

Federal Lands Ownership, Federal Lands Transfer, & your National Forests

Steve Hattenbach, Regional Director,
Wildlife, Fish, Rare Plants & Rangeland Management
USDA Forest Service, Southwestern Region



DISCLAIMERS:

- **NOT LEGAL ADVICE:** This presentation contains a brief summary of laws. It is not intended as legal advice. Individual application is fact dependant. Consult an attorney for specific legal advice.
- **NO COMMENT** on pending litigation or legislation
- **PERSONAL OPINIONS:** Opinions expressed are personal opinions and not opinions of the USFS.

Goals

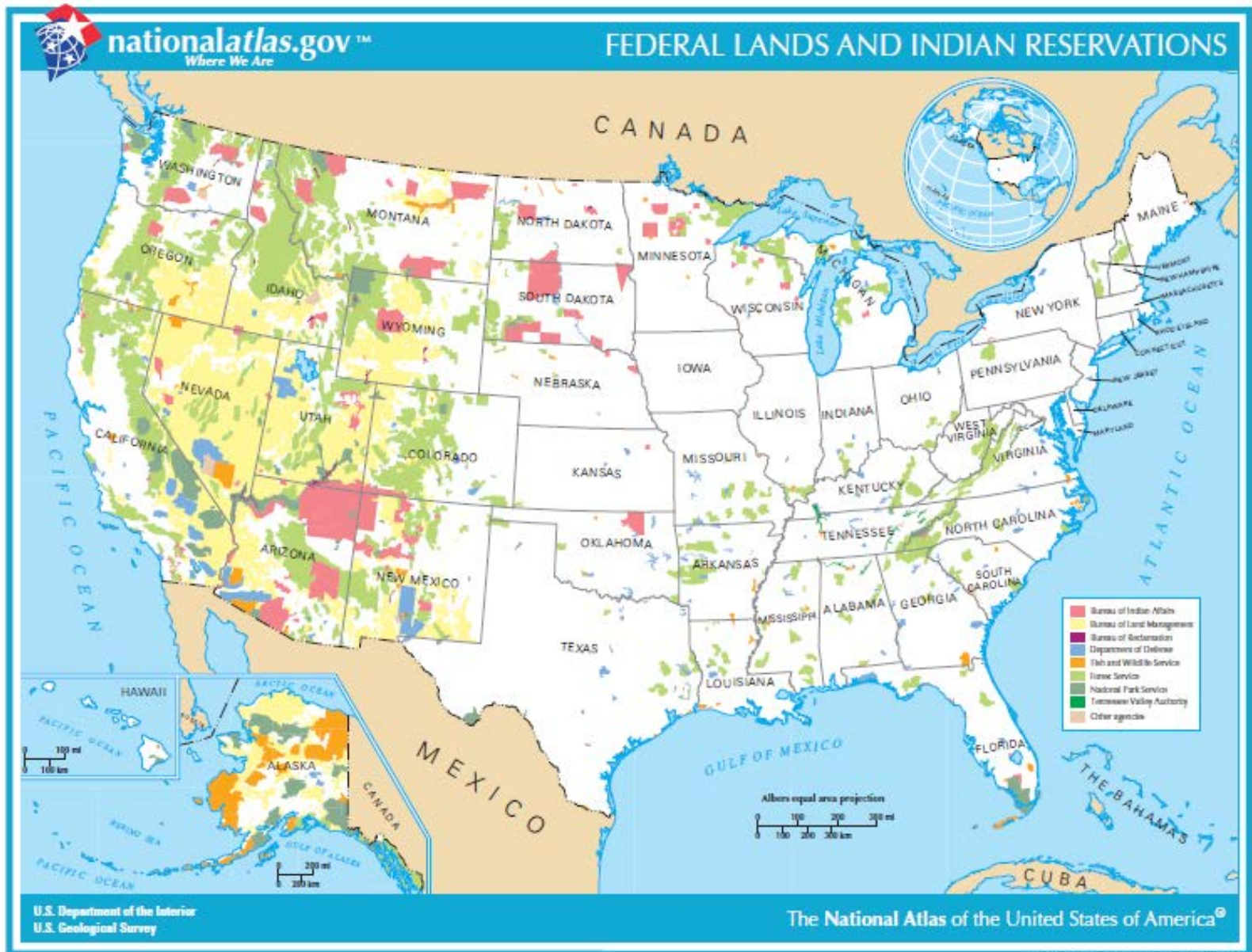
- Briefly summarize history of Federal ownership and jurisdiction over USFS lands in Southwest.
- Dispel common misconceptions regarding Federal ownership and jurisdiction over National Forests.
- Discuss common legal theories proposed for land transfer.
- Discuss practical issues associated with a land transfer.
- Discuss alternative mechanisms to address common concerns over land management & desire for increased local control.

