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Christopher Jackson

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# AT THE CROSSROADS: BALANCING PUBLIC EDUCATION AND WILDLIFE PROTECTION

CHRISTOPHER JACKSON\*

## INTRODUCTION

Protecting America's wildlife and pristine wilderness areas has been a priority, in one form or another, of our nation's government since the administration of President Theodore Roosevelt.<sup>1</sup> In fact, Roosevelt did more for the long-term protection of our nation's wilderness areas than all of his predecessors in the Oval Office combined.<sup>2</sup> Roosevelt viewed protecting our nation's wildlife and environmentally sensitive lands as a moral obligation<sup>3</sup> and framed it as one that was not to be taken lightly by our national leaders.<sup>4</sup> As a result, President Roosevelt created the nation's first wildlife refuge in 1903.<sup>5</sup> His efforts to protect the American wilderness is widely considered to be one of the most enduring presidential initiatives in our nation's history.<sup>6</sup> While Roosevelt's intentions were good, and the park system is recognized as a national treasure, it has also caused problems that he could not have imagined.

Much of the wilderness that Roosevelt sought to protect is now situated on federally controlled lands in the western United States.<sup>7</sup> The federal government's landholdings are significant, with approximately

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\* J.D. Candidate 2012, William & Mary School of Law; B.A. Political Science, George Washington University, 2006. The author would like to thank his family and friends for their abiding love, values, and for their reminders that even greater success is always right around the corner. He would also like to thank Greg Proseus and Noor Merchant for their unconditional friendship, loyalty, and understanding. Finally, the author would like to thank the staff and editorial board of the *William & Mary Environmental Law and Policy Review* for their hard work and dedication.

<sup>1</sup> See DOUGLAS BRINKLEY, *THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* 20–21 (2009).

<sup>2</sup> See *id.* at 20.

<sup>3</sup> *Id.*

<sup>4</sup> See *id.* at 21.

<sup>5</sup> ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 209 (2009).

<sup>6</sup> See BRINKLEY, *supra* note 1, at 21.

<sup>7</sup> Amy Stengel, "Insider's Game" or Valuable Land Management Tool? Current Issues in the Federal Land Exchange Program, 14 TUL. ENVTL. L.J. 567, 567–68 (2001).

thirty percent of the nation's surface being comprised of such property, and a large amount of this land consisting of wildlife habitats and refuges.<sup>8</sup> Some of these refuge lands were obtained for the explicit purpose of wildlife protection.<sup>9</sup> For instance, the Kofa National Wildlife Refuge in Arizona was obtained for the "conservation and development of natural wildlife resources, and for the protection of public grazing lands . . ."<sup>10</sup>

Much of the nation's current federal land ownership in the West is tied to the earliest days of the Republic.<sup>11</sup> From the late 1700s well into the mid-to-late 1900s, Congress acquired and sold land in the West in an effort to promote its settlement policies.<sup>12</sup> However, the government's actions came to an abrupt end with the passage of the Federal Land Policy and Management Act ("FLPMA") in 1976.<sup>13</sup> Seeking to provide adequate measures to manage its vast land holdings, Congress determined that a management scheme was needed to "effectuate the policies of the government regarding the use and conservation of natural resources, rangelands, and forests."<sup>14</sup> The FLPMA altered the nation's land use priorities by effectively terminating any further sale of lands held by the federal government.<sup>15</sup> As a result of the FLPMA, the government initially retained the lands that it did not sell prior to the date of the Act.<sup>16</sup> Today, approximately 247 million acres of land are managed by the Bureau of Land Management ("BLM") alone,<sup>17</sup> with the government's total land ownership reaching approximately 650 million acres.<sup>18</sup>

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<sup>8</sup> See FREYFOGLE & GOBLE, *supra* note 5, at 206.

<sup>9</sup> *Id.* at 209.

<sup>10</sup> *Id.* at 212.

<sup>11</sup> See Stengel, *supra* note 7, at 571.

<sup>12</sup> See *id.* at 571–72 (noting the various ways in which the federal government has both bought and sold land throughout our nation's history as well as set aside lands for preservation purposes).

<sup>13</sup> See Federal Land Policy and Management Act of 1976 §§ 101–102, 43 U.S.C. § 1701 (2006).

<sup>14</sup> Stengel, *supra* note 7, at 573.

<sup>15</sup> See 43 U.S.C. § 1701(a)(1) (2006) ("The Congress declares that . . . the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest.").

<sup>16</sup> See 43 U.S.C. § 1701(a)(1), (3) (2006).

<sup>17</sup> See U.S. DEP'T. OF THE INTERIOR, BUREAU OF LAND MGMT., PUBLIC LANDS STATISTICS 13–14 tbl.1-4 (2010), available at [http://www.blm.gov/public\\_land\\_statistics/pls10/pls10\\_combined.pdf](http://www.blm.gov/public_land_statistics/pls10/pls10_combined.pdf).

<sup>18</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/T-RCED-95-117, FEDERAL LANDS: INFORMATION ON LAND OWNED AND ON ACREAGE WITH CONSERVATION RESTRICTIONS 1

In the coming years, enrollment in public schools in western states is projected to be much higher than in other states.<sup>19</sup> In most states across the nation, state and local governments fund public education through the assessment of property taxes.<sup>20</sup> However, due to the significant amount of land possessed by the federal government in the West, many western states have found it difficult to raise money for their respective education districts.<sup>21</sup> This is because states may not tax land possessed by the federal government.<sup>22</sup> In states such as Utah, where federal lands comprise sixty-five percent of the state's total territory, the state is left with fewer options to fund public education.<sup>23</sup> To counter this funding deficit, state legislatures have become much more vocal in their opposition to federal land ownership in the West.<sup>24</sup> In addition, state politicians have also sought ways to add more monies to state coffers, sometimes through untraditional means.<sup>25</sup>

As a result of federal land ownership in the West, states are placed in a precarious situation. On one hand, protection of our nation's

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(1995), available at <http://gao.justia.com/departments-of-the-interior/1995/3/federal-lands-traced-95-117/T-RCED-95-117-full-report.pdf> (statement of John H. Anderson Jr., Associate Director of Natural Resources Management Issues).

<sup>19</sup> See *The APPLE Initiative*, UTAH STATE LEGISLATURE, slide 11 (2006), <http://www.le.state.ut.us/interim/2006/appleinitiative/> [hereinafter Utah APPLE Initiative]. Upon further searches, the 2006 numbers discussed in the Utah State Legislature's slides are the most current figures available, as of the publication of this Note. See *id.*

<sup>20</sup> See generally Utah APPLE Initiative, *supra* note 19, at slide 38.

<sup>21</sup> See, e.g., *A Resolution: Urging the United States Congress to Compensate Western States for the Impact of Federal Land Ownership on State Education Funding*, COLO. STATE BD. OF EDUC., [http://www.cde.state.co.us/cdeboard/download/RESOLUTION/res\\_appleinitiative.pdf](http://www.cde.state.co.us/cdeboard/download/RESOLUTION/res_appleinitiative.pdf) (last visited Apr. 5, 2012).

<sup>22</sup> Utah APPLE Initiative, *supra* note 19, at slide 38.

<sup>23</sup> See, e.g., Press Release, Orrin G. Hatch, U.S. Senator for Utah, Hatch Seeks Study on Impact of Federal Land on Utah Education Funding (Oct. 23, 2007), available at <http://www.votesmart.org/public-statement/300320/hatch-seeks-study-on-impact-of-federal-land-on-utah-education-funding>.

<sup>24</sup> See Ilya Somin, *Utah May Try to Use Eminent Domain to Take Federal Government Land*, THE VOLOKH CONSPIRACY (Mar. 3, 2010, 10:07 PM), <http://volokh.com/2010/03/03/utah-may-try-to-use-eminant-domain-to-take-federal-government-land/> (noting that the Utah House of Representatives passed legislation that allows the state to seize federal land under a theory of eminent domain).

