Trading Places

Absent greater efforts by public lands advocacy groups or greater agency accountability, it seems likely that wealthy interests will only increase their demands—and their holdings—by using land swaps to privatize our public lands at the public's expense

By Erica Rosenberg
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LAST SEPTEMBER, a federal district court handed the public a victory against the government by requiring the U.S. Forest Service to be more transparent in its land exchange practices. For those few who pay attention to the obscure world of federal land exchanges, it marks progress toward openness and accountability in what is often an opaque and corrupted process.

Federal land management agencies, such as the Bureau of Land Management and the Forest Service, use exchanges to consolidate land holdings, improve public access, reduce management costs, and protect watersheds. In 1976, the Federal Land Policy and Management Act officially made it federal policy to retain public domain lands and dispose of certain parcels only if it were in the national interest to do so. FLPMA requires that administrative trades must serve the public interest, and that the lands exchanged must be of equal value, with provisions for cash equalization if they are not. The National Environmental Policy Act also applies, so that the agencies must analyze, disclose, and mitigate the impacts of relinquishing public lands in exchanges, including considering alternatives and soliciting public input.

But this seemingly innocuous and beneficial management tool is too often used by agencies and Congress to support powerful private interests—timber companies, real estate developers, and mining companies—at the expense of public interests. For example, the Huckleberry Exchange, initiated in 1996 and completed in 2001, traded 7,000 acres of mature and old-growth forest in Washington state to Weyerhaeuser for 30,000 acres of mostly clearcuts and high-elevation terrain of rocks and ice.

Data on land exchanges, whether legislated or administrative, are both incomplete and inconsistent, but indicate significant activity. From fiscal years 1989-99, BLM completed about 2,600 transactions (about 1,700 to convey BLM lands and 900 to acquire nonfederal land). The Forest Service completed an average of 115 annually during that period. Data from 2009 indicate fewer completed transactions but still much activity: from October 2004 through June 2008, BLM and the Forest Service processed (that is, completed or terminated) 250 exchanges (an average of 29 annually) involving 628,429 acres of federal land and 621,588 acres of nonfederal land, valued at over $261 million and $245 million respectively. Data on legislated versus administrative exchanges are scarce, but between 2006 and 2015, nearly 20 percent of the

The author with her horse, Mya, on Callithea Farm, which is part of the Montgomery County, Maryland, park system and near the C&O Canal National Historical Park.

309 BLM exchanges were legislated. And, while good data are lacking on more recent trends, deals involving tens of thousands of acres valued at millions of dollars are still going on today.

I was introduced to the byzantine world of legislated land exchanges in 1991, when I staffed the Democrats on the Public Lands Subcommittee of the Senate Energy and Natural Resources Committee. At that time, many of the land exchange bills going through the committee had traded vast acreages to corporate beneficiaries. Here are three examples: First, the Gallatin Range Consolidation and Protection Act of 1993, which gave over 16,000 acres of Forest Service land in Montana to Big Sky Lumber in exchange for over 37,000 acres of corporate land. Second, the Arkansas-Idaho Land Exchange, by which Potlatch, another timber company, received approximately 17,625 acres of BLM and Forest Service land in Idaho and conveyed nearly 41,000 acres of Arkansas wetlands to the Fish & Wildlife Service and over 1,100 acres of land in Idaho. Finally, the Utah Federal Lands Exchange Act, authorizing several exchanges of lands and interests throughout Utah and involving nearly 200,000 acres.

On the other end of the spectrum were trades of smaller tracts between federal and local or state governments. Examples are the Kaniksu National Forest exchange of less than 50 acres with the University of Idaho, and the Eagle-Pitkin counties (Colorado) trade that transferred county-owned mining claims and inholdings on a national forest to the Forest Service in exchange for a Forest Service administrative site.

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The committee's stance was that if the parties to an exchange proposal could work it out and the senators wanted it, staff's job was to shepherd the bills through the committee and the chamber. Naïve as I was, I didn't know the potential pitfalls; the committee certainly had no official standards for the bills and no NGO was monitoring the deals. I simply tried to ensure "equal value exchanges" as FLPMA required and to ascertain—almost intuitively—whether a proposal was in the public interest. Support from the administration or an environmental group was usually the proxy for that determination. Consolidating public ownership or getting land or dollars for a federal building often seemed enough to garner agency support, and in turn, the committee's approval.