Myths, Legends, & Misinformation

Some of the misinformation this presentation will address includes claims like:

- The U.S. has no constitutional authority to own the public lands.
- The lands should be 'returned' or 'given back' to the States.
- The United States was required to dispose of the public lands.
- Public lands will pay for themselves.

Current Federal Land Ownership



Constitutional Authority

To Acquire, Own, and Manage Federal Lands

The Property Clause, Article IV, Sec. 3, cl. 2: “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;”

The Supremacy Clause, Article VI, cl. 2: “. . . Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”

The Treaty Clause, Art. II, Sec. 2, cl. 2: empowers the President to make treaties.

Acquisition of public lands



Acquisition of Lands in Southwest

Annexation of Texas & cession of claims (1845): (\$16M paid for cession)

Treaty of Guadalupe Hidalgo in 1848

Gadsden Purchase in 1853

“Courts in the United States have uniformly found that title to the land first passed to the United States through the [Treaty of Guadalupe Hidalgo].” U.S. v Gardner, 107 F.3d 1314 (9th Cir. 1997)

“...the San Juan National Forest is not now and never has been, under the control of the State of Colorado or any political subdivision thereof (such as Archuleta County).” U.S. v Luppi, 188 F.3d 520 10th Cir. 1999) (unpublished) (1999 WL 535295)

Policy of Disposal

A century of policy providing for disposal of public lands west of the original colonies.

At first this occurred through sale but this changed to favor 'actual settlers'.

- Land Ordinance of 1785 & Northwest Ordinance of 1787 (survey and sale)
- Preemption Act of 1841 (provided preemption rights to actual settlers)
- Homestead Act of 1862
- Mining laws of 1866 and 1872
- Desert Lands Act of 1877
- Stock Raising Homestead Act of 1916 (maximum homestead grant - 640 acres)

Many specific grants of lands were also given by Congress. Major examples include:

- State land grants for Schools and Universities, transportation grants, etc.
- Railroad grants, private land grants, etc.

More than 70% of lands acquired by the Federal Government was sold, granted, or disposed out of Federal ownership.

For more information see Public Land Statistics (2015) USDO, BLM
Explore the Homesteading Timeline, USDO, BLM

Land Rush



Presentation to AZ Ch., American Soc. of Farm
Managers & Rural Appraisers Feb 2017

Waiting at the Land Office to file claims



Presentation to AZ Ch., American Soc. of Farm
Managers & Rural Appraisers Feb 2017

Policy of Reservation

There is a long history of withdrawals or reservations of public lands for military use, conservation purposes, and other Federal uses.

- By executive authority. e.g. Grisar v. McDowell, 6 Wall 364 (1867); U.S. v. Midwest Oil Co., 236 U.S. 459 (1915)
- Through Congressional action. e.g. Light v. U.S., 220 U.S. 536 (1911)
- Famous early ex.: Yosemite (est. 1864) & Yellowstone (1872)

Increasing concerns for conservation and preservation began an era of reservation and protection of remaining public lands and establishment of major land management agencies.

Reservation For the National Forests

The Forest Reserve Act of 1891 and the 1897 Organic Act allowed for the reservation and establishment of the National Forests from public lands.

- Provided that National Forests would be managed to improve and protect the forest, secure favorable conditions of water flow, and furnish a continuous supply of timber. 16 U.S.C. § 475.
- Empowered the Secretary to make rules to regulate the occupancy and use of the National Forests and “preserve the forests from destruction.” 16 U.S.C. § 551.