<sup>25</sup> See, e.g., Mean Gruver, *Wyoming Governor Puts Slice of National Park on the Market*, WASH. POST, July 5, 2010, at A11, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/04/AR2010070404003.html> (discussing how the Governor of Wyoming has offered to sell portions of the Grand Teton in order to fund public education in his state).

wildlife is a concern central to many government policies and agencies.<sup>26</sup> However, ensuring that states have the ability to properly fund their educational systems is also important. During the 109th and 110th Congresses, legislation was introduced to remedy the funding inadequacies of western state school systems, while also protecting our nation's wildlife located on federally owned lands.<sup>27</sup> These bills received significant support from western state politicians, but were not ultimately passed.<sup>28</sup>

This Note will argue that the need for public education funding is at odds with the protection of wildlife on federally controlled lands in the western United States, and that current legislative proposals to remedy this problem cannot be realistically implemented, given the political and economic climate facing our nation. It will then propose the creation of a new legislative and legal regime, to be governed by the Secretary of the Interior, that will protect environmentally sensitive lands controlled by the federal government, as well as provide funding for public education in the western states.

Part I of this Note will provide an overview of the wildlife habitats located on federally controlled lands and the means used by the government to protect these areas thus far. Part II will analyze the detrimental impact that federal protection of these wildlife habitats has on states' abilities to collect sufficient property and natural resource taxes, which typically form a primary source of funding for public education. Part III of this Note will examine congressional proposals introduced to remedy this problem, including the APPLE Initiative,<sup>29</sup> H.R. 3463,<sup>30</sup> and H.R. 3464,<sup>31</sup> and will argue that legislative initiatives similar to these will face significant barriers to their implementation in the coming years. Finally,

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<sup>26</sup> See BRINKLEY, *supra* note 1, at 8–9.

<sup>27</sup> See Action Plan for Public Lands and Education (“APPLE”) Act of 2005, H.R. 3464, 109th Cong. §§ 2–3 (2005); *see also* Action Plan for Public Lands and Education (“APPLE”) Act of 2005, H.R. 3463, 109th Cong. §§ 2–3 (2005) (counterpart legislation to H.R. 3464).

<sup>28</sup> See Hatch, *supra* note 23 (indicating that Senator Hatch introduced an amendment to a Senate appropriations bill intended to support the Action Plan for Public Land and Education Act of 2007); *H.R. 3464: Action Plan for Public Lands and Education Act of 2005*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h109-3464> (last visited Apr. 5, 2012); *H.R. 3463: Action Plan for Public Lands and Education Act of 2005*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h109-3463> (last visited Apr. 5, 2012).

<sup>29</sup> See Utah APPLE Initiative, *supra* note 19, at slides 58–63.

<sup>30</sup> See APPLE Act H.R. 3463, *supra* note 27.

<sup>31</sup> See APPLE Act H.R. 3464, *supra* note 27.

Part IV will propose the creation of new legislation that will allow for both the sale of federally owned land to states and the protection of wildlife habitats by granting the U.S. Department of the Interior the legal authority to ensure continued protection of the habitats through enforcement powers and by creating a trust. This legislation might succeed where the previous bills did not because it will consider environmental concerns, remedy the public education funding dilemma, and ensure that it is economically and politically beneficial for both parties to implement.

I. OVERVIEW OF FEDERAL LAND OWNERSHIP AND EFFORTS  
ESTABLISHED TO PROTECT WILDLIFE

The Property Clause of the U.S. Constitution provides authority for the federal government to exercise possession over all federal lands.<sup>32</sup> The Property Clause states that Congress shall “have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”<sup>33</sup> For many decades, it was widely believed that upon a state’s entry into the Union, the federal government’s power within that territory decreased, eventually leaving the government to be considered “a private landowner.”<sup>34</sup> However, the Supreme Court soon began to issue opinions recognizing the federal government not only as a landowner within the states, but also as a sovereign.<sup>35</sup> Recognition of the central government as a sovereign power, when acting as a landowner, reached its climax in *Kleppe v. New Mexico*.<sup>36</sup>

The U.S. Supreme Court addressed the government’s ability to regulate the activities conducted on, and legal regimes governing, lands under federal control in *Kleppe v. New Mexico*.<sup>37</sup> In *Kleppe*, a case concerning the Wild Free-Roaming Horses and Burros Act,<sup>38</sup> the Court determined that Congress can exercise both the powers of a “proprietor

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<sup>32</sup> See U.S. CONST. art. IV, § 3, cl. 2.

<sup>33</sup> *Id.*

<sup>34</sup> FREYFOGLE & GOBLE, *supra* note 5, at 111 (recounting a common argument that the federal government’s ownership rights should be on par with those of citizens within a state).

<sup>35</sup> See *id.*

<sup>36</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (holding that the federal government had vast authority to promulgate laws and rules within the territories it held).

<sup>37</sup> See FREYFOGLE & GOBLE, *supra* note 5, at 206.

<sup>38</sup> Wild Free-Roaming Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified as 16 U.S.C. §§ 1331–1340 (2006)).

and of a legislature over the public domain.”<sup>39</sup> The Court found that although the Property Clause of the U.S. Constitution<sup>40</sup> does not allow Congress to determine public policy within a state, it does allow it to exercise complete control over the public property entrusted to it.<sup>41</sup> As a result, the Court upheld the government’s authority to promulgate laws and procedures to regulate and protect wildlife living on lands which are under federal control.<sup>42</sup> The Court’s decision in *Kleppe* allows Congress to “legislate freely in ‘respect’ to public property.”<sup>43</sup>

Today, the federal government owns approximately 650 million acres of land in the United States.<sup>44</sup> This is roughly thirty percent of the total area of the country.<sup>45</sup> The federal government owns significant amounts of land in each of the eleven mainland western states.<sup>46</sup> This ranges from twenty-eight percent of federal land ownership in Montana to eighty-three percent in Nevada.<sup>47</sup> Essentially, the federal government owns, roughly, fifty-two percent of the lands located in the thirteen western states, while four percent of the land of the other thirty-seven states is federally owned.<sup>48</sup> The United States government began a management system for lands in its possession in 1976, with the passage of the Federal Land Policy and Management Act.<sup>49</sup> The government manages land in its possession through several agencies within the U.S. Department of Agriculture and the U.S. Department of the Interior. The

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<sup>39</sup> *Kleppe*, 426 U.S. at 540.

<sup>40</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>41</sup> *Kleppe*, 426 U.S. at 540 (referencing its previous ruling in *United States v. San Francisco*, 310 U.S. 16, 30 (1940), in which the Court declared Congress’s ability to determine disposal rights with respect to hydroelectric power on public lands to be a valid exercise of its constitutional authority).

<sup>42</sup> *Id.* at 540–41.

<sup>43</sup> Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 809 (1993).

<sup>44</sup> *Printable Maps—Federal Lands and Indian Reservations*, NAT’L ATLAS OF THE U.S., <http://www.nationalatlas.gov/printable/fedlands.html> (last visited Apr. 5, 2012).

<sup>45</sup> *Id.*; FREYFOGLE & GOBLE, *supra* note 5, at 111.

<sup>46</sup> Utah APPLE Initiative, *supra* note 19, at slide 26. *See generally* U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-96-40, LAND OWNERSHIP: INFORMATION ON THE ACREAGE, MANAGEMENT, AND USE OF FEDERAL AND OTHER LANDS (1996) [hereinafter GAO LAND OWNERSHIP].

<sup>47</sup> Utah APPLE Initiative, *supra* note 19, at slide 26 (providing 2006 numerical data on the amount of land owned by the federal government in the West, with percentages of federal land ownership including, among others, fifty-three percent in Oregon, sixty-five percent in Utah, forty-four percent in California, and fifty percent in Wyoming).

<sup>48</sup> *Id.* at slide 29.

