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Public Policy and Land Exchange

Choice, law, and praxis

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Public Policy and Land Exchange

This original contribution to the field is the first to bring economic sociology theory to the study of federal land exchanges. By blending public choice theory with engaging case studies that contextualize the tactics used by land developers, this book uses economic sociology to help challenge the undervaluation of federal lands in political decisions. The empirically based, scholarly analysis of federal–private land swaps exposes serious institutional dysfunctions, which sometimes amount to outright corruption. By evaluating investigative reports of each federal agency case study, *Public Policy and Land Exchange* illustrates the institutional nature of the actors in land swaps and, in particular, the history of U.S. agencies' promotion of private interests in land exchanges.

Using public choice theory to make sense of the privatization of public lands, the book looks in close detail at the federal policies of the Bureau of Land Management and the U.S. Forest Service land swaps in America. These pertinent case studies illustrate the trend to transfer federal lands notwithstanding their flawed value appraisals or interpretation of public interest, thus violating both the principles of equality in value and observance of specific public policy.

The book should be of interest to students and scholars of public land and natural resource management, as well as political science, public policy, and land law.

Giancarlo Panagia is Associate Professor at Westminster College, Salt Lake City, Utah, USA.

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Public Policy and Land Exchange
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Giancarlo Panagia

To Janine and Susan Jane, true heroines in the protection of the public's lands, and to my godson Zack, who hopefully will be given a chance to enjoy them.

Foreword

"Sometimes, it takes an outsider to give us a fresh perspective on our own system." That is what a researcher for the Polish Academy of Sciences said to me in 1995 about my first book project (published in 1998) about the history of environmental and natural resources law in his country. And that is precisely what the Italian scholar Giancarlo Panagia has done so magnificently in this book.

The product of a decade of careful study, during the course of which the author completed not one but two doctorates at American universities, the book chronicles and analyzes the endemic corruption plaguing public–private land swaps in the western United States. That corruption has received virtually no attention in the public media, but it affects every American concerned not only with the state of our public lands but with effective, efficient, honest, and transparent governance. The cozy relationships between federal land management agencies and private landowners in the western United States have resulted in a massive financial rip-off of the American public and the denigration of the lands the public owns.

Dr. Panagia's analysis is at once comprehensive and concise, a scholarly tome written with a journalist's eye for capturing and holding the reader's attention. Each chapter starts with a different case study of a problematic public–private land swap, which helps to keep the analysis grounded. Viewing the problem from various angles, ranging from the historical to the economic, the sheer amount of research (in both primary and secondary sources) synthesized by the author is impressive. Perhaps because of those multiple angles of analysis, Dr. Panagia manages to avoid simplistic accounts and – what is more important – simplistic solutions that are commonly found in works by public lands scholars with ideological axes to grind. This book should be applauded by both environmentalists and public choice theorists, two groups that do not often overlap.

Finally, Dr. Panagia offers four proposals for reforming the system of public–private land swaps, which combine the great merits of sensibility, modesty, and real potential for ameliorating, if not completely resolving,

the problem. This book should be required reading for government policy-makers and media opinion-makers. It also should be read by every American who cares about the proper management of our public lands and tax dollars.

Dan Cole
Indiana University, USA

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My academic career has been influenced in the most part by two amazing mentors and scholars. I will never be able to repay either one for the selfless advice, friendship, and support I received from Daniel "Dan" Cole and John Hepburn. I would never have been able to achieve this major goal of publishing a manuscript without their unwavering effort to convince me that this research needed to be published. Why two scholars of their caliber would ever invest their brains, patience, and time and blindly support me in my endeavors probably is an issue for posterity. But I'm eternally grateful to both of them for believing in me. I also thank John Johnson, Randel "Randy" Hanson, Eric Dannenmeier, and Andrew Klein. Without their support and invaluably unique perspectives, I would have never completed any of my doctoral works. In addition, Frank Emmert has mentored me with such expertise and guidance that my career has fully developed thanks also to his suggestions. William "Bill" Rodgers deserves the real credit for teaching me the importance of researching and writing on federal land exchanges; his class at ASU law school opened my eyes to a subject I hardly knew at the time. But the passion to write in this field came from conversations with Janine Blaeloch and Susan Jane Brown, who showed me how hard work and perseverance in the protection of nature and its resources eventually pays off. I am indebted to Ray "RJ" Maratea, Jeffrey "Jeff" Nichols and Robert "Bob" Rains for showing me the way out of a dark tunnel during the drafting of this book. Not only did they provide editorial work, but they gave me invaluable advice in how to spice up the writing of each chapter in this book. Their contribution has allowed me to survive at a time in which this project was too overwhelming for me. RJ merits one more mention. Several times in the last few years, he was the one providing invaluable feedback every single time I felt I had reached an impasse on this project. He was the one who would spend time over the phone to give me ideas about new "hooks" in this project.

