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The Legal Landscape of America's Landlocked Property

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ABOUT THE AUTHOR

J.D., University of California, Davis School of Law, 2019. M.A., Loyola Marymount University, Urban Education Policy, 2015. A.B., Brown University, Public Policy & Economics, 2013. Congress must protect the American heritage of accessible wilderness. This Comment set out to summarize the modern legal challenges confronting a threat to that heritage: the western checkerboard. It is a problem that has frustrated outdoor recreation and rendered much of America's public lands inaccessible for over a century. I wrote this for my family and friends who share a love of the outdoors, and to all others inspired to preserve the health and vitality of America's wilderness for sustainable recreation. Special thanks are owed to Professor Albert C. Lin for his support in guiding my research and providing an engaging seminar to explore the field of public land law. And to the editors of the *UCLA Journal of Environmental Law and Policy* for their efforts in bringing this Comment to press.

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INTRODUCTION

Analogizing to the pleasures of reading a good book, Theodore Roosevelt wrote that “[l]ove of outdoor life, love of simple and hardy pastimes, can be gratified by men and women who do not possess large means, and who work hard.”¹ Unimpeded, low-cost access to America’s public land facilitates such recreation. Like public libraries, wilderness areas, national parks, and wildlife refuges provide spaces for people to explore and learn from a rich archive of the natural world. Outdoor enthusiasts of every type enjoy recreation on these public lands. America’s impressive expanse of public land remains a unique venue for multiple generations to enjoy a Thoreauvian saunter² with minimal financial impediment.

Four federal agencies administer public lands for conservation and recreation. The two largest, by acreage managed, are the Bureau of Land Management (BLM) and the United States Forest Service (USFS). The BLM alone manages nearly 250 million acres of public lands for “multiple use[s] and sustained yield,” primarily in thirteen western states.³ The USFS, which has a similar multiple-use mandate, manages 192.9 million acres, most of which are designated as national forests.⁴ Because of the historical choice to designate public land in a checkerboard pattern across the western United States, however, millions of these acres are inaccessible to the public.⁵ Certain public lands and their accompanying hiking, camping, fishing, and hunting opportunities are circumscribed behind private property. Even when the only place public

1. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY OF THEODORE ROOSEVELT 351–52 (Stephen Brennan ed., 2011).

2. See HENRY DAVID THOREAU, WALKING 28 (Tilbury House Publishers 2017) (1862) (“Some, however, would derive the word [saunter] from *sans terre*, without land or a home, which, therefore, in the good sense, will mean, having no particular home, but equally at home everywhere. For this is the secret of successful sauntering. He who sits still in a house all the time may be the greatest vagrant of all; but the saunterer, in the good sense, is no more vagrant than the meandering river, which is all the while sedulously seeking the shortest course to the sea.”).

3. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785; see also CAROL HARDY VINCENT, ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2017).

4. See VINCENT, ET AL., *supra* note 3, at 1.

5. See *infra* Parts I.A–I.B.

lands physically adjoin is at a corner of the checkerboard, passing from one public tract to another is typically illegal because of private property rights.⁶

Today, the patchwork of private-public land ownership and competing land use interests among conservationists, recreationists, corporations and families complicates and at times inhibits access to public lands. Many advocates believe a permanent reauthorization of the Land and Water Conservation Fund (LWCF), with dedicated annual funding, is the surest way of securing public land access.⁷ Others suggest states should administer public lands and exercise discretion over their management, sale, and recreational use.⁸ Meanwhile, some private actors with intent towards conservation have purchased specific private tracts to open up ingress routes to public land, while others have swapped land with the federal government, thereby creating such access.⁹ However, many more landowners have simply refused to sell private lands or easements to the BLM, perpetuating a situation where public lands remain inaccessible to the public behind private property, a problem hereafter referred to as the “western checkerboard problem.”

This Comment examines the variety of legal and political challenges confronting the western checkerboard problem. The first Part offers a historical explanation of the western checkerboard problem and discusses the unintended consequences of the Pacific Railway Acts. The second Part considers a variety of solutions to the western checkerboard problem, including common law causes of action and negotiated land transfers. The third Part focuses on Congressional action and the role the political process can play in improving and ensuring continued access to America's public lands. The Comment concludes with a summary of the legal framework surrounding the western checkerboard problem and a brief policy recommendation.

I. THE WESTERN CHECKERBOARD PROBLEM

This Part characterizes the scope of the western checkerboard problem. The first Subpart provides historical context around the land allocation and management plans that have resulted in today's access issue on public lands. The second Subpart examines the unintended consequences of the Pacific

6. A more thorough discussion of corner-crossings is discussed *infra* at Subpart II.B.2.a. See also Press Release, Bureau of Land Mgmt., Access Tips for Hunting on BLM Lands (Aug. 29, 2013), <https://www.blm.gov/press-release/access-tips-hunting-blm-lands> [<https://perma.cc/LK4V-SHNX>]; Paul Queneau, *Finding a Way In*, MONT. OUTDOORS, Sept.–Oct. 2014, at 11. (in Montana, “[p]arcel[s] that meet at an exact corner cannot be legally crossed without permission from all adjoining landowners”).

7. See *Unlocking the West's Inaccessible Public Lands: Off Limits, But Within Reach*, THEODORE ROOSEVELT CONSERVATION P'SHIP, <http://www.trcp.org/unlocking-public-lands> [<https://perma.cc/5FCQ-DKUH>] [hereinafter TRCP] (noting that “the Land and Water Conservation Fund is the single most powerful tool for opening landlocked public lands and . . . is set to expire on September 30, 2018”).

8. See *infra* Part III.B (discussing state land management practices).

9. See *infra* Part II.C (discussing land transfers and private purchases).

Railway Acts and considers the economic opportunity costs of landlocked public acreage.

A. *The Union Pacific Act of 1862 and the Homestead Act of 1862*

From outer space, images of the contiguous United States reveal a largely borderless landscape. Except for a few natural landmarks, state boundaries and property lines seem all but impossible to recognize; however, a close examination of satellite images of the American West exposes a peculiar patchwork that cannot be explained by natural forces. One such image of southwest Oregon reveals perfectly square plots of land alternating between deep green hues and barren light browns, suggesting an intentional land use plan.¹⁰ Similar checkerboards are visible across the West from a sufficiently elevated vantage, though even discerning eyes cannot see the extent of the western checkerboard without the aid of property lines drawn on a map. The checkerboard patterns found throughout the West are a visible reminder of a century-old land grant scheme intended to spur westward expansion.¹¹

Any casual student of American history could offer an explanation for the western checkerboard.¹² Officially, the patchwork owes its origins to the Union Pacific Act of 1862 and its five subsequent amendments—collectively referred to as the “Pacific Railway Acts.” The discovery of gold in California in 1848¹³ and the desire to expand west¹⁴ created a national fervor over a

10. See Emily K. Brock, *The Checkerboard Effect*, OR. ST. U. PRESS (Apr. 16, 2015), <http://osupress.oregonstate.edu/blog/checkerboard-effect> [<https://perma.cc/EG9S-8NUP>] (“If you look at satellite images of southwestern Oregon today, you can make out faint traces of a gigantic checkerboard design etched into the forest. The checkerboard is a still-visible remnant of management decisions made in the 1860s.”).

11. *Id.*

12. See Robert S. Henry, *The Railroad Land Grant Legend in American History Texts*, 32 MISS. VALLEY HIST. REV. 171, 172 (1945) (commenting that “the Federal railroad land grants, a subject frequently mentioned in high school and college texts which are the first, last, and only works on the history of their country read by many, if not most, Americans.”).

13. See Donald C. Cutter, *The Discovery of Gold in California*, CAL. DEP’T CONSERVATION, <https://www.conservation.ca.gov/cgs/Pages/Program-MRP/GoldDiscovery.aspx> [<https://perma.cc/FRN4-XQSU>] (explaining that while traces of gold were found in California as early as 1816, James Marshall’s discovery of gold in Sutter’s mill in 1848 is the better known date because the news was published in the San Francisco weekly newspaper in March of 1848, putting the world on notice of California’s gold). See also JAMES W. DENVER, PACIFIC RAILROAD AND TELEGRAPH, H.R. Rep. No. 34–358, at 1–2 (1856) (“The importance of our Pacific possessions is felt in every pursuit and in every relation of life. The gold of California has furnished the merchant and trader with a capital by which enterprises have been undertaken and accomplished which were before deemed impracticable A railroad across the continent would open up a vast extent of country to settlement, and much of what is now believed to be sterile and barren will, no doubt, (as in California) be found to yield bountifully to the agriculturist.”) (emphasis added).

14. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–48, at 705–06 (2007) (suggesting that while Southern Democrats believed in Manifest Destiny, Whigs, Lincoln, and others rejected the concept of American imperialism,

transcontinental railroad. Alongside the Homestead Act of 1862,¹⁵ the Pacific Railway Acts reflect Congress's intent to assure the security and economic growth of the United States.¹⁶

On July 1, 1862, President Lincoln signed the first of the Pacific Railway Acts into law, authorizing federal support for the Union and Central Pacific Railroad Companies to construct a transcontinental railroad.¹⁷ The Union Pacific Act and its later amendments granted contiguous rights of way within 200 feet on either side of newly laid track, as well as alternating one square-mile plots of land on either side of the tracks for every ten to forty miles.¹⁸ The railroad companies also acquired rights to timber, where timber was present, though mineral rights associated with the land were excepted.¹⁹ Consistent with prior articulations of Manifest Destiny,²⁰ the Act expressly "extinguish[e] as rapidly as may be the Indian titles to all lands falling under operation of this act . . ."²¹ All told, by 1943, the U.S. General Land Office reported transfers of over 131 million acres to railroads to fulfill the objectives of westward expansion.²²

B. *Unintended Consequences of the Pacific Railroad Acts*

Legislative history suggests Congress believed that granting lands to the railroads would "attach value to the remainder" of property that was otherwise unreachable before the railway.²³ Congress hoped that the railroad would drive private enterprise and facilitate economic growth.²⁴ Proximity to the railroad increased land values as Congress hoped, but it also rendered the land too expensive for those moving west.²⁵ The unsold land was either made available to the public through the Homestead Act of 1862 or retained by the federal

though still endorsed the spread of democracy).

15. Homestead Act, ch. 75, 12 Stat. 392 (1862). *See also Homestead Act*, LIBR. CONGRESS (Mar. 28, 2018), <https://www.loc.gov/rr/program/bib/ourdocs/homestead.html> [<https://perma.cc/83PF-9ADR>] ("Signed into law by President Abraham Lincoln on May 20, 1862, the Homestead Act encouraged western migration by providing settlers 160 acres of public land. In exchange, homesteaders paid a small filing fee and were required to complete five years of continuous residence before receiving ownership of the land. After six months of residency, homesteaders also had the option of purchasing the land from the government for \$1.25 per acre. The Homestead Act led to the distribution of 80 million acres of public land by 1900.").

16. *See DENVER*, *supra* note 13.

17. *See Pacific Railway Act of 1862*, ch. 120, §§ 2, 4, 12 Stat. 489, 491–92 (1862).

18. *Id.* at §§ 2–3.

19. *Id.* at § 3.

20. *See Manifest Destiny and Indian Removal*, SMITHSONIAN AM. ART MUSEUM, <https://americanexperience.si.edu/wp-content/uploads/2015/02/Manifest-Destiny-and-Indian-Removal.pdf> [<https://perma.cc/AQ9P-LXRQ>].

21. Pacific Railway Act of 1862, *supra* note 17, at § 2.

22. *See Henry*, *supra* note 12, at 172 (noting that as of 1943, only 131,350,534 acres were actually transferred to railroads).

23. *See DENVER*, *supra* note 13, at 2–3.

24. *See TRCP*, *supra* note 7.

25. Merry J. Chavez, *Public Access to Landlocked Public Lands*, 39 STAN. L. REV. 1373, 1377–78 (1987).

government.²⁶ The land retained by the federal government became public property that is now administered by the BLM or USFS. Because of the alternating checkerboard pattern of public and private land, however, many parcels of public land became landlocked behind private property and are therefore inaccessible.

Congress never foresaw the type of access problems that have resulted from the Pacific Railway Acts, as the Supreme Court has pointed out.²⁷ Parcels are landlocked when they cannot be accessed directly from a public road, or through adjoining public land accessible from a public road. There are 492,000 acres of landlocked public land in California alone, while Montana has 1.52 million acres and Nevada has 2.05 million.²⁸ In total, over 9.52 million acres of federal public land are landlocked²⁹ because of the Pacific Railway Acts and the checkerboard scheme.

To gain access to these parcels, an interested hunter or hiker need only ask for permission from the private landowner whose property restricts access to the public property; however, property ownership patterns have made it increasingly unlikely for private landowners to grant access for free.³⁰ Because 72 percent of western hunters rely on access to public lands, the western checkerboard problem disproportionately affects the ability to hunt;³¹ however, all types of outdoor recreation on lands hidden within America's western checkerboard are stymied by this lack of access.

C. *The Economic Opportunity Cost of the Western Checkerboard Problem*

For outdoor enthusiasts, these inaccessible lands represent foregone opportunities for recreation, including hiking, hunting, fishing, and camping. The economic value of ensuring access to public land for these activities is tremendous. In 2013 alone, consumers spent over \$646 billion on outdoor recreation, which directly supported 6.1 million jobs.³² This considerable segment of the outdoor economy has since grown further: in 2017, outdoor recreation generated \$887 billion in revenue, \$65.3 billion in federal tax revenue, and \$59.2 billion in state and local tax revenue, while directly supporting 7.6 million

26. *Id.* at 1378.

27. *See* *Leo Sheep Co. v. United States*, 440 U.S. 668, 686 (1979) (“Congress obviously believed that when development came, it would occur in a parallel fashion on adjoining public and private lands and that the process of subdivision, organization of a polity, and the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads.”).

28. TRCP, *supra* note 7, at 5–6.

29. *See id.* at 2.

30. *See id.*

31. *See id.*

32. *See* CTR. FOR W. PRIORITIES, *LANDLOCKED: MEASURING PUBLIC LAND ACCESS IN THE WEST* 6 (2013), <http://westernpriorities.org/wp-content/uploads/2013/11/Landlocked-Measuring-Public-Land-Access.pdf> [<https://perma.cc/Uyc6-9NVF>].

jobs.³³ Hikers, hunters, fishermen, campers, and wildlife watchers account for over \$461 billion in retail expenditures, nearly 52 percent of total spending on outdoor recreation.³⁴ Much of the landlocked acreage would be used by these types of outdoor enthusiasts because of the pristine hunting and hiking opportunities these lands offer.

The Department of the Interior's 2016 economic report estimates that recreation on BLM lands contributed \$6.68 billion to the economy and directly supported 48,139 jobs.³⁵ Compared to National Parks Service figures (\$34.88 billion from recreation and 318,150 jobs), available BLM properties generated significantly less economic value.³⁶ The BLM's impact is still substantial, though. Approximately 8.9 million of the 9.52 million acres of landlocked lands in the United States are administered by the BLM.³⁷ And while this means that a mere 3.6 percent of the BLM's 248.3 million acres are inaccessible to the public,³⁸ the rough imputed value of \$26.90 per acre translates to foregone annual recreation revenue exceeding \$239 million.³⁹

Public lands provide tremendous economic value to rural communities in particular.⁴⁰ Historically, rural counties with the highest share of federal public lands have had higher rates of employment and personal income growth than counties with lower shares of public land.⁴¹ Local economies benefit directly when public lands are readily available because these lands attract entrepreneurs, tourists, and retirees seeking to use the area for recreation. In 2014, the Colorado College Conservation in the West Poll reported that over 95 percent of westerners use their public lands at least annually, and more than half use them more frequently.⁴² The same poll reported that 74 percent of westerners are opposed to selling off public lands to decrease budget deficits.⁴³ Because public lands are used by locals and visitors alike, preserving access is a national interest.

33. See OUTDOOR INDUS. ASS'N, *THE OUTDOOR RECREATION ECONOMY 2* (2017), https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf [<https://perma.cc/TW4Y-CLZS>].

34. See *id.* at 18.

35. U.S. DEP'T OF THE INTERIOR, *ECONOMIC REPORT FY 2016 10* (2017), <https://doi.sciencebase.gov/doidv/files/FY%202016%20DOI%20Economic%20Report%202017-09-25.pdf>.

36. *Id.*

37. See TRCP, *supra* note 7, at 5.

38. See *id.*

39. See U.S. DEP'T OF THE INTERIOR, *supra* note 35, at 10.

40. Megan Lawson, *Federal Lands in the West: Liability or Asset?*, HEADWATERS ECON.: RURAL W. INSIGHTS (Feb. 2017), <https://headwaterseconomics.org/public-lands/federal-lands-performance> [<https://perma.cc/CN6D-RFWH>].

41. See *id.*

42. LORI WEIGEL & DAVE METZ, *THE COLO. COLL. STATE OF THE ROCKIES PROJECT, 2014 CONSERVATION IN THE WEST POLL EXECUTIVE SUMMARY 33* (2014), <https://www.coloradocollege.edu/dotAsset/ef6cac1a-da9d-4ede-a023-eb138fd43ac8.pdf> [<https://perma.cc/HB9K-CD7Z>].

43. *Id.* at 31.

II. LEGAL SOLUTIONS TO THE WESTERN CHECKERBOARD PROBLEM

This Part considers legal solutions to the western checkerboard problem. Subpart A considers a variety of common law legal remedies the American public could pursue to improve access. It later details how the most obvious of these legal solutions, an implied easement arising from necessity, has been rejected by the Supreme Court. Next, Part B explains why traditional theories of trespass fail to resolve the public access problem. Later, it considers the political and practical consequences of mass condemnation actions under the Fifth Amendment, including an evaluation of the BLM budget constraint and the legality of corner-crossings. Part C concludes this Part with an examination of alternative methods of land access acquisition: land exchanges and sales between the BLM, private parties, and states.