<sup>49</sup> *See* Federal Land Policy and Management Act of 1976 §§ 101–102, 43 U.S.C. §§ 1701–1702 (2006).



most important of these agencies are the U.S. Forest Service (“FS”), the Fish and Wildlife Service (“FWS”), the National Park Service (“NPS”), and the BLM.<sup>50</sup> Together, these agencies help determine the “use of federal lands, in accordance with their respective statutory mandates.”<sup>51</sup>

The foremost agency, among those charged with management of federally owned lands in the West, is the BLM. The BLM was first charged with maintaining federal lands in the 1934 Taylor Grazing Act.<sup>52</sup> Accordingly, the BLM was required to do anything within its power to ensure preservation of the lands under its control and prevent unnecessary property damage.<sup>53</sup> Despite its original mission, a more definitive charge came with the passage of the FLPMA in 1976.<sup>54</sup> Through enactment of FLPMA, Congress redefined the multiple use requirement,<sup>55</sup> originally set forth in the Multiple-Use Sustained Yield Act of 1964,<sup>56</sup> to ensure that federally controlled lands were maintained not only for the “present needs” of the nation, but also for its “future needs” as well.<sup>57</sup> Fiscal Year 2009 reports from the Department of the Interior indicate that the BLM manages a total of 249 million acres of land within the United States.<sup>58</sup> In addition the BLM is responsible for the 700 million acre subsurface mineral estates possessed by the government.<sup>59</sup>

The FWS also manages a significant amount of land in the possession of the federal government.<sup>60</sup> The FWS is the only government agency whose primary objective is to “conserve, protect and enhance fish, wildlife,

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<sup>50</sup> See FREYFOGLE & GOBLE, *supra* note 5, at 206–07.

<sup>51</sup> Dale A. Oesterle, *Public Land: How Much Is Enough?*, 23 *ECOLOGY L.Q.* 521, 523 (1996).

<sup>52</sup> FREYFOGLE & GOBLE, *supra* note 5, at 229.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; see also 43 U.S.C. §§ 1701–1702 (2006).

<sup>55</sup> See Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 *HARV. ENVTL. L. REV.* 345, 368–70 (1994) (indicating that “multiple use” in this context referred to federally controlled lands being used for grazing).

<sup>56</sup> See *id.* at 348–49; see also 16 U.S.C. §§ 528–531 (2006).

<sup>57</sup> See Hardt, *supra* note 55, at 369 (quoting Pub. L. No. 88-607, § 3, 78 Stat. 986, 987 (1967) which notes that Congress defined the multiple use requirement for management of federal lands “so that they are utilized in the combination that will best meet the present and future needs of American people.”).

<sup>58</sup> See U.S. DEP’T. OF THE INTERIOR, BUREAU OF LAND MGMT., Public Lands Statistics 14 tbl.1-4 (2009), available at [http://www.blm.gov/public\\_land\\_statistics/pls09/Cover.pdf](http://www.blm.gov/public_land_statistics/pls09/Cover.pdf).

<sup>59</sup> *Mineral and Surface Acreage Managed by the BLM*, UNITED STATES DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., [http://www.blm.gov/wo/st/en/info/About\\_BLM/subsurface.html](http://www.blm.gov/wo/st/en/info/About_BLM/subsurface.html).

<sup>60</sup> *Who We Are*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/who/> (last visited Apr. 5, 2012).



and plants and their habitats for the continuing benefit of the American people.”<sup>61</sup> According to the last comprehensive study of federal land ownership, the U.S. General Accounting Office (“GAO”) estimated that in the mid-1990s, the FWS managed approximately eighty-eight million acres of land.<sup>62</sup> The GAO found that this number represented a sharp increase in the amount of land under the FWS’s control since 1964.<sup>63</sup>

The work of the U.S. Forest Service dates back to 1897.<sup>64</sup> Despite its work in the 19th century, it was not until the 1920s that the Forest Service began proactively managing federal lands for wildlife-related purposes, specifically hunting.<sup>65</sup> The Service’s mission continued to grow and in 1960, Congress actually codified the work that the Forest Service had been performing since the late 1800s.<sup>66</sup> The GAO found that the amount of federal land under the authority of the Forest Service has increased since the 1960s, much like the FWS.<sup>67</sup> Today, the Forest Service manages approximately 193 million acres of land, making it the second largest federal land management agency behind the BLM.<sup>68</sup>

Finally, the National Park Service also retains management responsibility for much of the nation’s federally owned lands.<sup>69</sup> In the first one hundred years of our nation’s history, the United States government did not provide for the creation of an official agency tasked with ensuring the proper management of our nation’s park lands.<sup>70</sup> It was not

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<sup>61</sup> *Id.*

<sup>62</sup> GAO LAND OWNERSHIP, *supra* note 46, at 3 fig.1 (1996) (statement of Barry T. Hill, Associate Director, Energy, Resources, and Science Issues, Resources, Community, and Economic Development Division, Gen. Accounting Office).

<sup>63</sup> *Id.*

<sup>64</sup> FREYFOGLE & GOBLE, *supra* note 5, at 223.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See Angela Logomasini, *Measuring the Scope of Federal Land Ownership*, COMPETITIVE ENTER. INST., 3 fig.1 (2008), <http://cei.org/sites/default/files/Angela%20Logomasini%20-%20Measuring%20the%20Scope%20of%20Federal%20Land%20Ownership.pdf> (last updated 2008) (highlighting Figure 1—Federal Land Managed for Conservation).

<sup>68</sup> GAO LAND OWNERSHIP, *supra* note 46, at 4 (indicating the amount of land managed by the largest of the government land management agencies). *But see* U.S. DEP’T OF AGRICULTURE, THE U.S. FOREST SERVICE—AN OVERVIEW 1 (2007), *available at* [http://www.fs.fed.us/documents/USFS\\_An\\_Overview\\_0106MJS.pdf](http://www.fs.fed.us/documents/USFS_An_Overview_0106MJS.pdf) (noting the increase in total acreage from 191 to 193 million acres since 1996).

<sup>69</sup> *See When Did the NPS Begin?*, U.S. NAT’L PARK SERV., <http://www.nps.gov/legacy/legacy.html> (last visited Apr. 5, 2012).

<sup>70</sup> *See id.* (highlighting that while Congress did set aside Yellowstone National Park in 1872 as a national park, it did not create an agency to manage the nation’s national parks until 1916).

until August 25, 1916 that Congress created the National Park Service.<sup>71</sup> The National Park Service was created by the National Park Service Organic Act to ensure the protection of the nation's national parks and to conserve the wildlife contained therein.<sup>72</sup> Today, the National Park Service manages approximately eighty-three million acres of land.<sup>73</sup>

Although the federal government retains control over much of the lands in the western United States, much of the property under its authority is maintained for preservation and conservation purposes. In fact, much of the land owned by the federal government has been designated for wildlife preservation since the early twentieth century.<sup>74</sup> Over the course of the century, the government set aside much of the land under its control and designated certain areas to be “‘wildlife ranges,’ ‘game ranges,’ ‘wildlife management areas,’ ‘waterfowl production areas,’ and ‘wildlife refuges.’”<sup>75</sup> Today, we refer to these areas as being parts of the National Wildlife Refuge System.<sup>76</sup> This refuge system is managed by the Fish and Wildlife Service and is “the world’s premier” conservation system for fish, wildlife, and plants.<sup>77</sup> This System has grown to encompass more than “150 million acres, 556 national wildlife refuges and other units of the Refuge System, plus 38 wetland management districts.”<sup>78</sup>

Refuges are not amenable to alterations in form or function if the alterations could jeopardize the habitats of the wildlife present.<sup>79</sup> However, the FWS manages these refuges for the purpose of ensuring the continuation of wildlife values.<sup>80</sup>

While the System contains a diverse array of wildlife species, many of these refuges are located on federally controlled lands in the

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<sup>71</sup> *Id.*

<sup>72</sup> 16 U.S.C. § 1 (1916) (noting that the mission of the NPS should be to “promote and regulate the use of the . . . national parks . . . which purpose is to conserve the scenery and the natural and historic object and the wild life therein . . .”).

<sup>73</sup> *The National Park System—Caring for the American Legacy*, U.S. NAT’L PARK SERV., <http://www.nps.gov/legacy/mission.html> (last visited Apr. 5, 2012).

<sup>74</sup> See FREYFOGLE & GOBLE, *supra* note 5, at 209.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 211; see also *National Wildlife Refuge System*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/refuges> (last visited Apr. 5, 2012).

<sup>77</sup> *National Wildlife Refuge System*, *supra* note 76.

<sup>78</sup> *Id.*

<sup>79</sup> See Mansfield, *supra* note 43, at 846–48.