Several major conservation issues motivated action to set aside and protect lands, incl:

- Competitive overgrazing
- Unsustainable logging practices, loss of timber to fire, and fear of a ‘timber famine’
- Accelerated soil erosion, sedimentation and flooding
- Increased municipal needs for watershed protection



Presentation to AZ Ch., American Soc. of Farm
Managers & Rural Appraisers Feb 2017



Presentation to AZ Ch., American Soc. of Farm
Managers & Rural Appraisers Feb 2017



Presentation to AZ Ch., American Soc. of Farm
Managers & Rural Appraisers Feb 2017

Controversy Over the National Forests

Czar Pinchot and His Cossack Rangers Administering the Forest Reserves



Challenges to Reservation

Many challenges were brought against the reservation of public lands for the National Forests and the delegation of management authority.

- All challenges failed.

Congress could constitutionally enact [the Forest Reserve Act] and allow public forest reservations without the consent of the state where the land lies. See Light v. United States, 220 U.S. 523 (1911).

Congress has constitutional authority to authorize an Executive agency to make rules governing the use of the national forests, and enforce those rules. United States v. Grimaud, 220 U.S. 506 (1911); Light v. United States, *supra*.

National Forests in 1908



Re-acquisition of disposed lands

Several programs reacquired lands that became part of the National Forest system. Ex.

- 1911 Weeks Act (Eastern Forests)
- 1937 Bankhead-Jones Farm Tenant Act (Nat. Grasslands)
- 1965 Land and Water Conservation Fund Act

Principle reasons for these Acts (respectively):

- Desire for establishment/conservation of eastern Forests.
- Many lands disposed by homestead laws were unsuitable for agricultural use (a contributing factor in the Dustbowl).
- Desire for conservation in support of improved game habitat and watershed protections, etc.

Weeks Act Acquisitions



National Grasslands



Southwestern Region, USFS

- 11 National Forests
- 3 National Grasslands
- 20.6 million total acres
- 56,000 miles of roads
- 2,750 miles streams
- 37,900 acres of lakes
- 9,750 miles of trails
- 600+ camping areas
- 45 ski lifts/tramways
- 2.7 million acres of Wilderness
- 25% of fishing habitat in the State of New Mexico
- 50% of fishing habitat in the State of Arizona



Major Land Management Agencies & Federal Mineral Ownership

Forest Service:

- Forest Reserve Act of 1891
- 1897 'Organic Act' (Pettigrew Amendment)

National Park Service

- National Park Service Organic Act of 1916

Bureau of Land Management

- Taylor Grazing Act of 1934
- Federal Land Policy Management Act – 1976

Reservation of mineral rights:

- Stock Raising Homestead Act and Desert lands Act reserved mineral rights to the United States when lands were patented
- Split estate Federal minerals: 9.5M acres in NM, 3M in AZ

Theories for State Right to Federal Lands

Various theories have been used to challenge Federal reservation and jurisdiction over public lands and assert State right or ownership. None have succeeded.

These theories have been analyzed by numerous legal scholars. Recent ex. include:

- Report of the Public Lands Subcommittee, Western Attorneys General Litigation Action Committee, Conference of Western Attorneys General, (July 2016)
- A Legal Analysis of the Transfer of Public Lands Movement, Keiter and Ruple, University of Utah, College of Law (2014)

Theories for State Right: Equal Footing Doctrine

Usually based on a theory that 'equal footing' implies equal lands at the time of Statehood, and a strained reading of Pollard's Lessee v Hagan, 11 L. Ed. 565 (1845) which concerned land claims of original colonies

U. S. v. Texas, 339 U.S. 707 (1950) : Equal footing clause refers to political rights of a state - not economic stature.

U.S. v. Nye County, 920 F. Supp. 1108, 1114 (D. Nev. 1996): Distinguished *Pollard's Lessee* and rejected the argument that U. S. lacked the power to retain or manage federal land, citing the Property Clause.