A. *Common Law Principles Fail to Address the Western Checkerboard Problem*

1. Implied Easement Arising From Necessity

With an easement, hikers, hunters, and other recreational outdoor enthusiasts would be able to access landlocked public property. Easements are *in rem* property rights that grant the owner of a dominant estate a privilege with respect to an adjacent parcel of real property, known as the servient estate.⁴⁴ Easements burden the servient estate in order to facilitate access to and use of the dominant estate.⁴⁵ Here, with respect to the western checkerboard problem, an effective easement would burden the servient estate—private lands—with a right of way for outdoor enthusiasts to access the dominant estate: the landlocked public parcel. Such easements can arise through express creation or by implication. Courts recognize three types of easements arising by implication: those from *prior use*, those from *necessity*, and those from a *plat in a subdivision*.⁴⁶

For an implied easement to arise from necessity, a plaintiff must demonstrate original unity of ownership between the alleged dominant and servient estates, absolute necessity of the easement, and that the necessity existed at the time the two estates were severed.⁴⁷ Courts strictly construe the absolute necessity requirement; they will not recognize necessities that are self-imposed.⁴⁸ For example, in Idaho, necessity is not synonymous with otherwise “inconvenient” where alternate access to the property is possible, regardless of expense or danger.⁴⁹ Courts have even held that a road across a servient estate

44. See *Easement*, THE LAW DICTIONARY (2002).

45. *Id.*

46. See JAMES BACKMAN & DAVID THOMAS, A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS—EASEMENTS § 2.02(3)(a)–(c).

47. *Othen v. Rosier*, 226 S.W.2d 622, 625 (Tex. 1950).

48. See *Mitchell v. Seipel*, 53 Md. 251, 274–75 (Md. 1880).

49. See BACKMAN & THOMAS, *supra* note 46, at n.26 (citing *Machado v. Ryan*, 153 Idaho 212 (2012)).

was not truly necessary when the dominant estate was accessible via a navigable waterway.⁵⁰ Thus, the fact that a parcel is landlocked may not automatically imply an easement by necessity.

Further, *Leo Sheep Co. v. United States* forecloses easement by necessity as a legal remedy to the western checkerboard problem.⁵¹ In *Leo Sheep Co.*, the Supreme Court addressed whether the federal government had an implied easement to build a road across private land to connect two plots of public land.⁵² The issue in the case arose because, as discussed in Part I, Congress sought westward expansion and investment with the Union Pacific Act of 1862, creating a grid of alternating public and private land where every odd numbered plot within 20 miles of track was granted to the railroad.⁵³ The resulting checkerboard scheme made Wyoming's Seminoe Reservoir inaccessible, frustrating the public's ability to fish and hunt.⁵⁴ To facilitate public access to the landlocked reservoir, the federal government constructed a road across *Leo Sheep Co.*'s property, connecting the public domain lands.

The government never claimed that the Union Pacific Act reserved an express easement that would authorize the construction of a public road across *Leo Sheep Co.*'s property, and the Tenth Circuit concluded, in support of the government, that when "Congress granted land to the Union Pacific Railroad, it implicitly reserved an easement to pass" over private property to reach other public parcels.⁵⁵ However, in finding for *Leo Sheep Co.*, the Court reversed the Tenth Circuit's decision and held there was no implied easement across the private land to access the Seminoe Reservoir.⁵⁶ The Court noted that the common law presumption of "easement by necessity" could only exist whenever "such passage is necessary to reach the retained property."⁵⁷ Though the Seminoe Reservoir was landlocked, because the federal government retains the power of eminent domain—the ability to condemn lands for public use—there was no true "necessity" justifying the finding of an implied easement.⁵⁸

50. See, e.g., *Amodeo v. Francis*, 681 A.2d 462, 466 (Me. 1996); *Estate of Thomson v. Wade*, 499 N.Y.S.2d 541, 542 (N.Y. App. Div. 1986) ("An easement by necessity cannot arise when access is available through a publicly used waterway.").

51. *Leo Sheep Co. v. United States*, 440 U.S. 668, 679–81 (1979).

52. *Id.* at 669 ("Admittedly the issue is mundane: Whether the Government has an implied easement to build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862—a grant that was part of a governmental scheme to subsidize the construction of the transcontinental railroad.").

53. 440 U.S. at 677.

54. *Id.* at 678.

55. *Id.*

56. *Id.*

57. *Id.* at 679.

58. *Id.* at 679–80; see also *L & M Prof'l Consultants v. Ferreira*, 194 Cal. Rptr. 695, 701 (Cal. Ct. App. 1983) ("'Great necessity' does not exist when a condemnation alternative is more preferable than a reasonably acceptable noncondemnation alternative. Under such circumstances a piece of property is not 'otherwise' landlocked. 'Great necessity' exists only when a condemnation alternative is the sole reasonably acceptable means for providing utility

Ultimately, the Court couched its rationale in the maxim of settled expectations, and refused to support the construction of “public thoroughfares without compensation,” when providing access was possible without relying on some “ill-defined power.”⁵⁹

The Court’s refusal to permit the federal government to secure easements through implication by necessity makes it more difficult for the public to access landlocked acreage. Without the ability to pursue access through implied easements arising from necessity, the BLM can only seek access through condemnation actions, negotiated transfers, or purchases. Moreover, because the privately held lands are vast and represent tremendous environmental and economic value, they are expensive. This makes it unlikely that independent individuals will purchase lands to improve access for the public. Consequently, outdoor enthusiasts must rely on the BLM and the occasional well-organized and well-funded coalition to secure access to lands for the public. These alternative mechanisms of securing access are discussed further in Part III.

2. Nuisance & Trespass

Somewhat counterintuitively, plaintiffs have previously sought common law remedies based on theories of nuisance and trespass to resolve the land access problem. *Camfield v. United States*⁶⁰ is one of the original decisions on the accessibility of public land that interprets whether a private landowners’ right to fence its own property conflicted with the public’s right to access public recreation areas.

In *Camfield*, defendant landowners enclosed 20,000 acres of public land by erecting fences around their private property to carry out irrigation projects on their parcels.⁶¹ Because the defendant property owners had no “claim, color of title or asserted right” to the public land they enclosed, even though the fences were built on their own private lands, such an action violated the Unlawful Inclosures Act of 1885 (the Act), and the United States sought to have the fences removed.⁶² The Court explained that “the evil” of enclosing or “exclud[ing] or frighten[ing] off intending settlers, finally became so great that Congress” passed the Act to authorize removal of the fences.⁶³ The defendant landowners asserted that the Act was unconstitutional, claiming the federal government had no authority to require property owners in Utah to remove their fences.⁶⁴

service to a piece of property.”) (quoting Cal. Law Revision Comm’n, Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975)).

59. 440 U.S. at 687–88.

60. *Camfield v. United States*, 167 U.S. 518 (1897).

61. *Id.* at 519–20.

62. *Id.* at 522.

63. *Id.* at 524–25.

64. *Id.* at 522–23.

The United States essentially prevailed under a nuisance theory. The Court held that even though the fences were built on the defendants' private property, they were "manifestly intended to enclose the government's lands."⁶⁵ The Court acknowledged that the land in question was completely within the state of Utah on private property, but reasoned that while states retain sovereign police power over their lands, the federal government retains authority to protect its lands, just like any ordinary proprietor.⁶⁶ This authority is found in the Property Clause of the U.S. Constitution, which provides that "[t]he 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."⁶⁷ Empowered by the Property Clause, the United States can litigate as any private party can with respect to its own property. The decision in *Camfield* clarified the federal government's authority over its lands located within the states, though it did not resolve the access problem.

Camfield effectively opened up access to public lands that had been inaccessible by forcing the removal of fences that were on private land; however, the Court only held that the federal government acted within the authority of the Unlawful Inclosures Act because the fence was a nuisance.⁶⁸ While *Camfield* resulted in the removal of fences that rendered public land inaccessible, the *Leo Sheep Co.* court, which cited the *Camfield* court, did not read the Unlawful Inclosures Act of 1885 to provide a remedy for the western checkerboard problem generally.⁶⁹ The Court in *Leo Sheep Co.* distinguished the result in its case from *Camfield* by highlighting factual differences, pointing out that rather than enclosed public lands, it was faced merely with the refusal of a private owner to accept a public easement over his land.⁷⁰ Simply put: *Leo Sheep* clarifies that the remedy in *Camfield* can only be effectively applied where public property is circumscribed behind private lands that use fences to frustrate access to public property. Where there are no fences to constitute a nuisance, the Unlawful Enclosures Act cannot apply. Moreover, it was that statute which also prohibited the exact behavior in question in *Camfield*. And, the *Camfield* court did not discuss implied easements over the private lands,

65. *Id.* at 525.