<sup>80</sup> See Mansfield, *supra* note 43, at 846–47 (arguing that mineral and mining expeditions could still continue in areas designated “wildlife refuges” under the Mineral Leasing Act and Mining Law of 1872).

West. Federal lands in Nevada, for instance, contain nine refuge systems<sup>81</sup> that protect wildlife, including “colonies of American white pelicans, double-crested cormorants, California gulls, Caspian terns,”<sup>82</sup> and other “waterfowl.”<sup>83</sup> The federally controlled lands in Utah also contain a vast array of wildlife among its three wildlife refuges.<sup>84</sup> Wildlife species present on these lands include Northern pintails,<sup>85</sup> white-faced ibis,<sup>86</sup> and mammals such as river otters, prairie dogs, and elk.<sup>87</sup>

The Wildlife Refuge System is largely governed by two legal regimes: the National Wildlife Refuge System Administration Act of 1966 (“Refuge System Act”),<sup>88</sup> and the Wildlife Refuge System Improvement Act of 1997 (“Improvement Act”).<sup>89</sup> The Refuge System Act organized the refuges on federal lands into the national wildlife refuge system,<sup>90</sup> thus providing for a more coherent management structure. The Act directed the Secretary of the Interior to conserve and protect birds and other species of wildlife located on these lands.<sup>91</sup> Later, in an effort to restructure the Refuge System Act and provide the Refuge System with more concise and coherent goals, Congress passed the Improvement Act in 1997,<sup>92</sup> which provided a more detailed charter to the Wildlife Refuge System and gave authority to the FWS to conserve, manage, and restore

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<sup>81</sup> See *National Wildlife Refuge Locator*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/refuges/refugeLocatorMaps> (click on Nevada) (depicting the nine wildlife refuges located in Nevada—Sheldon NWR, Desert NWR, Ash Meadows NWR, Pahrnagat NWR, Moapa Valley NWR, Anaho Island NWR, Fallon NWR, Stillwater NWR, and Ruby Lake NWR) (last visited Apr. 5, 2012).

<sup>82</sup> *Anaho Island National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/refuges/profiles/index.cfm?id=84591> (last visited Apr. 5, 2012).

<sup>83</sup> See *Pahrnagat National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/refuges/profiles/index.cfm?id=84551> (last visited Apr. 5, 2012).

<sup>84</sup> See *National Wildlife Refuge Locator*, *supra* note 81 (click on Utah) (indicating that Utah has three wildlife refuges: Fish Springs NWR, Ouray NWR, and Bear River NWR) (last visited Apr. 5, 2012).

<sup>85</sup> *Fish Springs National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/refuges/profiles/index.cfm?id=65540> (last visited Apr. 5, 2012).

<sup>86</sup> *Bear River Migratory Bird Refuge*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/refuges/profiles/index.cfm?id=65530> (last visited Apr. 5, 2012).

<sup>87</sup> *Ouray National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/refuges/profiles/index.cfm?id=65570> (last visited Apr. 5, 2012).

<sup>88</sup> 16 U.S.C. §§ 668dd–668ee (2006).

<sup>89</sup> National Wildlife Refuge System Improvement Act, Pub. L. No. 105–57, 111 Stat. 1254 (codified at 16 U.S.C. §§ 668dd–668ee (2006)).

<sup>90</sup> See FREYFOGLE & GOBLE, *supra* note 5, at 211.

<sup>91</sup> *Id.*

<sup>92</sup> See National Wildlife Refuge System Improvement Act, 111 Stat. 1254.

fish, wildlife, and plant resources.<sup>93</sup> Despite amendments to the overall purpose of wildlife refuges, current law requires the FWS to “give priority to wildlife management and treat it as the primary or dominant use of refuges.”<sup>94</sup>

## II. IMPACT OF FEDERAL LAND OWNERSHIP ON PUBLIC EDUCATION IN THE WEST: CURRENT FUNDING METHODS

Until 1976, the federal government sold or transferred land to states in which it owned land within the states’ territorial boundaries.<sup>95</sup> One such method of compensation came in the form of enabling acts.<sup>96</sup> Beginning in the Republic’s earliest years, Congress stipulated that admission of new territories to the Union would require certain conditions to be met.<sup>97</sup> Congress usually began this process with the issuance of an enabling act.<sup>98</sup> An enabling act was the “bill which spell[ed] out the conditions that Congress expect[ed] the new state to meet before (and after) admission . . . .”<sup>99</sup> Pursuant to Congress’s enabling acts, some western states were required to forgo any future claims to federally owned land.<sup>100</sup> The passage of the Northwest Ordinance in 1787 provided a mechanism by which many states were able to receive compensation

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<sup>93</sup> See FREYFOGLE & GOBLE, *supra* note 5, at 211–12.

<sup>94</sup> Mansfield, *supra* note 43, at 848 (providing an example where “[a] court overturned a proposed land exchange, which would have removed land from the St. Matthew’s Island National Wildlife Refuge, because the Secretary’s ‘public interest’ determination was flawed”).

<sup>95</sup> See KRISTINA ALEXANDER & ROSS W. GORTE, CONG. RESEARCH SERV., RL34267, FEDERAL LAND OWNERSHIP: CONSTITUTIONAL AUTHORITY AND THE HISTORY OF ACQUISITION, DISPOSAL, AND RETENTION Summary, CRS-8 (2007) (noting that in 1976 Congress passed the FMLA, aimed at retaining lands in federal ownership) [hereinafter CRS REPORT].

<sup>96</sup> See Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 127–28 & n.25 (2004) (noting that the process for admission to the Union usually began with congressional passage of enabling acts).

<sup>97</sup> See *id.* at 127–28 (detailing the process that territories seeking admission to the Union must go through in order to reach statehood).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 128 (citing Omnibus Enabling Act § 4, 25 Stat. 676 (1889), which required South Dakota, North Dakota, Montana, and Washington to meet certain criteria in order to be admitted to the Union, and the Louisiana Enabling Act § 3, 2 Stat. 641 (1811)).

<sup>100</sup> *Id.* at 130–31 tbl.1. Table One indicates that western states such as Nevada, Montana, Utah, New Mexico, California, Oregon, and Washington were required to forgo any future claims on lands held by the federal government as part of their enabling acts. *Id.*

for disclaiming any future entitlement to federal lands.<sup>101</sup> Pursuant to the compromise, the new state pledged not to tax federal lands and in exchange Congress granted a portion of the land it owned within the state's border to the respective state for the support of public education.<sup>102</sup> The government agreed to provide states only specified areas within each federally surveyed township.<sup>103</sup> Pursuant to the compromise, the number of areas to be granted would be increased with time.<sup>104</sup> These enabling acts allowed for the creation of a federal-state compromise over the allocation of federal lands and funding of public education.

Despite the contractual agreement that formed the basis of the federal-state relationship in the first century of the nation's history, it was not fated to endure. The passage of the Federal Land Policy and Management Act ("FLPMA")<sup>105</sup> in 1976 altered the land allocation relationship that had been in place for over 100 years.<sup>106</sup> The FLPMA formally ended the prior method of land disposal by declaring that it would be the policy of the U.S. government that "... public lands be retained in Federal ownership . . . unless . . . it is determined that disposal of a particular parcel will serve the national interest . . . ."<sup>107</sup> The new policy of the government effectively ended the ongoing land exchange originally promulgated through the enabling acts.<sup>108</sup> Under the Act, "public lands" were defined as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership . . . ."<sup>109</sup> Specifically, section

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<sup>101</sup> See Alan Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, 12 NAT. RESOURCES & ENV'T 39, 39 (1997).

<sup>102</sup> See *id.* at 39–40 (pointing out that states admitted earlier in our nation's history received section sixteen of every federally surveyed township, states admitted after 1850 received sections sixteen and thirty-six, and states admitted last received sections two, sixteen, thirty-two, and thirty-six).

<sup>103</sup> See *id.* at 40.

<sup>104</sup> See *id.*

<sup>105</sup> Federal Land Policy and Management Act of 1976 §§ 101–102, 43 U.S.C. § 1701 (2006) [hereinafter FLPMA].