U.S. v. Gardner: Rejected the argument that the Equal Footing Doctrine limited the United States' authority over federal property and only allowed the land to be held in trust for future disposition.

Theories for State Right: 10th Amend.

Theory that 10th Amendment bars the U.S. from enforcing Federal law against State action regarding federal lands.

Wyoming v. United States, 279 F.3d 1214 (10th Cir. 2002) (rejected 10th Amendment argument that Federal Gov't denial of State of Wyoming vaccination plan for elk interfered with the State's sovereign authority)

Utah v. Garfield County, 122 F. Supp. 2d 1201, 1234 (D. Utah 2000) (holding that "where Congress exercises the Property Clause for purposes of managing the public lands, that exercise will be sustained even if it intrudes into subject areas that are traditionally a matter of state power, authority, and control").

U.S. v. Bd. County Comm'rs Otero County, 2015 WL 12661929, at 5 (D.N.M. 2015) "...the Tenth Amendment does not reserve an exclusive sovereign right to New Mexico to regulate federal lands in contravention of federal law." (aff'd 10th Cir. 2016)

Theories for State Right: Exclusive Jurisdiction

This theory usually maintains that since the U.S. does not have exclusive legislative jurisdiction over public lands that it only has powers of a normal proprietor of land.

Exclusive Legislation Jurisdiction is authorized by the Enclave Clause U.S. Const. Art. I Sec. 8 Clause 17. Ex. include the District of Columbia, military reservations, etc.

However, there is independent constitutional bases for Property Clause authority:

Kleppe v New Mexico, 426 U.S. 529 (1976) “while Congress can acquire exclusive or partial jurisdiction over lands within a State ..., the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. ...Congress ... retains the power to enact legislation respecting those lands pursuant the Property Clause. “

Proponents of this failed theory often selectively cite a Report “*Jurisdiction Over Federal Areas Within the States*” (June 1957) (AKA “*The Eisenhower Report.*”) However the Report p. 21 explains that although the U.S. may not have exclusive jurisdiction, it retains plenary authority over public lands under the Property and Supremacy Clause.

Disclaimers by States

Western states included 'disclaimer language' foregoing any claim to public lands in their constitutions. See Jicarilla Apache Tribe v U.S. 601 F2d 1116 (1979)

e.g. New Mexico's federal enabling statute for statehood was conditioned on the state and its citizens forever disclaiming any right or title to the federal lands within the state. See 36 Stat. 556, 558 (New Mexico Enabling Act, June 20, 1910).

"The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof..." New Mexico Const. Art. XXI, sec. 2 (January 21, 1911).

State Trust Lands: Although states disclaimed any interest in public lands, the Federal Government granted western states trust land for funding schools.

- New Mexico state trust lands: ~9 million acres
- Arizona state trust lands: ~ 9 million acres

Reserved Lands at Time of Statehood

	2014	1912
National	189 Million Acres	165 Million acres
Regional	20-22 Million Acres	23 Million Acres

In 1912, at the time of AZ & NM Statehood – ALL existing National Forests in AZ & NM were reserved, including the majority of current acreage in system.

Many additions and deletions have occurred but most acres in NFS system were already reserved when NM and AZ disclaimed ownership.

Sources: Forest Service Land Area Report (2015)

Forest Service Land Area Report (1912)

Establishment And Modification Of National Forest Boundaries (2012)

This is not true for most other Western States. Ex. NV (1864), ID (1890), UT (1896)

Practical Issues in Federal Land Transfer

Land acquisition involves consideration of liabilities and encumbrances versus potential revenue and uses.

- Legacy contamination (e.g. old mine sites)
- Legal restrictions on land use (e.g. ESA critical habitat)
- Outstanding encumbrances:
 - mining claims, R.S. 2477 ROWs, R.S. 2339 ROWs, private water rights,
- Municipal (water supply) and public utility (electric and gas) infrastructure
- Public expectations:
 - use at no cost (recreation/locatable minerals) or low cost (fuel wood, grazing)
 - conservation/preservation

Advocates of transfer usually argue that states can significantly increase revenues and operate more efficiently to pay for these costs. Projections are highly dependent on:

- Increased revenue from more timber harvest, increased oil and gas and mineral development, increased mineral royalties, and increased grazing fees.
- Predicted costs of administration, fire suppression, recreation, highways, etc.