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College. The School of Arts & Sciences offered me the opportunity to teach at such a great institution. Without a doubt, I have the good fortune to be surrounded by Justice Studies students who keep alive in my research and teaching a passion to address what is wrong with our system of laws and practices. They represent a future much brighter than our present times. Amy Fairchild has offered me guidance and deserves my eternal gratitude for putting up with my moody behavior for over five years. This project would have never got this far without her unwavering optimism and true belief in my capacity. Additionally, Fathom Croteau, my research assistant, has kept me sane long enough for me to complete this project.

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Contents

1 Introducing the sour taste

In December 1980, the General Accountability Office (GAO), an independent agency providing investigative services to the U.S. Congress, issued a draft review of a proposed land exchange involving the Chattahoochee National Forest in Georgia. The proposal was for 1,330 acres of private land to be swapped for 667 acres of U.S. Forest Service (USFS) land. Originally, in November 1979, the federal lands were appraised by an independent contractor at $328,000. A year later, the same appraiser found the value to be unchanged. The GAO was concerned that the appraiser had failed to consider the added value of a state road being constructed through the federal land. Although the appraiser had indicated that the highest value of the forestlands was residential development, no indication of this value increase was reflected in either appraisal. Thus, the GAO contacted the U.S. Forest Service chief, recommending that he disapprove and terminate the exchange.

Four months later, in April 1981, the GAO submitted its complete review of the proposed exchange in the Chattahoochee National Forest (GAO 1981). In addition to the prior problems, the GAO now pointed out that Forest Service officials, by equalizing the difference in the values of the private and public lands, had rounded off a total of $1,189 in favor of the private owner. Also, the GAO discovered that the proponent of the land swap was not even the owner of an 80-acre tract included in the offered lands. The GAO questioned why the Forest Service would pay for the appraisal of lands not even owned by the proponent.

This GAO document is just an example of investigative documents that this book collects to study the history and public policy related to federal land swaps between private parties and the U.S. government. In such swaps, the federal government trades public lands to private parties in return for private lands.[1] In the present study, special attention is paid to federal policy

1 In these land exchanges, the federal government swaps with private parties public lands in return for private lands in the interest of consolidating federal ownership into larger contiguous areas.

and case law concerning swaps conducted by the Bureau of Land Management (BLM) and the USFS. In particular, this book covers and analyzes extensively two recurring issues in land swaps leading to litigation: the interpretation of the statutory terminology "public interest" as used in federal law and the valuation of public lands traded to private ownership.

This book presents a legal analysis of several representative land swaps in the form of case studies. It proffers a legal analysis of several cases interpreting federal statutory law before both judicial and administrative panels. Federal public policy has changed since the first statute that governed land exchanges at the end of the nineteenth century. However, problems with land swaps, particularly the under-valuation of federal lands, have continued ever since. Although the General Exchange Act (GEA) of 1922 changed the legal requirements for land swaps from the original terminology of equal acreage to the present requirement of equal value, courts, by granting wide discretion to the BLM and the USFS, allow suspect valuation practices to escape judicial review. Even the Interior Board of Land Appeals (IBLA), the administrative court for the Department of the Interior (DOI), is very receptive to conferring wide discretion to the BLM. The IBLA is especially consistent in its unwillingness to overturn the judgment of the BLM even in cases that favor private parties' claims against the government.