<sup>106</sup> The passage of the Northwest Ordinance occurred in 1787 and was the catalyst for the formation and implementation of the enabling acts. See discussion *infra* Part IV.B. The FLPMA was not passed until 1976, well over 100 years after the Northwest Ordinance. FLPMA §§ 101–102.

<sup>107</sup> 43 U.S.C. § 1701 (2006).

<sup>108</sup> CRS REPORT, *supra* note 95, at CRS-8.

<sup>109</sup> See 43 U.S.C. § 1702 (2006). The FLPMA also provided exceptions to the definition of public lands by indicating that lands "located on the Outer Continental Shelf; and lands

703 of the Act repealed previous statutes authorizing land sales or transfers.<sup>110</sup> The FLPMA “established a policy in favor of retaining public lands for multiple use management.”<sup>111</sup>

While the FLPMA may have provided more coherence for federal agencies implementing Congress’s various preservation and conservation policies,<sup>112</sup> it left many western states with a potential funding deficit.<sup>113</sup> Since their ability to acquire future lands under the enabling acts was terminated with the passage of the FLPMA,<sup>114</sup> states and the federal government began examining alternative methods to remedy the resulting funding deficit. The solution selected was land exchanges.<sup>115</sup> The government initially acquired land holdings in the West when the original states located in this part of the country surrendered their lands to the government.<sup>116</sup> Under a land exchange program, the federal government enters into an agreement with a private landowner to trade portions of public land to a private landowner.<sup>117</sup> This transfer was made possible by the precedent set by the Northwest Ordinances of 1785 and 1787, which “transferred lands in the region into federal ownership and mandated that new states be established with recently acquired lands.”<sup>118</sup> The private landowner receives federally owned land, and the federal government receives tracts of land that it then brings under federal management.<sup>119</sup> Typically, the government initiates these land swaps in

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held for the benefit of Indians, Aleuts, and Eskimos” shall be exempt from the definition of “public lands” as set forth in the Act. *Id.*

<sup>110</sup> See CRS REPORT, *supra* note 95, at CRS-8.

<sup>111</sup> *Lujan v. National Wildlife Federation*, 497 U.S. 871, 877 (1990) (indicating that the FLPMA authorized the Secretary of the Interior to keep an inventory of all public lands, required land use planning on public lands, and effectively established criteria to achieve these goals).

<sup>112</sup> See FREYFOGLE & GOBLE, *supra* note 5, at 222–23.

<sup>113</sup> See *infra* notes 120–24 and accompanying text.

<sup>114</sup> See 43 U.S.C. § 1701 (1976).

<sup>115</sup> See Stengel, *supra* note 7, at 572.

<sup>116</sup> *Id.* at 571.

<sup>117</sup> *Id.* at 568.

<sup>118</sup> *Id.* at 571.

<sup>119</sup> See *id.* at 568; see generally Susan Montoya Bryan, *Land-Swap Critics Protest at Capitol*, KRQE NEWS NEW MEXICO (Jan. 19, 2010, 10:00 PM MST), <http://www.krqe.com/dpp/news/environment/white-peak-critics-protest-at-capitol> (describing protests by New Mexico residents concerning their frustration over land swaps in the northern part of the state).



order to “consolidate public land holdings in order to better implement natural resource management programs and land use planning.”<sup>120</sup>

While such a system may be beneficial to both parties, land exchanges initiated by the government have come under increasing fire from developers, environmentalists, legislators, and citizens groups, groups who are not parties to the original land swap deals.<sup>121</sup> According to a GAO report issued in 2000, there is evidence that public lands were being undervalued, or private lands being overvalued, based on faulty land appraisals.<sup>122</sup> According to many critics of land exchange programs, exchanges are occurring to the detriment of the public.<sup>123</sup> As a result of the potential undervaluation of public lands, and overvaluation of private lands, it is difficult to place a price tag on these lands. It appears that the current land exchange program administered by the BLM and FS is faulty because these agencies base their appraisals on outdated information that undervalues federal lands.<sup>124</sup>

#### A. *Property Taxes*

The funding of public education in America comes from a variety of sources, including federal, state, and city treasuries.<sup>125</sup> Despite the diverse methods for obtaining funds, local governments typically rely heavily on state and local property taxes to fund the majority of their public education.<sup>126</sup> This is no different in the western half of the United States. States in the western United States tax at a rate comparable to those states in the rest of the nation, and allocate similar percentages of

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<sup>120</sup> Stengel, *supra* note 7, at 568.

<sup>121</sup> *Id.*

<sup>122</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-73, BLM AND THE FOREST SERVICE: LAND EXCHANGES NEED TO REFLECT APPROPRIATE VALUE AND SERVE THE PUBLIC INTEREST 4–6 (2000); see also W. Land Exch. Project, *General Accounting Office Slams Land Trades*, LAND EXCHANGE UPDATE, Jan. 2001, at 1, available at <http://www.westernlands.org/NewsNo7.pdf>.

<sup>123</sup> W. Land Exch. Project, *supra* note 122, at 1.

<sup>124</sup> See Stengel, *supra* note 7, at 595–96 (arguing that the land exchange program should be overhauled, calling for new oversight of land exchanges by agency review panels, use of independent appraisals, and arguing that appraisal transparency is necessary to implement a sufficient land exchange program).

<sup>125</sup> See *Online Backgrounders—School Funding*, PUB. BROADCASTING SERV., [http://www.pbs.org/newshour/backgrounders/school\\_funding.html](http://www.pbs.org/newshour/backgrounders/school_funding.html) (last visited Apr. 5, 2012).

<sup>126</sup> See *School Finance*, EDUC. WEEK (June 20, 2011), <http://www.edweek.org/ew/issues/school-finance/>.



their budgets to public schools.<sup>127</sup> Although western states allocate relatively similar percentages of their budgets to public schools,<sup>128</sup> there is still an impact, from the lack of taxation of federally controlled lands, on their ability to raise enough money to fund schools. This impact is largely the result of the inabilities of western states to generate tax revenue because of “the vast amount of land” owned by the federal government.<sup>129</sup>

Pursuant to the FLPMA, the federal government is immune from taxation of federally held lands by state and local governments.<sup>130</sup> Because of the FLPMA’s prohibition on taxation of federal lands, “[e]very acre of federal land [is] an acre that cannot be taxed by local governments.”<sup>131</sup> Because public education funding is heavily dependent upon state and local property tax revenues, and because western states are prohibited from assessing property taxes on federally controlled lands, these states are at a distinct disadvantage when it comes to funding public education.<sup>132</sup> Thus, it is easy to imagine the financial impact this prohibition has on states in which the federal government controls significant amounts of land.<sup>133</sup> If the federal government did not maintain such vast land holdings within these states, they would be able to commercially develop these lands, and thus, assess property taxes on them.

### B. *Natural Resource Revenues*

In addition to property taxes, western states are also prohibited from obtaining the full amount of revenue generated by natural resources located on federally controlled lands.<sup>134</sup> Lands controlled by the federal government in the western half of the nation are comprised of natural

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<sup>127</sup> Utah APPLE Initiative, *supra* note 19, at slides 17–22.

<sup>128</sup> Utah APPLE Initiative, *supra* note 19, at slide 23.

<sup>129</sup> *Issues: Property Rights*, CONG. W. CAUCUS, <http://www.westerncaucus.pearce.house.gov/index.cfm?sectionid=71> (last visited Apr. 5, 2012).

<sup>130</sup> See 43 U.S.C. § 1701(a)(13) (2006) (noting that the federal government should compensate states and local governments for “burdens created as a result of the immunity of Federal lands from State and local taxation”).

<sup>131</sup> CONG. W. CAUCUS, *supra* note 129.

<sup>132</sup> See *id.*

<sup>133</sup> See Utah APPLE Initiative, *supra* note 19, at slide 41 (indicating that the property tax revenue lost has been calculated as the following: Nevada—\$305 million, Arizona—\$256 million, Wyoming—\$220 million, Idaho—\$235 million, Utah—\$214 million, and California—\$208 million, among others).