Existing Economic Studies: Utah

An analysis of a transfer of Federal Lands to the State of Utah (2014)
University of Utah, Utah State University, and Weber State University.

- “...forecasting the full economic effect of a lands transfer from the federal government to the State of Utah is simply not possible.”
- “From a strictly financial perspective, it is likely that the State of Utah could ... cover the costs to manage them. Our research also suggest that it could put a strain on the state’s funding priorities ... as the state adjusts to the loss of federal dollars, evaluates land resources and conditions, and develops programs to replace those now managed by federal agencies.”
- “Based on our analysis, the land transfer could be profitable for the state if oil and gas prices remain stable and high and the state negotiates a change in royalty revenue... to 100 percent.”
- Base on crude oil prices from \$62 to \$92/bbl (current price is ~\$50s)

Existing Economic Studies: Idaho

University of Idaho: Would a transfer of Federal lands to the State of Idaho make or lose money? O’Laughlin (2014)

- “In total, after subtracting all these costs [fire suppression, developed recreation, PILT/SRS, highway maintenance] from the timber net income, the proposed transfer would result in a loss to the State of Idaho of \$111 million/year under the low end scenario and \$60 million/year under the medium scenario. Under the high end scenario the state would see a gain of \$24 million/year.”
- Based on maintaining relatively high prices for timber and increase in timber volume sold 2X to 5X current harvest.

Practical Issues

Federal Payments to the States & Local Gov'ts

More than 20 laws require revenue sharing with State and local Gov't for revenues generated from Federal lands, plus other laws for direct payments. Major examples:

PILT: Payment in Lieu of Taxes <http://www.doi.gov/pilt>

New Mexico ~\$34-37 Million/yr.

Arizona ~ \$32-34 Million/yr.

SRS: Secure Rural Schools <http://www.fs.usda.gov/main/pts/home>

New Mexico ~ \$9 Million/yr.

Arizona ~\$12 Million/yr.

Mineral Revenues (50% of federal revenue) (see Office of Natural Resource Revenue)

New Mexico ~ 369 million (2016)

Arizona ~ 55,000 (2016)

Grazing fees Millions collected - hundreds of thousands go to Arizona or New Mexico (50% to range betterment) (12.5, 25%, or 50% - to state gov'ts)

Timber Receipts (25% to States) – small revenue in the SW, but still important in NW

Practical Issues – Yearly Costs

Southwest Forests' Budgets: \$200M/yr

- excluding Regional, National, Reserve, etc.

Arizona National Forest Units

	Apache-Sitgreaves	Coconino	Coronado	Kaibab	Prescott	Tonto	Total
FY 2012	\$25,197,606	\$25,731,034	\$20,780,228	\$13,308,075	\$13,098,355	\$23,145,486	\$121,260,784
FY 2013	\$24,076,264	\$24,915,862	\$19,243,520	\$13,803,894	\$12,387,200	\$22,120,685	\$116,547,425
FY 2014	\$23,245,652	\$22,751,343	\$18,575,394	\$13,762,487	\$12,460,194	\$23,634,438	\$114,429,508
FY 2015	\$22,549,421	\$22,029,028	\$18,330,460	\$16,409,793	\$14,458,666	\$23,900,337	\$117,677,705
Total	\$95,068,943	\$95,427,267	\$76,929,602	\$57,284,249	\$52,404,415	\$92,800,946	\$469,915,422

New Mexico National Forest Units

	Carson	Cibola	Gila	Lincoln	Santa Fe	Total
FY 2012	\$15,774,550	\$16,776,884	\$18,880,216	\$15,666,860	\$21,743,057	\$88,841,566
FY 2013	\$14,250,681	\$17,443,488	\$17,672,038	\$14,330,460	\$21,023,652	\$84,720,319
FY 2014	\$15,049,573	\$20,115,746	\$17,595,679	\$15,044,367	\$20,748,923	\$88,554,288
FY 2015	\$14,302,094	\$19,198,197	\$17,846,930	\$14,445,323	\$19,384,886	\$85,177,430
Total	\$59,376,898	\$73,534,315	\$71,994,863	\$59,487,010	\$82,900,518	\$347,293,603