66. *Id.* at 524.

67. U.S. CONST. art IV, § 3 cl. 2.

68. 167 U.S. at 525 ("[W]e think the fence is clearly a nuisance.").

69. 440 U.S. at 685 ("Obviously, if odd-numbered lots are individually fenced, the access to even-numbered lots is obstructed. Yet the *Camfield* Court found that this was not a violation of the Unlawful Inclosures Act. In that light we cannot see how the *Leo Sheep Co.*'s unwillingness to entertain a public road without compensation can be a violation of that Act.").

70. *Id.* at 685–86.

nor opine on the need for congressional action to improve access beyond the Unlawful Inclosures Act.

While the *Camfield* problem is one of public access, it hardly resembles the modern western checkerboard problem. In fact, the Unlawful Inclosures Act continues to make it illegal for private landowners to render public land inaccessible by fencing it in. The law would seemingly also punish private landowners that aim to deceive the public by marking public lands as private with “no trespassing” signs. The BLM even asks the public for notification upon encountering mismarked public land.⁷¹ However, *Camfield* never discussed any congressional intent to support guaranteed access to public lands, and without any statute on point, the *Leo Sheep Co.* court also had little reason to find such congressional intent. Neither the Unlawful Inclosures Act nor any other act of Congress has ever been construed to imply general access rights to landlocked public parcels. And as *Leo Sheep* makes clear, so long as eminent domain is a tool the federal government can use to improve access to landlocked parcels, or until Congress acts specifically to remedy the western checkerboard problem, the BLM has no other common law remedy.

B. *The Feasibility of Condemnation and Eminent Domain Actions*

Where trespass actions are limited to facts similar to those in *Camfield* or other fences that constitute a nuisance, the BLM, as *Leo Sheep Co.* suggests, could use eminent domain to open access to landlocked public lands.⁷² Because the BLM administers 93.2 percent of this landlocked acreage,⁷³ it is the government agency with the greatest ability to resolve the access problem in the West.

Eminent domain is available to government entities (as well as certain types of private actors, like private companies functioning as public utilities)⁷⁴ that seek to acquire property for actual or ostensible public uses. The Fifth Amendment allows the government to take private property for public use if it provides the owner with fair compensation.⁷⁵ Known as condemnation actions or eminent domain, these Fifth Amendment “takings” effectuate public policy by ensuring the government has the ability to acquire property rights when doing so is in the public interest.⁷⁶

71. See Press Release, Bureau of Land Mgmt., *supra* note 6.

72. See 440 U.S. at 679–80.

73. See TRCP, *supra* note 7.

74. See, e.g., CAL. PUB. UTIL. CODE §§ 610–625 (2007) (allowing private entities to condemn easements for the provision of their utilities; see also Rick Rayl, *Power Struggle Developing Over Who Can Sell Power*, NOSSAMAN LLP: CALIFORNIA EMINENT DOMAIN REPORT (Oct. 27, 2009), <https://www.californiaeminentdomainreport.com/2009/10/articles/projects/power-struggle-developing-over-who-can-sell-power> [<http://perma.cc/VZ6X-EX4N>].

75. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

76. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005).

Fifth Amendment takings are fiercely litigated. Controversy arises over what constitutes a public use, and whether the market value of the property is just compensation.⁷⁷ In the landmark 2005 case *Kelo v. City of New London*, the Supreme Court held that the taking of private property for the fulfillment of a city development plan for economic enrichment constituted a public use.⁷⁸ The condemnation action required evicting numerous landowners who refused to sell their property to fulfill the plan of the New London Development Corporation (NLDC) to revive a “blighted” community. One of the people affected was petitioner Susette Kelo, a woman who had made substantial improvements⁷⁹ to her now famous pink home.⁸⁰ Kelo, her fellow petitioners, and other critics of the NLDC plan felt the taking was unfair, and were skeptical of whether its purported benefits would materialize.⁸¹ The Court, however, was not convinced by the petitioners’ arguments and relied on precedent broadly construing the meaning of “public use” to justify the condemnation action.⁸² In finding for the City of New London, the Court reasoned that the massive economic improvement of the area that would result from the construction of restaurants, apartments, retail, and office spaces provided a sufficiently important public benefit to the city, justifying the taking.⁸³ Justice O’Connor’s dissent criticized the decision for blurring the line between public and private property use.⁸⁴ Justice Thomas, who also dissented, similarly feared that takings for “economic development” would completely erase the Public Use Clause from the Constitution, and render it as a tool for taking land for uses that are not truly public.⁸⁵ Their critical voices were only the first among many in the aftermath of one of the least popular Supreme Court decisions thus far in the twenty-first century.

Prior to *Kelo*, few anticipated that the Court would even hear a public use case, as many legal commentators regarded the definition of “public use” to

77. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

78. *Id.*

79. *Id.* at 475.

80. See Richard A. Epstein, *Kelo v. City of New London Ten Years Later*, NATIONAL REVIEW (June 23, 2015, 8:00 AM), <https://www.nationalreview.com/2015/06/kelo-eminent-domain-richard-epstein> [<https://perma.cc/Q2U8-2XF2>].

81. The petitioners were ultimately correct, and the New London Development Corporation plan failed. The property has since remained vacant since the homeowners were removed. See *id.*

82. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

83. *Kelo*, 545 U.S. at 474, 483.

84. *Id.* at 497 (O’Connor, J., dissenting).

85. *Id.* at 507, 523 (Thomas, J., dissenting).

be settled law⁸⁶ after *Berman v. Parker*.⁸⁷ Consequently, the 5–4 *Kelo* decision precipitated fierce criticism and surprised many Americans who were previously unaware of how easily the government could seize their land. National surveys revealed that anti-*Kelo* sentiment transcended racial, ethnic, and political lines.⁸⁸ Some scholars suggest that the *Kelo* decision's unprecedented bipartisan backlash⁸⁹ drew the most extensive legislative reaction of any other Supreme Court case in American history.⁹⁰ Indeed, more than 40 states tightened their eminent domain laws in its aftermath,⁹¹ and President Bush issued an executive order restricting eminent domain actions used for economic development.⁹² However, this nearly unanimous political backlash hardly narrowed the states' ability to condemn private property for economic development.⁹³ Urban renewal and economic enhancement remains a viable justification for eminent domain, even in jurisdictions that adopted post-*Kelo* reforms.⁹⁴

1. Is There Political Will to Condemn Easements to Access Public Land?

The foregoing suggests that western landowners might try to revive *Kelo*-esque indignation to thwart a mass series of BLM condemnation actions; however, it is unclear whether easements to improve access to landlocked public acreage would be met with the same level of outrage and scrutiny as was *Kelo*.

Kelo reaffirmed a broad definition of public use, so condemnation actions to improve access to America's public lands should survive any challenge under the "public use" prong of the Fifth Amendment. The Federal Land and Policy Management Act (FLPMA), which expressly provides that BLM land be administered for multiple uses and sustained yield, also confers on the BLM power to condemn property to achieve this result.⁹⁵ Thus, courts should easily

86. See Ilya Somin, *The Story Behind Kelo v. City of New London—How an Obscure Takings Case Got to the Supreme Court and Shocked the Nation*, WASH. POST: THE VOLOKH CONSPIRACY (May 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-story-behind-the-kelo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation/?utm_term=.ad5373712b74 [<https://perma.cc/BMZ8-XPJK>].

87. 348 U.S. 26 (1954).

88. See Ilya Somin, *The Limits of Backlash: Addressing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2019 (2009).

89. *Id.* at 2108–09. ("The U.S. House of Representatives immediately passed a resolution denouncing *Kelo* by a lopsided 365–33 vote.").

90. *Id.* at 2102.

91. Tom Condon, *New Movie Will Revive Painful Lesson in How Not to Redevelop a City*, CT MIRROR (Apr. 2, 2018), <https://ctmirror.org/2018/04/02/new-movie-will-revive-painful-lesson-not-redevelop-city> [<https://perma.cc/6AF8-FA94>].

92. Exec. Order No. 13,406, 3 C.F.R. 2006 Comp., pp. 235–36 (2007).

93. See Somin, *supra* note 85, at 2114.

94. *Id.* at 2114, 2120.

95. See Federal Land Policy and Management Act §§ 102, 205, 43 U.S.C. §§ 1701, 1715 (2012).

find that creating ingress and egress routes to previously inaccessible land serves the public interest. Moreover, the inaccessible public land in question will be maintained in perpetuity for all Americans, a constituency considerably larger and broader than the local community of New London, Connecticut. The negative image *Kelo* evokes of evicting the elderly and displacing low-income citizens in “blighted” communities would also be absent from condemnation actions to grant access to public lands, though wealthy property owners whose ownership patterns restrict public use of lands could be politically powerful enough to stir opposition. It is also worth mentioning that President Trump considers eminent domain to be a “wonderful” thing and applauds the *Kelo* decision for its ability to “employ thousands of people, or . . . build a factory” without a “little house” in the way.⁹⁶ While Trump’s political and ideological opponents are numerous, much of his supportive base lives and works in the rural West.⁹⁷ It is unclear if these supporters share President Trump’s take on eminent domain, though depending on the nature and scope of an expanded BLM effort to acquire new easements, public opinion could cleave along political lines and create new constituencies around an old problem.