<sup>134</sup> See *id.* at slide 46.

resources such as hard-rock minerals, timber, and water resources.<sup>135</sup> The federal government shares less than fifty percent of its royalty revenues with the states.<sup>136</sup> In addition, the government often stipulates exactly how these funds are to be allocated by the state.<sup>137</sup> Because federal lands are less likely to be developed, either commercially or in any other way, the possible royalties that a state may receive as a result of the natural resources located within its borders is greatly reduced.<sup>138</sup> The Utah Legislature has estimated that the amount of lost revenue from natural resource royalties for western states totals approximately \$2 billion.<sup>139</sup>

### C. *Payments in Lieu of Taxes*

In addition to lost revenues from property taxes and natural resource royalties, the federal government has also failed to properly subsidize states for lost profits through its “payment in lieu of taxes” regime.<sup>140</sup> Payments in lieu of taxes (“PILTs”) are “intended to compensate local governments for the burden of having tax-immune federal lands.”<sup>141</sup> The U.S. Department of the Interior maintains responsibility for administering the payment calculations according to formulas determined by Congress and distributed through the Congressional appropriations process.<sup>142</sup> For instance, in Arizona, one of the states in which the

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<sup>135</sup> See Oesterle, *supra* note 51, at 526–30 (noting how the federal government, through its ownership of lands, often mismanages, or even abuses, its control of various natural resources, including those listed above).

<sup>136</sup> Utah APPLE Initiative, *supra* note 19, at slide 46.

<sup>137</sup> See *id.* See generally Judy Zeilo & Lisa Houlihan, *State Energy Revenues Update*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jun. 2008), <http://www.ncsl.org/issues-research/budget/state-energy-revenues-update-1.aspx> (detailing two prevailing state natural resource income streams: state severance taxes and leases on federal lands within a state's boundaries).

<sup>138</sup> Utah APPLE Initiative, *supra* note 19, at slide 46.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at slides 44–45. According to the Utah Legislature, “the amount of PILT payments to western states in FY 2004 was only about 4% of the annual property tax revenue lost by western states.” *Id.* at slide 44.

<sup>141</sup> Alexander H. Southwell, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZ. L. REV. 417, 446 (1996–1997).

<sup>142</sup> See *Payment in Lieu of Taxes*, NAT'L ASSOC. OF COUNTIES, <http://www.naco.org/legislation/policies/WIR/Pages/PaymentinLieuofTaxes.aspx> (last visited Apr. 5, 2012) (providing background information on the history and operation of the payment in lieu of taxes program).

federal government owns the most land,<sup>143</sup> from fiscal years 2007–2010, Congress provided between \$19 million and \$32 million in PILTs to Arizona each year.<sup>144</sup> However, western states contend that such payments are not sufficient to support their public education needs. The Utah Legislature, for instance, points out that the annual revenue lost by western states in fiscal year 2004 amounted to \$4.2 billion, whereas the federal government's PILTs payments totaled \$185 million.<sup>145</sup>

As a result of this funding deficit, western states have found themselves in dire financial straits. Even though state and local taxes, as a percentage of personal income, are as high as those in other states, namely those in the eastern and southern portion of the United States, there remains a deficit in funds available for public education.<sup>146</sup> According to the Congressional Western Caucus, "On average, western states have more students per classroom than the other 37 states, with enrollment projected to increase dramatically over the next 10 years."<sup>147</sup> On the other hand, states in the eastern half of the United States are expected to maintain stable enrollment figures over the same period of time.<sup>148</sup> Thus, western states will likely lack the financial resources necessary to counter their growing enrollment population. These state governments currently find themselves unable to meet this growing demand and will most likely continue to face difficulties in this area.<sup>149</sup>

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<sup>143</sup> See Utah APPLE Initiative, *supra* note 19, at slide 26 (indicating that the federal government owns approximately forty-four percent of the land in Arizona).

<sup>144</sup> See NAT'L ASSOC. OF COUNTIES, *supra* note 142 (click drop down box and select "Arizona") (highlighting that over a period of three years, Congress provided a range of PILTs to Arizona, with the largest payments occurring in fiscal year 2008 and fiscal year 2009, and then decreasing in fiscal year 2010).

<sup>145</sup> See Utah APPLE Initiative, *supra* note 19, at slide 45.

<sup>146</sup> See CONG. W. CAUCUS, *supra* note 129 (pointing out that western states continue to lack the money necessary to adequately fund their public education programs and facilities).

<sup>147</sup> *Id.*

<sup>148</sup> See *id.* (noting that to combat this educational funding shortfall, many western states in addition to Utah are advocating for similar "APPLE" state programs).

<sup>149</sup> See, e.g., Bob Bernick Jr. & Lisa Riley Roche, *Utah Legislature: House Leaders Promise to Restore \$21 Million to Public Education*, DESERET NEWS, March 9, 2010, <http://www.deseretnews.com/article/700014964/Utah-Legislature-House-leaders-promise-to-restore-21-million-to-publiceducation.html> (noting that the Utah Legislature has found it difficult to meet its funding goals for public education within the state, leading to possible cuts in public education including recruitment of teachers, reduced busing, and postponement of various building projects).

### III. RECENT CONGRESSIONAL PROPOSALS AND THEIR FAILURES

#### A. *Legislative Proposals Introduced to Remedy This Problem*

To address the funding disparities that exist for western states, two primary pieces of legislation were introduced in Congress. Congressional representatives from western states introduced the Action Plan for Public Lands and Education Act of 2005, H.R. 3464,<sup>150</sup> and a companion bill, with the same name, H.R. 3463.<sup>151</sup> Under H.R. 3464, the federal government, through the Secretary of the Interior, would be required to make annual payments to western states specifically for the purpose of funding public education.<sup>152</sup> Pursuant to H.R. 3464, Congress would be required to make payments in an amount “which bears the same ratio to the total amount appropriated for payments under this Act . . . as the number of acres of federally owned property in the State bears to the total number of acres of federally owned property in all of the eligible States.”<sup>153</sup> In short, this legislation required Congress to make payments to each western state so long as their lands remain under federal control. Also, it provided a ratio by which Congress made payments based on the total amount of federally owned property in all of the eligible states.

Although H.R. 3464 required congressional appropriation of funds for western public schools, it was primarily the companion bill, H.R. 3463, which provided specific guidelines for the implementation of the Act. H.R. 3463 required western states to select five percent of the “unappropriated public lands,”<sup>154</sup> within their borders to be transferred

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<sup>150</sup> See Action Plan for Public Lands and Education (“APPLE”) Act of 2005, H.R. 3464, 109th Cong. §§ 2–3 (2005). This legislation was introduced in the U.S. House of Representatives by Congressman Rob Bishop of Utah on July 27, 2005. *Id.*

<sup>151</sup> See Action Plan for Public Lands and Education (“APPLE”) Act of 2005, H.R. 3463, 109th Cong. §§ 2–3 (2005). This legislation, which was a companion bill, was also introduced in the U.S. House of Representatives by Congressman Rob Bishop on July 27, 2005. *Id.*

<sup>152</sup> See H.R. 3464 § 3 (noting that the Secretary of the Interior would be required to make certain payments to the state “only if the State agrees to expend the funds only for the purpose of education improvement”).

<sup>153</sup> *Id.* at § 3(c).

<sup>154</sup> H.R. 3463 § 3(b). According to H.R. 3463, the definition of “unappropriated public land” was “any and all land under the management and control of the Bureau of Land Management or United States Forest Service, excluding land that is—(A) held in trust . . . ; (C) a unit of the National Park System; (D) a Wildlife Refuge; (E) a Wilderness Area designated by Congress . . . .” *Id.* at § 3(f)(5).

back to that particular state.<sup>155</sup> Because this legislation excluded national parks and wildlife areas, Congress essentially provided a mechanism to fund public education, yet simultaneously protect wildlife areas in the western U.S. However, neither bill, H.R. 3464 nor 3463, was acted upon during the 109th Congress when they were introduced.<sup>156</sup>

*B. Inadequacy of the Proposals*

Although western representatives attempted to introduce and pass legislation to remedy their states' education funding problems, each proposal failed to take into account important environmental aspects associated with land transfers or payment programs. As H.R. 3463 indicated, national parks, wildlife refuges, and wilderness areas would be protected by the Act.<sup>157</sup> Despite the inclusion of this language within the text of the bill, the bill contained no legal assurances that wildlife habitats would continue to be protected in those areas in which commercial development, or other man-made actions, may occur on the outer premises of these environmentally sensitive lands.<sup>158</sup> More specifically, neither bill allowed for, or addressed, federal intervention into these environmentally sensitive areas should western states fail to ensure that the wilderness areas remain protected.<sup>159</sup>

*C. Similar Legislation Would Not Be Workable in Current Political and Economic Climates*

The current recession makes it unlikely that either Congress, or the President, would have an appetite to address these ongoing issues<sup>160</sup> anytime soon. States in the West are not immune to the economic woes

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<sup>155</sup> See *id.* at §§ 2(18), 3(b)(1) (indicating that states would select five percent of federally controlled lands within their borders to be granted back to the respective state).