Occasionally, a local environmental group would voice a concern about whether a parcel leaving federal ownership was in the public interest. But for the most part, with little scrutiny or analysis—and often with support of an NGO like the Trust for Public Land or The Nature Conservancy—these putative "win-win" bills moved with little or no dissent. Most national public lands groups remained unconcerned. Even my highly-principled boss, Senator Dale Bumpers (D-AR), pushed the Arkansas-Idaho exchange. But the bill, like other legislated deals, waived NEPA and FLPMA, thereby providing little opportunity for public scrutiny or guarantees the deal served the public. Legislated deals often overrode land-use planning requirements, and changed FLPMA-mandated appraisal and equalization requirements.

Following a five-year hiatus from the Hill, I joined the staff of the House Resources Committee in 1999, where I worked for Representative George Miller (D-CA), the ranking minority member. By then, scandals associated with agency land deals had come to light, some through the work of the newly formed Western Lands Project, which Janine Blaeloch had founded to watchdog the privatization of public lands after litigating the Huckleberry Exchange. When I arrived, Miller was in the midst of pursuing an investigation of administrative land exchanges, prompted in large part by revelations from Blaeloch's work.

Scathing Government Accountability Office and inspector general reports on land exchanges exposed corrupt agency practices. In the 1990s, the Forest Service and BLM had traded 2 million acres of public land for 3 million acres of mostly private land in increasingly complex deals that at times transferred entire mountains into private ownership. Despite the net acreage gain for the agencies, the GAO found that the public often lost out, because the government undervalued its own land, overvalued the private land, and made trades that benefited the private proponents rather than the public. In one instance, a buyer got 70 acres of federal land for $763,000, and then sold the parcel the same day for $4.6 million, according to the *Washington Post.* GAO recommended that the agencies shut down their land exchange programs and replace them with auctions so agencies could use the proceeds to buy lands they sought. Miller called for a moratorium on administrative exchanges. Neither recommendation was implemented.

These revelations and Blaeloch's successful NEPA challenge to the Huckleberry Exchange forced the

land management agencies to reform their practices. The Huckleberry Exchange was ultimately completed without trading away old-growth or certain tribally significant lands.

Miller was also scrutinizing the legislative land exchange and give-away proposals increasingly appearing before the committee. The bills were getting more egregious in their terms and in their departure from federal requirements and standards. Land exchange and conveyance bills constituted a significant part of the committee's business. The bills generally went unopposed for a variety of reasons: small non-interstate trades were of parochial interest; the deals were generally cut to the satisfaction of the parties involved; proposals moved quickly through the legislative process, so there was little opportunity for controversy or scrutiny; and no organized constituency opposed them.

By congressional standards, an extraordinary number of these bills passed. In the 106th Congress, for example, of approximately 18 land deal bills referred to the Forest Subcommittee, 14 became law. Many of these bills had the patina of protecting the public interest, with federal land surrounding a community painted as a liability and a crimp on expansion, and the community, often a poor county or school district locked in by federal land, painted as in dire need of developable territory. There was little public involvement, and witnesses at the hearings were generally the deal's proponents, such as a county or school representative. If a lobbyist was involved at all, it was generally a third-party "facilitator" who might be accompanied by his or her client—perhaps a mining company or a rancher. Unlike with wilderness bills, these exchanges were often below the radar and the opposition, if any, lacked lobbying acumen.

Given the localized nature of these bills, few members meddled or were motivated to scrutinize the larger trend of giving away federal assets. The exception was George Miller, who tried to hold members to a set of principles: exchanges should be of equal value. Projects should go through NEPA. Appraisal and cash-equalization provisions should be consistent with federal standards. And the deal should be environmentally and fiscally sound. In short, the terms of a legislated exchange should comport as closely as possible to the federal land policy directives for administrative exchanges.

In advancing these principles, for example, Miller got a better deal for taxpayers on a Senate-passed bill to give public land to Sisters, Oregon, for a sewage treatment plant, by requiring that the city either purchase the land or compensate the agency with free utility services up to the value of the land.

PERHAPS the most contested of the bills I worked on in the House was H.R. 4656, the Washoe Land Conveyance. The bill was emblematic of the ideological differences that exist in Congress around the issue of federal land tenure. Introduced in June 2000 by Representative Jim Gibbons (R-NV), the bill authorized the Forest Service to convey 8.7 acres of Tahoe National Forest land to Washoe County, Nevada, so it could build a school. The Forest Service had purchased the land in 1981 for $500,000 as environmentally sensitive property under the Santini-Burton Act. Another act of Congress was needed to override that law's requirement that the parcel be used for water quality or recreation purposes—here, the land was clearly not being conveyed for the purposes for which it had been acquired. The land was valued at $2-4 million, but deed restrictions and a reversionary clause in the bill reduced the value by 75 percent.

