]

This article has been premised on the idea that there are alternatives to dealing with the subversion of the land exchange process other than through buyouts or the circumscription of the administrator's exchange powers. It is submitted that the inheld tracts are regulatable to prevent threatened disruption, that the Forest Service has already asserted the power to impose such restraints, and that such regulation would be consistent with the modern Supreme Court's application of the Taking Clause. Consistency with *Lucas v. South Carolina Coastal Commission*[268] contendedly exists because the private inheld tracts are burdened, beyond the limits of nuisance, by equitable servitude or implied easements that serve as a basis for an expanded use of the police power.

VII. Conclusion

In conclusion, then, we can acknowledge that the land exchange power is one with great potential and fairly limited direct checks. The standard of public interest is variegated and nonprioritized, the requirement of equal valuation is malleable, and the judicial review standard of nonarbitrariness is generally applied softly, with soothing deference. Given the power over development and the vulnerability to extortion, one can consider the desirability of a more precise or formalized statutory structure and review such as evidenced in the planning acts of the 1970s,[269] and the ensuing flood of litigation.

It is contended that the current version of discretionary power is appropriate, in form and containment, and likely to expand in use and influence.[270] If the current discretion was confined and subordinated to a proliferation of legislative standards and to increased local and judicial influence, then real planning, innovation, and quality would quite possibly be compromised by local politics, local economics, and increased litigation.[271] Beyond the issue of paralysis by particulariza-

267. *Id.* at 442.
268. 505 U.S. 1003 (1992).
269. *See* Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§ 1701-84; National Forest Management Act of 1976, 16 U.S.C. § 1600-14; Public Range Lands Improvement Act of 1978, 43 U.S.C.A. §§ 1901-08; National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-61.
270. *See* COGGINS & GLICKSMAN, *supra* note 13, at ch. 10C, 56.2.
271. *See* Richard W. Behan, *RPA/NFMA—Time to Punt*, 79 J. FORESTRY 802 (1981), *cited in* COGGINS, WIKLINSON & LESLY, *supra* note 162, at 36-38.

tion, there is a question of inherent limitations on legislative foresight. In other words, could Congress, even if it wanted to, create a workable model that would handle all the myriad variables of exchange in advance? It seems more likely that Congress would need to and will continue to delegate substantial discretion over the substance and fine tuning of exchange and growth management.

It should also be recalled that this is, after all, the government's land;[272] Congress is a proprietor as well as a sovereign and the Forest Service is entitled to exercise a wide range of responsive discretion as the agent and caretaker for the owner. Though some authors and communities may feel that gateway success and solvency are the paramount concerns of the neighboring national forests and parks,[273] the national land managers are, in truth, responsible to the general public welfare ahead of the local government. They have a duty to protect the public resources from cross-boundary threats that bear on the utility and quality of the lands.[274] The federal administrators are, in function,[275] trustees and their foremost duties to the public lands and to the future generations transcends the immediacy of private and local needs. This supports the continuation of a broad discretionary power over the exchange and management of the public lands, as well as the growth plans of local communities and private inholders.

If one's concern is less about Forest Service discretion in the growth control context and more about the administrators' vulnerability to manipulation, there are several ameliorating perspectives that might quell a desire for precipitous constriction of the exchange process. First of all, the forces of extortion are independent of the exchange process—they may use it or misuse it, but they are not dependent on it. A legislative confinement of the exchange tool might lessen the Forest Service's ability to both participate meaningfully in the quality and form of gateway community growth and to consolidate or secure significant land acquisitions—and it would have no real impact on the extortionists who would thereafter simply shift their pressure to Congress, state and local governments, and private citizens in lieu of holding up the Forest Service.

272. Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 453 (1988).

273. *See* JIM HOWE, ED MCMAHON & LUTHER PROPST, BALANCING NATURE AND COMMERCE IN GATEWAY COMMUNITIES 92 (1997).

274. *See* William Lockhart, *External Threats to Our National Parks: An Argument for Substantive Protection*, 16 STAN. ENV. L. J. 3 (1997).

275. *See, e.g.*, Sierra Club v. Department of the Interior 398 F. Supp. 284, 287 (N.D. Cal. 1975).

Secondly, one should acknowledge the history and tradition of professionalism in the Forest Service which, since the early days of Gifford Pinchot, has been an agency of high integrity and dedication to purpose. The Forest Service, on its own initiative, devised the concept of federally protected wilderness,[276] and voluntarily undertook the duty of roadless area review for possible inclusions in the Wilderness System.[277] It has been vigilant in its development of land and resource management plans,[278] and it has been far less obviously in the grasp of local extractive users, as has been often evidenced with regard to the Bureau of Land Management.[279] The Forest Service has been responsive to local interests—but not generally subservient to them. This course of agency performance suggests that any capitulation to local interests or inholders will be more likely a concession to the power of vested rights than a reflection of agency weakness or delegative failure. Even in this regard, it has been herein suggested that there are alternatives for pressure that stand apart from the operations of the exchange process and that present the possibility of either a constitutional controlling of jarring inconsistencies with regulation or of a redefinition of protectable property.

To conclude, the development of the gateways, the urbanization of the outback, and the rapid rise in high country land values, in Colorado and other Rocky Mountain states, have spawned multifaceted responses by the National Forest Service, state and local governments, environmental associations, and private interests. These reactions are sometimes parochial and often in conflict, but they are not incapable of coordination. The active federal agency participation and the enlightened, creative use of the discretionary exchange power can promote better planning, better protection of sensitive interests, and better adjustments of the benefits and burdens of growth and rising land values.

276. Aldo Leopold, a forest ranger in New Mexico's Gila National Forest, devised a plan for an administrative wilderness in the Gila—the first official wilderness area in a national forest. MARYBETH LORBRECKI, A FIERCE GREEN FIRE 83-96 (1996).

277. COGGINS, WILKINSON & LESHY, *supra* note 162, at 1040-41.

278. *See* Scott Hardt, *Federal Land Use Planning and It's Impact on Resource Management Decisions*, *in* PUBLIC LAND LAW II paper no. 4 (1997).

279. *See supra* notes 17, 19.