<sup>156</sup> See Action Plan for Public Lands and Education ("APPLE") Act of 2005, H.R. 3463, 109th Cong. §§ 2–3 (2005); Action Plan for Public Lands and Education ("APPLE") Act of 2005, H.R. 3464, 109th Cong. §§ 2–3 (2005).

<sup>157</sup> Action Plan for Public Lands and Education ("APPLE") Act of 2005, H.R. 3463, 109th Cong. § 3(f)(5) (2005).

<sup>158</sup> See H.R. 3463 (providing no indication that the areas surrounding the lands that may be appropriated will be protected).

<sup>159</sup> See Action Plan for Public Lands and Education ("APPLE") Act of 2005, H.R. 3464, 109th Cong. §§ 2–3 (2005); H.R. 3463 (no indication is made in either bill that there will be federal intervention if the western states fail to protect the transferred areas).

<sup>160</sup> See *supra* Parts II–III.

affecting the rest of the nation.<sup>161</sup> Indeed, western states continue to struggle to finance their educational systems.<sup>162</sup> The economic downturn's impact has resulted in public education financing deficits across the nation.<sup>163</sup> The economic downturn has led to teacher layoffs, and more than one-third of school districts are actually considering the elimination of summer school for students.<sup>164</sup> To add to this, schools across the nation are anticipating larger class sizes.<sup>165</sup>

Despite these issues, there may be little appetite in Washington to expend the time and energy to specifically address the issues faced by western states. While it could otherwise be an important priority to ensure that western states have adequate funding for their public education, other matters appear to take precedence. Both President Obama and Congress are expected to spend time addressing federal budget proposals, the 2012 election, and military withdrawal from Afghanistan.<sup>166</sup> In addition, the White House is currently focused on the ongoing crisis in Syria.<sup>167</sup> However, even those who encourage the White House to craft new spending measures to avoid cuts in state education programs recognize the limits.<sup>168</sup> Many acknowledge that there is no desire for new funding measures.<sup>169</sup> As a result of the ongoing economic downturn, it is unlikely that Congress will

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<sup>161</sup> See *Should Arizona's Education Funding Get Cut in Midst of Budget Crisis?*, ABC15.COM (Feb. 27, 2011), [http://www.abc15.com/dpp/news/local\\_news/hear\\_me\\_out/should-arizona-s-education-funding-get-cut-in-midst-of-budget-crisis](http://www.abc15.com/dpp/news/local_news/hear_me_out/should-arizona-s-education-funding-get-cut-in-midst-of-budget-crisis).

<sup>162</sup> See, e.g., *id.* (providing a discussion concerning whether cuts should be made to Arizona's education funding during the middle of a budget crisis).

<sup>163</sup> See Senator Tom Harkin, *Most Important Priority Is to Protect U.S. Classrooms from the Recession*, THE HILL (May 18, 2010, 4:29 PM), <http://thehill.com/special-reports/education-may-2010/98483-most-important-priority-is-to-protect-us-classrooms-from-the-recession>.

<sup>164</sup> *Id.* (stating that considerations to cut summer school completely are being made in more than one third of school districts).

<sup>165</sup> See *id.* ("62 percent are anticipating larger class sizes.").

<sup>166</sup> See Isabel V. Sawhill, *Mapping the Obama Administration's Priorities*, BROOKINGS INST. (Feb. 13, 2012), [http://www.brookings.edu/opinions/2012/0213\\_obama\\_priorities\\_sawhill.aspx](http://www.brookings.edu/opinions/2012/0213_obama_priorities_sawhill.aspx).

<sup>167</sup> See Assoc. Press, *Obama, Erdogan Strategize on Syria; 'We Cannot Remain a Spectator,' Erdogan Says*, WASH. POST (Mar. 25, 2012), [http://www.washingtonpost.com/world/middle\\_east/obama-erdogan-strategize-on-syria-we-cannot-remain-a-spectator-erdogan-says/2012/03/25/gIQATXXJZS\\_story.html](http://www.washingtonpost.com/world/middle_east/obama-erdogan-strategize-on-syria-we-cannot-remain-a-spectator-erdogan-says/2012/03/25/gIQATXXJZS_story.html).

<sup>168</sup> See Zachary A. Goldfarb, *Obama Has Few Options to Aid Strapped States*, WASH. POST, Feb. 27, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/27/AR2011022702931.html>.

<sup>169</sup> See *id.*



be willing to devote substantial time to addressing the wildlife and school funding issues in the western United States.

IV. MOVING FORWARD: PROPOSALS FOR NEW CONGRESSIONAL  
LEGISLATION TO PROTECT WILDLIFE AND ENSURE GREATER  
FUNDING FOR PUBLIC EDUCATION

To both help alleviate the public school funding void in the western states, as well as ensure the continued protection of wildlife in that part of the country, it is important that new congressional legislation be drafted and enacted.

A. *Sale of Land to States*

Any new legislation on this matter should adequately address the sale of federally owned lands to western states. The previous bill (H.R. 3463) provided that the federal government grant five percent of the land under its control to each western state in which federal lands were held.<sup>170</sup> H.R. 3463 allowed the states to select which five percent, subject to certain exceptions, of federally controlled lands would be granted from the federal government.<sup>171</sup> In contrast, under this new legislative proposal, states would be allowed to actually buy back portions of federally controlled lands.

Under this legislation, the percentage of land sold back to states would be determined through a ratio that accounts for the size of the state, the state's population, and the amount of federally owned land within the state's boundaries. For instance, since the federal government owns over eighty percent of the land in Nevada,<sup>172</sup> the state would be able to purchase a greater amount of federally controlled lands. On the other hand, should the federal government own a smaller percentage of land within the state, then the state would be allowed to purchase a smaller share of federally controlled lands.

Given the current economic and political climate, legislation allowing states to actually buy federal lands would be feasible for a variety of reasons. First, such an option would allow for the balancing of

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<sup>170</sup> Action Plan for Public Lands and Education ("APPLE") Act of 2005, H.R. 3463, 109th Cong. § 2 (2005).

<sup>171</sup> See *id.* at § 3(b).

<sup>172</sup> See Utah APPLE Initiative, *supra* note 19, at slide 26.



federal and state priorities. Seeing as how there is currently limited desire within Congress or the presidential administration to address peripheral issues not at the forefront of the national scene, granting states this “purchase power” would allow them to assess their own public education needs and then make a determination as to whether to purchase these lands or not. Although western states are currently faced with mounting budget deficits,<sup>173</sup> requiring states to purchase the lands is the only viable option.

*B. Wildlife Habitats*

Legislation addressing this issue must also provide viable options for the protection of wildlife habitats located on federally controlled lands. The previous legislation, H.R. 3463, provided for the protection of such wildlife areas.<sup>174</sup> H.R. 3463 prohibited states from including lands that were units of the National Park System, wildlife refuges, or congressionally designated wilderness areas, into the five percent of lands that would be given back to the states.<sup>175</sup> Like H.R. 3463, any new legislation must also stipulate that wilderness areas located on federally controlled lands be protected. This new legislative scheme should provide that wildlife preserves and habitats, and wildlife sensitive areas, in general, remain under federal control.