In *Kelo*, a major issue was whether the purported economic benefits of the condemnation would materialize. Using eminent domain to address the western checkerboard problem and restore access to public lands through a series of easements would assuredly create value to the local and broader outdoor recreation economy once access to land is available. With near certain economic benefits that accrue to the entire American public, political opposition to a dedicated BLM effort to eliminate landlocked acreage should avoid the bipartisan political disdain that scarred the *Kelo* decision. Additionally, while economic development is not the primary justification of condemning the private land—as was the case in *Kelo*—the projected economic and recreational gains of improving access to public lands are not speculative.⁹⁸ Lastly, condemnation actions that create easements across private property to access wilderness feel categorically dissimilar to actions quieting title to the principal residences of low-income and middle-class Americans. Any dedicated BLM effort to improve the public’s ability to enjoy public land would feel less offensive to those troubled by *Kelo*’s reach. It is thus unlikely that a series of

96. Matt Welch, *Donald Trump Thinks Kelo-Style Eminent Domain is ‘a wonderful thing,’* REASON (Oct. 6, 2015, 9:13 PM), <https://reason.com/blog/2015/10/06/donald-trump-thinks-ke-lo-style-emin-ent-d> [<https://perma.cc/3XM7-D2T7>]. However, takings to improve access to landlocked acreage hardly resemble the economic development-style takings of which President Trump is such a supporter.

97. See *A Country Divided by Counties*, ECONOMIST (Nov. 11, 2016), <https://www.economist.com/graphic-detail/2016/11/11/a-country-divided-by-counties> [<https://perma.cc/D6BE-MNG7>] (“American politics appear to be realigning along a cleavage between inward-looking countryfolk and urban globalists. Mr. Trump hails from the latter group, but his message resounded with the former.”).

98. See *infra* Part I.C.

Fifth Amendment takings associated with easements to landlocked public land would be met with the same political fallout that followed *Kelo*.

At the same time, many private land owners will fiercely oppose the land acquisition, and others will rally behind private land rights as a matter of constitutional principle.⁹⁹ Thus, to maximize the political palatability of a series of new easements, the BLM should seek to exhaust alternatives to condemnation actions and secure access to public land in more cooperative ways, including through land transfers and conservation easements. Indeed, while FLPMA expressly authorizes the BLM to acquire easements through condemnation and eminent domain to ensure access to public lands,¹⁰⁰ it also authorizes exchanges and land purchases to effectuate the same result.¹⁰¹ These alternatives, discussed further in Part III, are likely to be more palatable to the public and private landowners than adversarial takings litigation. Moreover, such negotiated settlements might be more cost effective. Given the financial constraints of the BLM, discussed in Part II.C, these alternatives might be the most reasonable tools for effectuating access to public lands and executing FLPMA's multiple use, sustained yield mandate.

2. Economic Realities: The BLM Budget Constraint

Even if political will exists for massive condemnation actions to secure access to public lands, the current BLM budget makes such actions nearly impossible. The BLM had a deferred maintenance backlog close to \$700 million after FY2017.¹⁰² It spent \$38.6 million on land acquisition that same year, and authorized \$38.5 million toward that end in FY2017;¹⁰³ however, by FY2018, the land acquisition budget decreased by about \$35 million,¹⁰⁴ evidencing the lapse of the LWCF. This reflects the current administration's focus on maintaining current BLM lands rather than acquiring additional lands.¹⁰⁵ Thus, as discussed in Part III, the reauthorization of the LWCF is the first and most important step toward securing access to America's landlocked acreage.

99. See Jin Zhang, *Trump Needs to Transfer All Federal Land Back to the States*, THE AMERICAN SPECTATOR (Jan. 11, 2018, 12:00 AM), <https://spectator.org/trump-needs-to-transfer-all-federal-land-back-to-the-states> [<https://perma.cc/3M2L-8Z3R>] (noting that "generations of politicians and even federal judges have ignored the constitutional restrictions on federal land ownership").

100. FLPMA provides authority for acquisition of lands or interests in lands by purchase, exchange, donation, or eminent domain, when it is consistent with the mission of the Department and with land use plans. Federal Land Policy and Management Act of 1976 § 205, 43 U.S.C. § 1715 (2012).

101. See *infra* Part II.C.

102. U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2018: BUREAU OF LAND MANAGEMENT, at VII-133 (2018).

103. *Id.* at VIII-7.

104. *Id.*

105. *Id.* at VIII-8.

The BLM could further advance its interests by maintaining more detailed records of the patchwork of easements across private lands. The Theodore Roosevelt Conservation Partnership (TRCP) reports that federal land agencies have no “standardized data sets for easements, legal rights-of-way, and established corridors across private land to which the public has binding and legal public access.”¹⁰⁶ With an improved, easily accessible and publicly available database of existing easements, the BLM could leverage crowdsourcing to prioritize expending resources on access projects that require condemnation or a negotiated purchase. Such a database could mitigate the costs of litigating condemnation actions by allowing the BLM to commit its financial resources in a strategic manner to most efficiently increase access in any given part of the West.

1. Decriminalizing Corner-Crossings Could Ease the BLM's Budget Constraint

Another solution to much of the western checkerboard problem would be to decriminalize corner-crossings between adjoining public lands. Currently, many western states prohibit crossing between parcels of public land at their corners when doing so requires that you step over private land.¹⁰⁷ In Montana alone, permitting corner-crossings would open up nearly 800,000 acres of public land.¹⁰⁸ Unfortunately, there is no consensus among the western states affected by the checkerboard access issue as to how corner-crossings should be handled. The issue is intensely political: like in *Kelo*, the debate pits private property rights against competing conceptions of the public good. Though as previously discussed, the constituencies involved in *Kelo* and the western checkerboard problem are not identical, and the justification for public access hardly resembles urban renewal of a blighted community. Yet the debate over corner-crossings seems to foreshadow a political controversy of the *Kelo* type that would ensue following a series of BLM condemnations to improve public access to landlocked acreage.

To illustrate how one western state has grappled with corner crossings, consider Montana. In 2017, the Montana legislature proposed a bill that would impose penalties of up to \$500 and six months imprisonment for any person that hops from one corner of public land to another.¹⁰⁹ This contrasted starkly

106. See TRCP, *supra* note 7, at 8.

107. See Matt Gouras, *Montana House Rejects 'Corner Crossing' Bill*, MISSOULIAN (Feb. 19, 2013), https://missoulian.com/news/state-and-regional/montana-legislature/montana-house-rejects-corner-crossing-bill/article_21c541c0-7a31-11e2-a957-0019bb2963f4.html [<https://perma.cc/JTA9-99CN>].

108. *Id.* (“[Rep. Ellie Hill said] the measure would ensure access to more than 800,000 acres of landlocked public parcels.”).

109. H.R. 566, 65th Leg., Reg. Sess. (Mont. 2017), <https://leg.mt.gov/bills/2017/BillPdf/HB0566.pdf> (“In cases where it is not practicable to provide effective posting of private land as required by subsections (1) through (3), including private land that is unfenced and situated in a checkerboard ownership pattern with public lands, privilege to enter or remain

with a 2013 Montana bill that would have *permitted* corner-crossings, which garnered strong support among state Democrats and sportsmen before the Montana House rejected it.¹¹⁰ The Republican controlled legislature cited remaining concerns about private property rights and opted to advance a bill that pays landowners for hunter access instead.¹¹¹

Other states do not expressly prohibit corner-crossings. In Wyoming, for instance, such crossings only constitute criminal trespass when a hunter crosses a corner with the intent to hunt on private land.¹¹² Washington enforces corner-crossings similarly, while Utah, Idaho, New Mexico, and Colorado enforce any unauthorized corner crossing as a trespass.¹¹³ Nevada tried to decriminalize corner-crossings in 2017, but the bill died after being submitted to the Committee on Natural Resources, Agriculture, and Mining.¹¹⁴ The new law would have permitted corner-crossings that do not cause harm to private property owners' land or reasonably interfere with their quiet use and enjoyment of the property.¹¹⁵ Without a federal case defining the scope of property rights at corners, the BLM simply advises visitors to its lands to consult state law, and asserts that any corner-crossing is illegal.¹¹⁶

Decriminalizing corner crossings would be a cost-effective alternative to a massive series of condemnation actions. And while such a change in trespass law would be politically contentious, any law standardizing corner-crossings would come from state legislatures or from Congress. Thus, it would reflect the will of the people, and might not be as offensive to the national public as a judicially authorized, *Kelo*-style taking for economic development.