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The bill gave away at a discount environmentally significant land purchased with taxpayer dollars to benefit a small group of taxpayers. Given land prices in the Tahoe area, the sale provided less than adequate funds to replace the land, assuming the agency could even purchase a comparable parcel. At the hearing Gibbons spoke in support of the bill and the Forest Service against it. Although the local environmental group did not support the bill, they chose not to take a stand against it because they didn't want to appear "anti-education." At mark-up Representative Adam Smith (D-WA) offered an amendment that would have removed the deed restrictions that prevented the Forest Service from getting fair market value for the parcel.

The amendment was voted down and the bill reported out of committee with dissenting views signed by Miller and Smith. Miller then spoke against the bill during floor debate, stating, "This bill is simply bad policy, and it is bad economics for the taxpayer; and I think it is bad for the environment in the Lake Tahoe basin. . . . We just continue to dip into the federal land base and we parcel it out on less than a fair market value, less than equal basis." For his part, Gibbons portrayed the measure as being about education. In the end, the bill passed.

Two years later, Miller left the committee, thereby changing the panel's minority leadership. The implications for legislated land deals, which often circumvent administrative process requirements of environmental

review, equal value, and public scrutiny, were enormous. The Bush administration was loathe to object to Republican-sponsored bills, and the Democrats no longer universally applied the Miller principles.

The Mount Wilson bill, for example, would have given away a National Forest parcel valued at over $100 million to a private observatory; the sponsor's chief of staff sat on the observatory's board. As the bill was moving through the committee, a front-page story in the *Los Angeles Times* about a Pennsylvania congressman doling out public land in California effectively killed it. In another bill involving 50,000 acres of land, the developer-owner of the Yavapai Ranch in Northern Arizona pushed a deal for his elaborate development plans, including shopping centers and a runway. The rancher threatened to build ranchette subdivisions if the deal didn't go through. With his delegation's help, he got his taxpayer-subsidized real estate deal in 2005. In 2014, yet another still-controversial Arizona exchange would give lands—withdrawn from mining, on the National Register, valued in the billions, and sacred to the Apache—to a copper mining company.

Agencies are still pandering to wealthy interests, undervaluing public land, and restricting opportunities for public involvement

With a different administration, a different ranking Democrat, a more entrenched Republican majority, and leaner economic times, the number and brazenness of the giveaways and sales increased. "Public interest" became more loosely defined, if considered at all. Land giveaways were treated like earmarks. The Democrats' minority status made them reluctant to fight bad deals; to get anything done on their agenda, they had to acquiesce to bills that they may have otherwise opposed. Even Miller couldn't avoid the politics; he had planned to call for a vote on a Utah land exchange but changed his mind when its sponsor threatened to kill a Miller-sponsored parks bill.

WHEN I left the Hill in 2004, I joined the board of the Western Lands Project, the only group watchdogging land exchanges—both administrative and legislative—throughout the West. The group's leader, Janine Blaeloch, had taken an arcane and complex process that public lands advocates had ignored, and single-handedly exposed systemic problems with the exchanges. Environmental groups had neglected to consider hidden costs of land deals to the public (be they in land, water, dollars, access, or circumvention of the processes designed to protect them) or windfalls to private and local interests.

WLP led the outcry against "quid pro quo" wilderness. Such deals, which aimed to win the support of both wilderness advocates and wilderness opponents, gave public land to surrounding communities, ceded water rights, and waived environmental protection in exchange for wilderness designations in other areas. WLP was also instrumental in blocking efforts to sell off public lands to balance the budget and fund federal payments to counties. It opposed a series of Senator Harry Reid (D-NV)-sponsored bills that fueled Las Vegas development with the sell-off of BLM lands and that funneled proceeds to BLM and state entities. It was a staunch defender of public involvement and transparency in land management decisions such as exchanges, and it educated citizens on fighting bad deals.

In the twenty or so years after the 1999 Huckleberry decision, there had been gradual, yet substantial, improvements in NEPA analysis for federal land exchanges. Both agency staff and the public had a heightened awareness that these transactions could have significant consequences on the ground and weren't always win-wins. Even under Republican control, Congress introduced and passed fewer bad land deals, and land management agencies markedly improved their appraisal processes, routinely proposing deals that passed muster more often than not. After nearly two decades, WLP disbanded in 2016.

But in 2021, a small state-focused group, Colorado Wild Public Lands, contacted me. I was surprised to learn that another organization had formed to watchdog land exchanges, which despite WLP's efforts remained problematic. Across the West, powerful players who aim to turn valuable public lands into private playgrounds or developments were continuing to usurp the exchange tool. In Montana, the Forest Service is working on a deal involving 15 square miles of land that would enable the exclusive Yellowstone Club to expand its private ski resort. In Nevada, a BLM deal—the largest ever— would transfer 240,000 acres of public land, including prized hunting grounds, to a rancher/sports team owner in exchange for 84,000 acres.