A valid solution to this impasse over the valuation of federal lands and the public interest determination of land swaps could be provided by the courts. Currently, though, both administrative judges and federal courts have declined to impose restraints on the agencies. The rule so far has been the dismissal of most challenges on procedural matters such as lack of standing, or, if the merits are reached, bowing to agency discretion. It could be that judicial oversight of land appraisal and public interest determination controversies are the final bulwark against the undervaluation of federal lands.

The past and now present problem

What makes these particular land transactions relevant to the public are the established trends, embedded in BLM and USFS policies, to transfer federal lands despite flawed land appraisals and faulty public interest determinations. These trends lead to a loss of economic value for the public and a consequent sour aftertaste for all of us.

This book examines why the BLM and the USFS consistently undervalue public lands and fail to respect the statutes which require the public interest to be served by all federal land swaps. The public interest, ostensibly the motivation for any land swap, requires a full consideration of the needs of the government and the people. In addition, how the constant undervaluation of federal lands affects the needs of diverse communities is still an unresolved issue.

This book investigates the undervaluation of the federal lands swapped by the BLM and the USFS and focuses on case studies in which the BLM

and the USFS exchanged federal lands with private parties despite knowledge that the public lands were being undervalued. While land swaps have had success as a means to acquire private lands, the federal agencies have lost value in these exchanges by undervaluing federal lands. It is necessary to determine the causes of persistent undervaluation of public lands or disregard for the public interest in the transaction. Investigative reports of each federal agency allow an understanding of the institutional nature of the actors in land swaps where both the BLM and the USFS have historically failed to protect the interests of the public (Draffan and Blaeloch 2000).

At some point of socialization in their careers, some agencies' officials lose their multiple-use management ideals and reacquire, instead, what public choice theory refers to as self-interest. Firestone expresses this when he states: "Cultures are most effective in shaping behavior when their adherents cannot imagine any other way to behave. As soon as alternatives become available, deviance and cultural conflict can occur" (1990:108–109). This self-interested behavior contributes to the depreciation of the public interest, thus leading to the undervaluation of federal lands, a truly misunderstood chapter of U.S. land policy (Espey 2001).

From history to policy

By developing a historical time frame from the late 1890s to the present, this book intends to analyze the historical and legal changes pertaining to the interpretation of terms related to land swaps. Careful consideration of the chronology of events surrounding land swaps has led some authors to believe that the causes of undervaluation of lands or improper public interest determinations can be found in the general atmosphere of federal land and resource privatization which developed in the last decade of the twentieth century and has been common to both agencies.

Therefore, it is by conscious decision that this book focuses on the history, public policy literature, and investigative reports of land-swap issues covering a time span over one century. Thus, the disciplines most relevant to this project are history and law. Historical and legal evaluations help demonstrate the divide between public and private interests in land swaps. Under the rational choice model, in the words of Little, "the general idea is to explain specific social phenomena as the aggregate result of large numbers of rational persons making choices within a specific social and natural environment" (Little 1991:65). A description of human agency where commitments, beliefs, and cultures account for behavior helps explain self-motivated actions of public officials through public choice theory.

Why do we apply theory to make sense of faulty land exchanges? Land swaps are little known throughout American society. The total annual loss of value in land swaps conducted by the federal government, at both the administrative and legislative levels, is staggering. The use of public choice to understand public officials' behavior is the first step to improve agencies'

practices before we can create policies which ascertain a more encompassing valuation and public interest determination of lands.

This project evaluates possible alternatives to the present land-swap process. In particular, it evaluates whether, in case the current problematic policies continue, "free market environmentalists" are correct in arguing that once those lands are in private hands the market will accurately determine their highest and best uses. They argue that privatization would be socially beneficial even if the federal government simply gave the lands away through exchange transactions, as it often did in the late nineteenth century.

Federal land swaps have been the subject of legal scholarship only since the publication of a 1964 article on sales and exchanges of federal lands. That article summarized federal exchange procedures and was essentially a guide to acquiring public land. At the time the problems in such exchanges, according to the author, "were the location and acquisition of acceptable private land to be offered" (Moran 1964:45).