3. Past Condemnation Actions

Notwithstanding the political and economic forecasts of an expanded effort by the BLM to condemn easements, Section 205(a) of FLPMA expressly authorizes the BLM to acquire property through eminent domain

upon land is extended only by the explicit permission of the landowner. Entry to private property as described in this subsection (5) from adjacent public lands without permission of the landowner or the landowner's agent is an absolute liability offense. A violator of this subsection is guilty of a misdemeanor and shall be fined not less than \$50 or more than \$500 or imprisoned in the county jail for not more than 6 months, or both.") (emphasis added).

110. Gouras, *supra* note 107.

111. *Id.*

112. *Hunting Access in Wyoming: Public Land Access*, WYO. GAME & FISH DEP'T, <https://wgfd.wyo.gov/Public-Access/Access-Summary> [<https://perma.cc/Z3ZK-SRZJ>] ("The game and fish trespass statute prohibits a person from entering private land to hunt or intend to hunt without permission.").

113. See Matthew Copeland, *Cornered: Western Sportsmen Trapped by Arcane Regulation Prohibiting Public Access at Corner Crossings*, OUTDOOR LIFE (Aug. 10, 2015), <https://www.outdoorlife.com/blogs/open-country/cornered-western-sportsmen-trapped-arcane-regulation-prohibiting-public-access> [<https://perma.cc/CD4Q-V3C4>].

114. Assemb. 386, 79th Leg., Reg. Sess. (Nev. 2017).

115. *Id.*

116. Press Release, Bureau of Land Mgmt., *supra* note 6.

to improve public access. Surprisingly, though, very few published cases consider Section 205(a). It provides that the BLM may “acquire . . . by purchase, exchange, donation, or eminent domain, lands or interests therein,” but “may exercise the power of eminent domain only if necessary to secure access to public lands.”¹¹⁷

The “if necessary” element of FLPMA’s grant of authority to the BLM was litigated in a Tenth Circuit case,¹¹⁸ *United States v. 82.46 Acres of Land*, in which the BLM sought to acquire “several privately owned parcels of land for the declared purpose of providing access to certain public lands.”¹¹⁹ The private owner, Sanger Ranch, Inc., claimed that there was no necessity justifying the condemnation action because preexisting roadways already provided access to the public land.¹²⁰ The Tenth Circuit first determined that the necessity of the acquisition was subject to judicial review because FLPMA only granted a qualified delegation of authority.¹²¹ Thereafter, the Tenth Circuit reversed the District of Wyoming’s decision, and held that the government had improperly exercised its powers of eminent domain pursuant to FLPMA. The court remanded the case because the record was insufficient for the court to determine whether there was a necessity justifying the public taking. However, the Tenth Circuit also held that the BLM’s proposed 100-foot easement was not improper simply because it was wider than the existing twenty-five- to thirty-foot roadways, commenting that, “the Secretary in acquiring lands under 43 U.S.C. § 1715(a) is not necessarily limited to the width of a pre-existing roadway which he seeks to acquire.”¹²²

Although *Kelo* expanded the definition of public use, and accessing public land unquestionably accrues to the benefit of the public, the *82.46 Acres* decision suggests that courts will not freely grant easements over public land pursuant to FLPMA without a legitimate showing of necessity. This seems consistent with *Leo Sheep Co.*, which cautions that the BLM’s efforts to open up the West should not casually trample a private landowner’s rights.¹²³ In contrast, FLPMA’s stricter necessity requirement seems discordant with the *Kelo* decision. The *Kelo* Court weighed a projected net

117. Federal Land Policy and Management Act of 1976 § 205(a), 43 U.S.C. § 1715 (2012).

118. *United States v. 82.46 Acres of Land*, 691 F.2d 474, 475 (10th Cir. 1982).

119. *Id.*

120. *Id.* at 476.

121. *Id.* at 477.

122. *Id.* at 478.

123. See 440 U.S. at 687–88 (“Generations of land patents have issued without any express reservation of the right now claimed by the Government. Nor has a similar right been asserted before. When the Secretary of the Interior has discussed access rights, his discussion has been colored by the assumption that those rights had to be purchased. This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.”).

public benefit against a discernable harm to plaintiffs.¹²⁴ Though economic improvement was the public use justification, no showing of the likelihood or “necessity” of such land use was required. With respect to landlocked public property, the public’s access, in perpetuity, seems weightier than a private entity’s fear of potential trespasses over vast tracts of land. However, as the discussion of the *Kelo* backlash suggests, broad exercises of the condemnation authority are tremendously unpopular, at least when used to address “urban blight.”¹²⁵

As of this writing, research has not revealed any published cases that consider easements to completely landlocked property; therefore, it is unclear how a court would construe FLPMA’s necessity requirement on such lands. And though the *82.46 Acres* decision can be read to imply that courts could strictly construe FLPMA’s necessity requirement and reject a condemnation action, it is hard to imagine a court holding that an ingress route to completely landlocked public property fails that test.

Another way to improve access would be a lawsuit compelling the BLM to condemn easements on the public’s behalf. However, such an action would likely fail. FLPMA sets forth that “goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of *multiple use and sustained yield* unless otherwise specified by law.”¹²⁶ A coalition of conservationists and outdoor enthusiasts could thus seek to have a court compel the BLM to effectuate the dual mandate of multiple use and sustained yield set forth by FLPMA to improve access to landlocked acreage. This hypothetical coalition plaintiff could ask a court to compel the BLM to seek easements to remedy the access problem created by the western checkerboard. At least one Supreme Court case seems to stand in the way of this legal theory, however.

In *Norton v. SUWA*, the Southern Utah Wilderness Alliance (SUWA) “sought declaratory and injunctive relief for BLM’s failure to act to protect public lands in Utah from damage caused by [off-road vehicle] use.”¹²⁷ Specifically, SUWA claimed that BLM failed to conduct a proper National Environmental Policy Act (NEPA) analysis and that the BLM violated its nonimpairment obligation under 43 U.S.C. § 1782(c).¹²⁸ Section 1782(c), in relevant part, requires that the BLM shall manage wilderness study areas “so as not to impair the suitability of such areas for preservation as wilderness.”¹²⁹ SUWA did not prevail, as the Supreme Court held that the BLM’s failure

124. See 545 U.S. at 500–01 (discussing *Kelo*’s home, its replacement, and the government’s power to condemn).

125. See discussion *supra* Part II.B.

126. Federal Land Policy and Management Act of 1976 § 102, 43 U.S.C. § 1701(a)(7) (2012) (emphasis added).

127. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 60 (2004).

128. *Id.* at 60–61.

129. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c).

to act—or in *SUWA*, a failure to protect public lands from off-road vehicle use—is not remediable under the Section 706(1) of the APA. The Court noted that BLM land use plans are merely a preliminary step in total land management.¹³⁰ Similarly, in a hypothetical suit compelling the BLM to condemn easements for public access of landlocked lands, the plaintiff coalition would struggle to find any final agency action or decision reviewable under the APA. Like in *SUWA*, the BLM's choice *not* to pursue easements with its limited budget would likely also not be a reviewable final agency action. As articulated in *Norton*, a claim under APA § 706(1) can only proceed when a plaintiff shows that an agency “failed to take a *discrete* agency action that it is *required* to take.”¹³¹ Simply put: the BLM's choice to not pursue condemnation actions would not be a reviewable final agency action because the BLM has discretion over when, where, and how it should improve access to public lands.

In addition, the BLM's budget is a function of Congress's goals, and by implication, the people's choice. That the BLM cannot afford to condemn access to every single plot of landlocked land is less the BLM's choice than it is the agency's circumstance, one the political process could change. The recent FY2018 budget notwithstanding, in every year prior the BLM has devoted substantial resources to land acquisition for conservation and public access, mostly due to the Land and Water Conservation Fund guarantee.¹³² Still, the fact that a significant portion of America's public lands remain landlocked suggests that the BLM's budget allocation remains insufficient to secure complete access to America's public lands. Without the ability to enforce action through the APA, the public must rely on the BLM to pursue other avenues of securing access. Decriminalizing corner-crossings and improving the database of existing easements could each help reduce BLM financial pressure and landlocked acreage. Better still would be coupling those reforms with the reauthorization of the LWCF, which would provide the most likely path toward eliminating the western checkerboard problem.

C. *Private Land Acquisition and Negotiated Sales, and Land Exchanges*

An alternative mechanism for reducing landlocked acreage is wholesale acquisition of the private tracts that make public lands inaccessible. The opening up of New Mexico's Sabinoso Wilderness provides one example of this federal approach. Comprised of 16,000 acres of pristine hiking, hunting, camping, and fishing lands east of Las Vegas, New Mexico,¹³³ Sabinoso had the distinction of being the only wilderness area in the United States that was landlocked and inaccessible to the public.¹³⁴ That changed in 2017 when the

130. *Id.* at 69.