Practical Issues – Fire Suppression Costs

New Mexico National Forest Units

FY	Carson	Cibola	Gila	Lincoln	Santa Fe	TOTAL
2015	\$767,966	\$3,044,158	\$2,566,899	\$310,229	\$2,440,394	\$9,129,647
2014	\$620,644	\$3,236,400	\$10,710,755	\$1,600,121	\$8,441,395	\$24,609,315
2013	\$2,167,804	\$3,434,215	\$21,877,463	\$1,050,468	\$7,053,911	\$35,583,861
2012	\$961,024	\$3,691,518	\$39,366,188	\$27,518,607	\$3,298,200	\$74,835,537
2011	\$5,815,945	\$5,109,230	\$25,920,350	\$14,797,227	\$17,400,399	\$69,043,151
TOTAL	\$10,333,383	\$18,515,521	\$100,441,655	\$45,276,652	\$38,634,300	\$213,201,511

Arizona National Forest Units

FY	Apache-Sitgreaves	Coconino	Coronado	Kaibab	Prescott	Tonto	TOTAL
2015	\$1,515,561	\$3,680,513	\$3,244,601	\$2,442,455	\$1,575,634	\$5,180,815	\$17,639,579
2014	\$2,478,861	\$14,109,947	\$5,236,733	\$2,218,186	\$1,377,716	\$5,837,598	\$31,259,041
2013	\$1,650,152	\$3,533,316	\$3,004,877	\$1,366,296	\$8,013,675	\$6,247,046	\$23,815,362
2012	\$1,887,083	\$2,434,617	\$6,514,193	\$1,441,450	\$932,930	\$30,497,702	\$43,707,975
2011	\$116,407,109	\$5,135,430	\$74,253,169	\$2,157,798	\$934,005	\$7,336,857	\$206,224,368
TOTAL	\$123,938,766	\$28,893,822	\$92,253,573	\$9,626,185	\$12,833,960	\$55,100,018	\$322,646,325

Grand Total (FY2011-2015)	\$578,831,968*
----------------------------------	-----------------------

*Includes Regional Office Fire Costs

BLM Costs versus Revenues

BLM operates on a national budget of ~1.3B but produces billions in revenue. Some sources of more information

The BLM: A Sound Investment for America
(2016) – State and National economic impacts

Public Benefits from Public Lands (2000) - State
by State comparison of budget and revenues

Increased Revenue & Social Consequences

National Forests are managed for multiple use, many of which are free to the general public:

- ecosystem services like clean water & air
- Wildlife habitat
- Recreational opportunities

State Lands managed to provide Revenue

See <http://www.nmstatelands.org/>

See <https://land.az.gov/>

Grazing Fees

Grazing Fees – costs would presumably increase with transfer

- NMSLO 2014 \$3.99/AUM 2015 \$4.80/AUM 2016 \$5.99/AUM
- AZLD 2014 \$2.78/AUM 2015 \$3.12/AUM 2016 \$3.45/AUM
- Federal lands 2014 \$1.35/AUM 2015 \$1.69/AUM 2016 \$2.11/AUM

For differences and similarities between grazing administration see:

- http://www.nmstatelands.org/uploads/files/BLM_Slo%20Comparisons.pdf
- <https://land.az.gov/natural-resources/rangeland-management/rangeland-management-improvements>

Heightened approval process and level of mitigation required on Federal lands.

- heightened level of public input
- heightened scrutiny to minimize environmental impacts and maximize multiple benefits (e.g. through processes of NEPA, ESA, NHPA, etc.)
- Consideration of non-economic use – recreation wilderness – wildlife habitat

There is still a tension over use v conservation.

For discussion purposes – contrast two studies importance and use of public lands.