And in Colorado, since 2000, the BLM and the Forest Service have proposed over 150 land exchanges, far more than in other western states. From 2004 to 2008, BLM in Colorado processed 18 exchanges involving 127,624 acres. In 2022 alone, the agencies proposed to trade more than 4,500 acres of public

lands, worth over $9 million, in three major Colorado land exchanges. Land to be traded away includes access to precious riverfront, and hundreds of acres of prime hunting and recreation territory.

In 2017, the public in Colorado lost 1,470 acres of popular wild lands at the base of 13,000-foot Mount Sopris near Aspen. BLM handed it over to Leslie Wexner, former CEO of Victoria's Secret, at his request (albeit with some improvements, thanks to Colorado Wild's founders). In 2008, the billionaire owner of a 25,000-acre ranch near Kremmling began pushing an exchange that would privatize a 15-mile stretch of state-designated Gold Medal trout waters. Another large landowner near Meeker is pursuing a trade that would bar dozens of neighbors and countless hunters and outfitters from 3,800 acres of public lands that support their livelihoods. A similar deal for a ranch on Treasure Mountain in Marble to create a private ski resort is also in the works; for leverage, proponents have closed public access to a well-visited historic mill and popular back country.

The proposals may sound reasonable in terms of acreage. In the Valle Seco Exchange, for example, the San Juan National Forest would trade 380 acres for 880 acres of prime game-wintering habitat. But the trade mostly benefits the landowners pushing the exchange; the public will lose river access, corridors considered for Wild and Scenic River designation, wetlands, old-growth, and significant cultural sites. The Valle Seco Exchange also includes more than 175 acres of a Colorado roadless area (a designation tantamount to wilderness). The exchange would allow neighboring landowners to consolidate parcels of those 380 acres with their ranches, opening the door to resort development.

The Valle Seco Exchange follows a long-standing pattern. Well-connected and savvy "facilitators," such as Colorado-based Western Land Group, help private landowners buy lands that are on federal agency acquisition wish lists. The landowners then threaten to manage and develop those lands in ways that undermine their integrity. The Valle Seco proponents did this by closing gates on public roads on their lands and threatening to fence the 880 acres for an elk farm and hunting lodge.

The process is hardly open and fair. The agencies cater to these private interests by routinely refusing to share land appraisals and other documents with the public until after the public process has closed—or too late in the process to make it meaningful. In Valle Seco, appraisals were completed in August 2020, but they weren't released to the public until December 2021, just a few weeks before the scheduled decision date for the exchange. Advocates managed to pry the appraisals out of the agency only after submitting multiple Freedom of Information Act requests and taking legal action.

In *Colorado Wild Public Lands v. U.S. Forest Service,* a 2023 decision, the district court ruled that the Forest Service's policies of withholding land appraisals and documents—shared with proponents and their consultants but not the public—until the exchange is finalized violated FOIA. The holding should have helped to ensure a fairer process through timely disclosure of documents. And a 2000 FOIA ruling in WLP's favor that had ordered appraisals released (despite agency claims of private parties' confidentiality rights) had already precipitated a Forest Service policy of releasing appraisals along with the draft Environmental Assessment. Despite the rulings, the agency is still withholding appraisals. For example, instead of completing appraisals to make them available during the public comment period in a recent exchange, the agency delayed appraisals until after the comment period ended in November 2023—and has yet to produce them.

The process remains corrupt and nontransparent. Agencies still present backroom deals, initiated by powerful interests

STILL, WLP's and Colorado Wild's efforts over the last 30 years have made a difference. Fewer deals are introduced in Congress and fewer deals are in the administrative pipeline, in part because the agencies lack the staffing and funds to process them, and have shifted priorities. The public and NGOs have a heightened awareness of and appreciation of public lands, and are actively opposing deals that limit their access or diminish their assets.

But poor practices continue. The process remains inherently corrupt and nontransparent. The agencies still present backroom deals, initiated by powerful interests and their paid facilitators, and negotiated for years out of the public purview. Agencies still withhold key information, delay responses to FOIA requests, and allow appraisals that fail to reflect the value of public lands and the development potential of lands conveyed to private hands. Absent greater efforts by public lands advocacy groups or greater agency accountability, it seems likely that wealthy interests will only increase their demands—and their holdings—by privatizing our public lands at the public's expense.