131. *Id.* at 64.

132. See U.S. DEP'T OF THE INTERIOR, *supra* note 102, at VIII-7.

133. *Id.*

134. See Jodi Peterson, *Latest: New Mexico's Landlocked Wilderness May Become*

Wilderness Land Trust (WLT) bought the adjacent Rimrock Rose Ranch. The WLT donated the property to the BLM, and access was opened up to the Sabinoso Wilderness Area soon after the BLM completed the process of accepting the Trust's donation of 85.5 percent of the ranch.¹³⁵

In a similar acquisition, the BLM purchased a 600-acre ranch that opened 32,000 previously inaccessible acres of land in Arizona's Coronado National Forest to the public in September of 2017.¹³⁶ The private land was originally purchased by the Trust for Public Lands and then sold to the BLM for \$480,000.¹³⁷ To facilitate the Arizona deal, the BLM worked with the Arizona Department of Fish and Game and the Trust for Public Lands over the course of several years to align interests and finalize the terms of the deal.¹³⁸

In another cooperative land sale, the Montana Fish, Wildlife, and Parks Department purchased a permanent road easement from a private rancher in March of 2018 and has set out to convey the .14 mile stretch of road to the BLM.¹³⁹ Previously, the landlocked BLM property had only been accessible due to the goodwill of the private ranch owner, but after acquiring the easement for \$20,000 (funded by hunting license revenues and private donations), the state of Montana has increased access to federal land for the American public.¹⁴⁰

FLPMA also authorizes the BLM to engage in land sales and land exchanges when doing so is consistent with the public interest and publicly approved land use plans.¹⁴¹ Land exchanges with private land owners are particularly useful in resolving the western checkerboard problem because the BLM can strategically trade property in ways that improve access without depleting its budget. In-kind exchanges of land are more cost effective

Reachable, HIGH COUNTRY NEWS (Aug. 24, 2017), <https://www.hcn.org/issues/49.15/latest-news-mexicos-landlocked-wilderness-may-become-reachable> [https://perma.cc/KZ39-QFFD].

135. *See id.*; *Welcome to Sabinoso Wilderness*, BUREAU OF LAND MGMT., https://www.blm.gov/sites/blm.gov/files/NM_Sabinoso%20FAQsheet.pdf [https://perma.cc/SRG3-54HE].

136. Adam Ruggiero, *BLM Purchase Opens Public Access to Wild Backcountry*, GEARJUNKIE (Oct. 4, 2017, 12:54 PM), <https://gearjunkie.com/blm-opens-public-land-coronado-national-forest-santa-teresa> [http://perma.cc/NLT9-L9L9].

137. *Id.* ("Sporting and conservation groups alike hailed the sale as a boon to outdoor recreation. Mike Quigley, Arizona director for the Wilderness Society, called the area 'some of the most pristine backcountry.'")

138. Isaac Windes, *Purchase Opens 32,600 Acres near Coronado Forest to Hiking, Hunting*, TUCSON.COM (Sept. 24, 2017), https://tucson.com/news/local/purchase-opens-acres-near-coronado-forest-to-hiking-hunting/article_542132fa-4dbe-59f8-ba5d-98b57d5503e8.html [https://perma.cc/M5SC-N3PN].

139. *Public Gains Access to 3,400 More Acres in Southwestern Montana After Road Easement*, BILLINGS GAZETTE (Mar. 20, 2018), https://billingsgazette.com/outdoors/public-gains-access-to-more-acres-in-southwestern-montana-after/article_cbb2d38e-38a0-563fae6e-cb0be1b3b384.html [https://perma.cc/H6QW-HGD2].

140. *Id.*

141. *Sales and Exchanges*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/lands-and-reealty/land-tenure/sales-and-exchanges> [https://perma.cc/JKB9-7VFH].

than litigious condemnation actions or purchases financed by the LWCF. For example, a recent land exchange pursuant to Section 206 of FLPMA between the BLM and the Castle Rock Land and Livestock Company (Castle Rock) will provide the public with “its first-time right to access certain recreation areas . . . in a way that mutually benefits federal and private lands.”¹⁴² The exchange involves a transfer of 11,586 acres of private land for 12,306 acres of “non-contiguous” federal land. Known as the “Skull Valley Land Exchange,” this transfer began in 2006, and the 45-day public protest period ended on September 14, 2018.¹⁴³ Castle Rock acquired all the available surface and minerals on the federal and nonfederal lands, other than those held by the state of Utah, and the United States acquired property that is essential to mule deer, elk, and wild horse herds.¹⁴⁴ The land conveyed to the United States also covers a portion of the historic Pony Express Trail.¹⁴⁵

Successful land exchanges like the aforementioned that reduce the western checkerboard problem are, however, relatively rare. Such amicable and beneficial transfers are often limited in scope because they require an element of luck and take a long time to effectuate. In addition, land exchanges often only serve to improve access to previously accessible public lands.¹⁴⁶ And the BLM cannot always rely upon a willing private landowner to decide on her own to sell property to a nonprofit or advocacy group as part of a brokered exchange to improve land access. However, third parties like the Theodore Roosevelt Conservation Partnership, the Wilderness Land Trust, and the Trust for Public Lands fill an important role in reducing the western checkerboard problem by facilitating land exchanges, and can help direct scarce BLM funds toward securing access opportunities when they arise.

142. Press Release, Bureau of Land Mgmt., Utah Land Exchange Improves Public Access to Big Game Hunting (July 30, 2018), <https://www.blm.gov/press-release/utah-land-exchange-improves-public-access-big-game-hunting> [<https://perma.cc/63U2-TR5T>].

143. *Id.*; See *Skull Valley Land Exchange* (DOI-BLM-UT-W010-2009-0026-EA), BUREAU OF LAND MGMT. (July 30, 2018, 1:48 PM), <https://eplanning.blm.gov/epl-front-office/eplanning/legacyProjectSite.do?methodName=renderLegacyProjectSite&projectId=80611> [<https://perma.cc/4E6N-JBFT>].

144. Press Release, Bureau of Land Mgmt., *supra* note 142; Notice of Decision, Bureau of Land Mgmt., Skull Valley Land Exchange (July 2018), https://eplanning.blm.gov/epl-front-office/projects/nepa/80611/152554/186770/SVLE_DR_7-30-18_508_Formatted.pdf [<https://perma.cc/8CG6-W4TU>].

145. Notice of Decision, Bureau of Land Mgmt., *supra* note 144.

146. See *Land Exchange Will Improve Access to Public Lands in Grant County, OR*, DEP'T OF FISH AND WILDLIFE (Mar. 8, 2013), <https://dfw.state.or.us/news/2013/march/030813b.asp> [<https://perma.cc/TCZ4-T46G>].

III. POTENTIAL CONGRESSIONAL SOLUTIONS

A. *Reauthorizing the Land and Water Conservation Fund Will Facilitate Access to Landlocked Public Acreage*

The Land and Water Conservation Fund Act of 1965 created the LWCF to help strengthen the “health and vitality of U.S. citizens.”¹⁴⁷ In its first fifty years, the LWCF has been used to open more than five million acres of public land to outdoor enthusiasts and invest more than \$16 billion in conservation and outdoor recreation.¹⁴⁸ The LWCF Act credits the fund with \$900 million annually, but Congress must appropriate these monies for them to actually be spent on the LWCF’s three purposes: federal acquisition of land and waters, stateside grants for recreational planning, and other related goals.¹⁴⁹

Between FY1965 and FY2018, the LWCF received over \$40 billion from recreation fees, motorboat fuel taxes, surplus property sales, and outer continental shelf (offshore oil and gas lease) receipts.¹⁵⁰ Unsurprisingly, offshore oil and gas leases accounted for almost 95 percent of the revenue flowing to the LWCF.¹⁵¹ However, between FY1965 and FY2018, \$21.6 billion of these receipts were not appropriated.¹⁵² Of the \$18.4 billion that was appropriated, \$11.2 billion (60.9 percent) was used for federal land acquisitions.¹⁵³

The budget-neutral LWCF that conserved habitat and improved public land access for hunting and fishing expired on September 30, 2018.¹⁵⁴ Its expiration troubled environmentalists and outdoor recreation enthusiasts alike. Among the tools the BLM can leverage to improve access to landlocked public acreage, the LWCF is foremost; indeed, advocates such as the TRCP regard it as “the single most powerful tool for opening landlocked public lands,”¹⁵⁵ and desperately sought its reauthorization. Recently, more than 200 hunting, fishing, and conservation groups urged Congress to reauthorize the LWCF.¹⁵⁶ In late 2018, the House Natural Resources and Senate Energy and Natural Resources committees sought to reauthorize the LWCF, fully fund the program, and set aside three percent of the fund to secure access to landlocked

147. See CAROL HARDY VINCENT, CONG. RESEARCH SERV., RL33531, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY, AND ISSUES I (2018).