In order to fully ensure the protection of wildlife areas, the legislation must provide for a new regulatory regime, which would allow the government to enforce its protection of these lands. This legislation should give the Department of the Interior (“DOI”) enforcement rights over all wildlife habitats. In addition, it would allow DOI to close, or open, such habitats to the public based on the recommendations of the respective government office with primary oversight of that particular refuge, preserve, or park. Essentially, the legislation would allow recommendations to come from organizations such as the BLM, FWS, or NPS.

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<sup>173</sup> See ABC15.COM, *supra* note 161 (indicating that Arizona is facing a budget deficit); see also Goldfarb, *supra* note 168 (highlighting that many states have fallen short of their funding needs).

<sup>174</sup> Action Plan for Public Lands and Education (“APPLE”) Act of 2005, H.R. 3463, 109th Cong. § 3(d)(5) (2005).

<sup>175</sup> *Id.* (indicating that certain areas such as wildlife refuges and National Parks, among others, fall within the term “unappropriated public lands” which means that they may not be part of the five percent of lands considered for sale).

Next, the legislation must specifically address the ability of states and commercial entities to develop the lands which are purchased from the federal government. Given the dire straits in which western states find themselves with respect to public education funding,<sup>176</sup> one of the most profitable methods by which they may increase education funding is through the commercial development of lands purchased from the government.<sup>177</sup> In fact, commercial development of these lands remains, perhaps, the western states' most viable opportunity to better fund public education. This proposed legislation should set up a "monitored perimeter" surrounding wildlife habitats and other wildlife areas. The perimeter should be twenty five to fifty miles in length, running in each direction, from the wildlife area. Under the legislation, the government, through DOI, would be required to monitor, on an annual basis, the impact that proposed commercial development may have on the area surrounding these wildlife habitats. It is important to note that these wildlife habitats would still be located on federally controlled lands, as this legislation would not allow purchase of those areas containing wildlife habitats and other wildlife areas.

As a result of this monitoring program, it is important that the legislation also create a licensing program to be administered by the DOI. This licensing program would deposit the authority to grant or deny licenses for commercial development of Western lands, formally owned by the federal government, within DOI. At the heart of this program would be DOI's ability to conduct "Impact Studies/Investigations." These impact studies would require DOI to examine whether a proposed development would negatively impact wildlife habitats located within the fifty mile outer limit zone. Should DOI determine that any state actions or commercial development activities pose a harm to wildlife habitats, the Department would have the ability to legally order the cessation of the activity. The state, or commercial entity, whose projects were halted could then petition to the head of the respective agency (FWS, BLM, NPS, or other agency) which had authority over the nearby wildlife area, to demonstrate that its activities were not harmful to the wildlife sensitive areas. The authority to resolve any continuing disputes between the

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<sup>176</sup> See Goldfarb, *supra* note 168.

<sup>177</sup> See *supra* Part II (indicating how the Federal government has mismanaged federal lands, reducing the amount of funds that otherwise might be available to states for education funding).

agency and state, or commercial entity, would be deposited with the Secretary of the Interior.

*C. Creation of Trust Managed by Secretary of Interior*

Finally, any new legislation should stipulate that proceeds from the sale of federal lands be placed in a trust managed by the Secretary of the Interior. The purpose of the trust would be twofold. First, the legislative scheme would allocate a portion of the proceeds received from the sale of federally controlled lands to the trust. The legislation would stipulate that upon being placed in the trust, these funds would only be used by DOI in its investigations and studies of the impact on wildlife in areas in which states sought to commercially redevelop lands purchased from the federal government. Specifically, these funds would be used by DOI to investigate whether commercial redevelopment would negatively impact any wildlife areas located within the twenty-five to fifty mile perimeter, of the proposed development sites. Secondly, the funds placed into the trust would also be used by DOI to determine whether state activities are negatively impacting wildlife areas/habitats.

Management of the proposed trust would reside with both the Secretary and Deputy Secretary of the Interior. Under the legislation, the Secretary would be required by law to give his permission before any funds contained within the trust are dispersed for investigation into the impact that commercial development or state activities may have on wildlife areas.

Legislation allowing for the creation of a new regulatory enforcement regime, through DOI and the Secretary of the Interior, remains a viable option to protecting wildlife located near lands that may be sold. Indeed, DOI would not have to create any new departments or divisions to adequately meet the regulatory regime's requirements. Divisions such as FWS and BLM, which already possess the ability to monitor the wildlife in the western states,<sup>178</sup> are sufficient to effectively investigate and study the impact that development on lands sold to states might have on nearby wildlife.

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<sup>178</sup> See CAROL HAND VINCENT, CONG. RESEARCH SERV., RL 32393, FEDERAL LAND MANAGEMENT AGENCIES: BACKGROUND ON LAND RESOURCES MANAGEMENT Summary (2004), available at <http://www.nationalaglawcenter.org/assets/crs/RL32393.pdf>.

## CONCLUSION

In many ways, President Roosevelt aptly summarized the approach that must be taken by western states, and the federal government alike, through his motto “Over, Under or Through—But Never Around.”<sup>179</sup> Just as Roosevelt’s motto suggests, both western states and the federal government must eventually confront the problems associated with public education funding and wildlife’s existence head on. Although American wildlife has been the subject of our government’s policies since 1903,<sup>180</sup> to be truly effective, both sides must understand that “[e]xcept in zoos and other captive situations, wild animals do not live in isolation.”<sup>181</sup> American wildlife in the West is not immune from the effects, whether positive or negative, of society’s reach.<sup>182</sup> Both the federal government, as well as western state governments, must find a way to balance the need for increased funding methods for education, along with wildlife protection.

While wildlife protection has been an essential part of our nation’s conservation heritage,<sup>183</sup> our nation must be forward-looking. The adequate education of our nation’s students is not an issue that may be taken lightly, especially in an age when educational superiority is most often a prerequisite for success.<sup>184</sup> But such needs beg the question of exactly how far states, or the federal government, should go in finding additional funding methods. On one hand, states must have the ability to regain some of the lands currently held by the federal government. Part and parcel of this ability must also be the opportunity for states to commercially develop such lands in order to increase proceeds for state treasuries. On the other hand, the federal government must be both willing to lose some of its landholdings in the West, as well as willing to ensure the continued protection of wildlife on these lands.

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<sup>179</sup> Edmund Morris, *Leaders and Revolutionaries: Teddy Roosevelt*, TIME, April 13, 1998, available at <http://www.time.com/time/magazine/article/0,9171,988150,00.html>.

<sup>180</sup> See FREYFOGLE AND GOBLE, *supra* note 5, and accompanying text (noting that the policies of President Roosevelt were some of the first to actually address the issue of wildlife protection).

<sup>181</sup> *Id.* at 12.

<sup>182</sup> See Mansfield, *supra* note 43, at 846–48.

<sup>183</sup> See discussion *supra* Part II (describing the early history of conservation in America).

<sup>184</sup> See Scott Malone, *U.S. Economy Becoming Less Competitive, Harvard Business School Survey Finds*, HUFFINGTON POST, Jan. 18, 2012, [http://www.huffingtonpost.com/2012/01/18/us-economy-less-competitive-harvard-business-school-survey\\_n\\_1212548.html](http://www.huffingtonpost.com/2012/01/18/us-economy-less-competitive-harvard-business-school-survey_n_1212548.html).

If nothing is more powerful than an idea whose time has come,<sup>185</sup> now is the time for both the federal government, and state governments, to begin addressing this matter. The best way to do that is the enactment of new legislation, which addresses both the concerns of western states and the federal government, and which can be enacted in the current economic and political climates. Through the creation of legislation allowing for the purchase of federally controlled lands, states will be allowed to make determinations on their own with respect to the amount of funding needed, and determine how best to fund the purchases. In addition, this allows the federal government to return land to the states, while both receiving financial proceeds from the sale and avoiding the political pitfalls of having to develop consensus about how best to proceed with funding public education in the West.

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<sup>185</sup> See VICTOR HUGO, *HISTORY OF A CRIME* 237 (Isabel F. Hapgood et al. trans., The Kelmescott Society 1888) (1877) (suggesting that an invasion of foreign armies can be resisted, but that there can be no resistance to an invasion of ideas).