The article addressed the needs of developers and businesses interested in acquiring public lands from the BLM. The author stressed that in land swaps "the procedures provide a wide area of discretionary power to such [a governmental] official; success in any instance depends upon the manner in which that discretion is exercised" (Moran 1964:49). The article instructed lawyers and their clients to complete land swaps by taking advantage of the complacency and discretionary practices of the Bureau's employees. The author concluded that all that was necessary for a swap to succeed was "closer contact between the administering officials and the representatives of private interests and an understanding by each of the problems of the other" (Moran 1964:50). According to the article, contrary to the policy of withdrawing public lands from potential private acquisition, the federal government should have disposed of these lands for economic development by private parties. Land exchanges, according to him, were created to facilitate private acquisition of public lands.

To prevent such skewed viewpoints and to give the BLM a clear mandate of forest and range management, Congress passed the Federal Land Policy and Management Act (FLPMA) in 1976. In confirming the withdrawal of the public domain (now renamed public lands) from private acquisition, Congress mandated the BLM to properly manage these land assets using several different approaches, such as range, grazing, recreation, and wilderness.

After a decade of land swaps conducted by the BLM and the USFS[2] under the new statute, in 1985 the Senate requested the GAO to review the exchange programs as actually implemented. In fact, due to budget cuts, the agencies had resorted to increased use of swaps to eliminate problems created by in-holdings – islands of private lands interspersed within larger

2 A particular provision of the FLPMA, section 206(a), made the exchange procedures applicable also to the USDA, thus, to the U.S. Forest Service. 43 U.S.C. § 1716(a) (1976).

federal and state land management areas. Therefore, the study commissioned by the Senate was to inquire about the land-swap process and make recommendations for improvement. The results of the study were somewhat perplexing. Although the "GAO found that the land exchange process [was] working well" (GAO 1987:2), several concerns were raised. The major area of concern was "cases when equal value was not obtained" (GAO 1987:3) in violation of FLPMA.

These alarming results prompted Congress to introduce a new bill, drafted by the natural resources development industry, to specify rules and procedures for appraisals to prevent failures to obtain equal value. In 1988, Congress finally passed the Federal Land Exchange Facilitation Act (FLEFA) to "facilitate and expedite land exchanges by providing more uniform rules pertaining to land appraisals and by establishing procedures for resolving appraisal disputes" (GAO 2000:7). FLEFA was supposed to guarantee that all swaps would garner equal value.

Congress mistakenly assumed that FLEFA would be a panacea for controversial land valuations. FLEFA created a new bargaining and negotiation process to handle the case of appraisals being challenged by either party to a swap. FLEFA also conferred on the agencies the power "to approve adjustments in the values of lands exchanged as a means of compensating a party for incurring [land swaps] costs" (Draffan and Blaeloch 2000:79). These changes did not track the recommendations of the GAO, which had chastised these very same practices. Representative Ron Marlenee had previously said that the practice of the BLM and USFS of transferring selected lands to pay for the exchange's administrative costs was tantamount to "giving away or selling off federal lands to a vested few, those [private parties] who are involved in the exchange" (U.S. House of Representatives 1986).

In sum, the GAO had found that both the BLM and the USFS had "adjusted" valuations in violation of the law. In direct response, Congress, rather than following the recommendation of the GAO, rubber-stamped the practice. Since then, authors have stopped critiquing this practice because it is now legal.

Environmental scholars question the practices of the agencies, especially when federal officials are being left at the mercy of private interests. Local communities and national politicians constantly pressure these officials into giving in to the requests of land developers. In addition, the agency's officials might become captive to private parties' interests (Brown 2000). Finally, in other instances, the same agency officials find themselves in a conflict of interest through a never-ending "revolving door" system (Draffan and Blaeloch 2000).

Espey (2001) has shown the true complexity of these issues surrounding land exchanges. She found that the political affiliation of the president is an explanatory variable of the preferential treatment that private businesses receive in land exchanges. Espey is disillusioned about the solutions proposed by other authors to solve the status quo. She notes that the same