2016 Colorado College Conservation in the West survey:

- 60% of voters in the West reject the sale of significant holdings of public lands.
- 75% of voters in the West say that conservation is an important issue for elected leaders
- 85% of voters in the West say leaders should find common ground on conservation.
- 72% of voters in the West say public lands benefit their economy.

Economic, Social, & Cultural Aspects of Livestock Ranching on the Española & Canjilon Ranger Districts of the Santa Fe & Carson National Forests. (2003) RMRS-GTR-113

- 36% of permittees disagree or strongly disagree with the statement that “Public lands, such as national forest or BLM-managed lands, should be managed with equal consideration for the use and enjoyment of all U.S. citizens”
- 97% of permittees agree or strongly agree with the statement that “Public lands, such as national forest or BLM-managed lands, should be managed with greatest consideration for long time, traditional users”

After a century of conservation and service we are still debating the perfect balance between conservation and use.

Public Land Commissions

Multiple “public land commissions” were established in the past 200 years to review laws and policies on Federal lands. These often resulted in new legislation. The two most recent Commissions:

Hoover Commission: (early 30s) analyzed the potential transfer of public lands to the States and reviewed mineral and grazing policies

- Transfer idea died in response to widespread opposition, which came in part from Western senators/Congressman opposed to the idea of transfer of lands without mineral rights or timber lands
- Often cited as a factor in creation and passage of the Taylor Grazing Act and later creation of BLM in the 40s

Public Land Law Review Commission (late 60’s to early 70s)

- usually credited for simplification (repeal) of numerous public land laws and creation of FLPMA.

Mechanisms For Increased Participation in Land Management Decisions and Site Specific Land Transfers

Public participation in Forest Plan Revision and Project Level NEPA

Collaborative Forest Restoration Projects - e.g. 4FRI

Cooperating Agency under NEPA 40 CFR 1501.6

- Available to state, local, and tribal gov't
- Requires jurisdiction by law or special expertise in the decisions to be reached
- Intent is to provide “seamless” government by maximizing coordination among federal, state, local and tribal government agencies.

Land Ownership Adjustments for site specific issues – See 36 CFR 254

- Land exchanges
- Townsite Act - sale for municipal purposes – e.g. utility infrastructure
- Small Tracts Act – sales <5 acres for issues like mineral fractions, boundary mistakes, etc.

BLM also has multiple disposal authorities and exchange authorities e.g.

- disposal of public lands 43 USC 1713
- Recreation purposes to State and Local gov't 43 USC 869

Congressional Actions

Congress frequently obtains or disposes of Federal lands and changes conservation status. An example:

National Defense Authorization Act (2015)

- Changed Columbine Hondo Wilderness boundary
- Disposed of land to Town of Red River
- Legislated the Resolution Copper land exchange
- Established Valles Caldera National Park

Trends in Federal Land Ownership

Federal land ownership down 3.6% since 1990

- Not uniform across states or agencies
- Large reductions in DOD and BLM lands
- Small increases in FS (1%), NPS (5%), FWS (3%)
- Decreases in AZ, CA, NV, WY, AK,
- Increases in ID, MT, NM, OR, UT, WA, CO

Congressional Research Service, Federal Land Ownership: Overview and Data R42346 (Dec. 29, 2014)

More Information

Federal Land Management Agencies: Background on Land and Resource Management RL30867 (2001)

Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention RL34267 (2007)

Federal Lands and Natural Resources R43429 (2015)

Federal Land Ownership: Acquisition and Disposal Authorities RL34273 (2015)

State Management of Federal Lands R44267 (2015)

Grazing Fees: Overview and Issues RS21232 (2012)

Land Management Agencies: Revenue Sharing Payments to States and Counties GAO (1998)

Beginnings of Range management; Albert Potter, First Chief of Grazing, U.S. Forest Service. USDA Forest Service, R4-VM 2005-01 (2005)

Timeless Heritage: A History of the Forest Service in the Southwest. USDA Forest Service FS-409 (1988)

The US Forest Service, A History. Steen (1977)

The Story of the Range. Barnes USDA Forest Service (1926)