148. See TRCP, *supra* note 7, at 9.

149. See Vincent, *supra* note 147, at 1–3.

150. *Id.* at 3.

151. *Id.*

152. *Id.*

153. *Id.* at 3 fig. 1.

154. *Id.*

155. TRCP, *supra* note 7, at 9.

156. See Randall Williams, *204 Hunting, Fishing, and Conservation Groups Urge Lawmakers to Revive LWCF*, THEODORE ROOSEVELT CONSERVATION P’SHIP (Nov. 8, 2018), <http://www.trcp.org/2018/11/08/204-hunting-fishing-conservation-groups-urging-lawmakers-revive-lwcf> [<https://perma.cc/B7XG-754Q>].

public land.¹⁵⁷ Commentators regarded this reauthorization as political, low hanging fruit, and had hoped for the lame duck 115th Congress to fund the LWCF by December of 2018,¹⁵⁸ a hope that went unrealized.

Fortunately for outdoor enthusiasts, in February 2019, the House of Representatives approved a permanent reauthorization of the LWCF by a rare bipartisan vote of 363 to 62.¹⁵⁹ The Senate had already passed the Natural Resources Management Act earlier in 2019 by a vote of 92–8¹⁶⁰ after Senator Lisa Murkowski introduced a permanent reauthorization of the LWCF in January of 2019.¹⁶¹ President Trump promptly signed the so-called John D. Dingell, Jr. Conservation, Management, and Recreation Act (Dingell Act) into law on March 12, 2019.¹⁶² And in May 2019, the House Interior and Environment Appropriations Subcommittee requested \$524 million to fund the LWCF for the 2020 budget.¹⁶³ While this is only 8.2 percent more than half of the \$900 million outlay, if approved, \$524 million would be the highest funding level for the LWCF since 2003.¹⁶⁴

The bipartisan support for the LWCF and its permanent reauthorization is promising news for land access advocates. As discussed, the LWCF funds land transfers, purchases, and potential condemnation actions needed to open up the vast acres of landlocked federal tracts. Without it, the future of improving public land access is bleak.

157. *Id.*

158. *LWCF is an easy opportunity for bipartisan cooperation*, The Daily Sentinel, https://www.gjsentinel.com/opinion/columns/lwcf-is-an-easy-opportunity-for-bipartisan-cooperation/article_0852c738-00c9-11e9-b2d1-10604b9f6eda.html [<https://perma.cc/8N29-UASY>].

159. See Tom Cors & Justin Bartolomeo, *President Signs Bill Permanently Reauthorizing LWCF*, LAND & WATER CONSERVATION FUND COALITION (Mar. 12, 2019), <https://static1.squarespace.com/static/58a60299ff7c508c3c05f2e1/t/5c87fbb04e17b6692133fd7b/1552415664400/LWCF+Coalition+Statement++Reauthorization+Signing++Final.pdf> [<https://perma.cc/EN92-RDHW>].

160. *Id.*

161. See *S.47—John D. Dingell, Jr. Conservation, Management, and Recreation Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/47/text> [<https://perma.cc/YR3P-CECT>].

162. See Tom Pfister, *Land And Water Conservation Fund Activated by ‘Dingell Act’*, FORBES (Mar. 13, 2019, 2:05 PM), <https://www.forbes.com/sites/tompfister/2019/03/13/land-and-water-conservation-fund-activated-by-dingell-act/#358738663e9e> [<https://perma.cc/2YM6-QM9R>] (“The Act’s namesake, the late U.S. Representative John Dingell of Michigan, was an outdoorsman and conservationist, and served in Congress for more than 59 years, longer than any other member in its history. In February, former Congressman Dingell died at the age of 92.”).

163. *Id.*

164. *Id.*

B. *Could the Public Trust Doctrine and a Transfer of Public Lands to the States Resolve the Western Checkerboard Problem?*

The Public Trust Doctrine (PTD) is a common law principle that traces its origins to Roman Law.¹⁶⁵ The original language upon which the PTD has been derived provides that “[b]y the law of nature these things are common to all mankind: the air, running water, the sea, and consequently the shores of the sea.”¹⁶⁶ The PTD was first interpreted to protect public access to fisheries, navigable waterways, and commercial avenues. Various states have since expanded the PTD to a variety of other resources, potentially paving the way for the PTD to be used to secure access to America’s landlocked acreage.

The Supreme Court first recognized the PTD in 1842. In *Martin v. Lessee of Waddell*, the Court determined that states retain property interests in the land below navigable waters in the same character under which charters from the British crown granted them.¹⁶⁷ Accordingly, the Court held that the lessee lacked any *exclusive* right to take oysters, because the state of New Jersey was to maintain the property “for the benefit and advantage of the whole community.”¹⁶⁸ Since *Lessee of Waddell*, the PTD has traditionally been applied to navigation, commerce, and fishing. However, the Supreme Court of New Jersey expanded that scope in a 1984 decision. In *Matthews v. Bay Head Improvement Ass’n*, New Jersey articulated that the PTD “entitles the public to swim in the ocean and to use the foreshore in connection therewith” and that the public interest requires reasonable access to enjoy this right.¹⁶⁹ New Jersey’s interpretation of the PTD to guarantee *access* to objects of the public trust was a major expansion of the authority of that doctrine. Since 1842, when the Supreme Court of the United States first recognized the PTD, various states have applied the doctrine to protect tidelands, shorelands, wildlife, rural

165. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1969) (“The source of modern public trust law is found in a concept that received much attention in Roman and English law—the nature of property rights in rivers, the seas, and the seashore.”).

166. *Id.*

167. *Martin v. Lessee of Waddell*, 41 U.S. 367, 413–14 (1842) (“And in the judgment of the Court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown.”).

168. *Id.* at 411.

169. *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 364 (N.J. 1984) (“Exercise of the public’s right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.”).

parklands, the dry sands of beaches, and even California property inland from the shore.¹⁷⁰ Most recently, scholars have explored the limits of the doctrine to consider its usefulness in preserving ecology, the atmosphere,¹⁷¹ and even inland access.¹⁷² However, Federal courts have been reluctant to embrace the PTD,¹⁷³ and it has primarily been used as a remedy for state lands and accessing and preserving state natural resources.¹⁷⁴ Thus, to ensure access to public land through the PTD, the federal government would have to transfer land to the states,¹⁷⁵ or federal courts would have to recognize the PTD as a viable remedy concerning federal land issues.

While the BLM does engage in land sales and exchanges with states, it is unlikely that any broader transfer of federal land to state control will happen.¹⁷⁶

170. Shelby D. Green, *No Entry to the Public Lands: Towards a Theory of a Public Trust Servitude for a Way over Abutting Private Land*, 14 WYO. L. REV. 19, 66–67 (2014) (“The concept of public trust is now interpreted to encompass a broad range of interests affecting the public interest in lands—to include the right to portage on private land around stream barriers and public access rights to tidelands and shorelands. The doctrine has been extended to protect wildlife and rural parklands. At first, it was limited to protecting the wet sand of a beach, but now it has been expanded to cover the dry sand. It was extended in California to inland from the shore.”).

171. See generally Ipshita Mukherjee, *Atmospheric Trust Litigation—Paving the Way for a Fossil-Fuel Free World*, SLS BLOGS: ENVTL. & NAT. RESOURCE L. (July 5, 2017), <https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world> [<https://perma.cc/TE2S-PC8E>] (describing some recent cases arguing that the government holds the atmosphere in trust for the people, such as *Juliana v. United States*).

172. Green, *supra* note 170.

173. See Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty*, 19 PUB. LAND & RESOURCES L. REV. 51, 53 (1998) (“But not since noted public lands scholar Charles Wilkinson, in 1980, urged the application of the public trust doctrine by federal courts, has the argument for vigorous federal application of the doctrine been made.”).

174. See *id.* at 52 (noting that “[o]nce a court characterizes a resource as a public trust resource, the court may apply the doctrine to protect that resource from environmentally harmful extrication, harvest, diversion, or other use activities immune to statutory redress”). See generally *id.* at 55–58 (discussing the PTD as “an effective tool for judicial oversight and mitigation of the environmentally harmful actions of private interests and complacent state agencies”).

175. *But cf.* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 278 n.32 (1981) (commenting that “two articles have analyzed the question of whether the public trust doctrine applies to federal lands: Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application to the Judicial Review of Land Classification Decisions*, 8 WILLAMETTE L.J. 135 (1972); Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977)”).

176. Many debate the legal legitimacy, practicality, and worthiness of transferring federal land to the states to achieve environmental goals. See, e.g., Blumm, *infra* note 182 (criticizing the transfer of federal lands to the states). See also Ben Long, *Fact-Checking the Debate on Federal Land Transfer*, OUTDOOR LIFE (May 3, 2017), <https://www.outdoorlife.com/fact-checking-debate-on-federal-land-transfer> [<https://perma.cc/L7Z6-5QZV>] (suggesting that while proponents say state governments can do a better job managing public lands than the federal government, opponents fear that transferring lands to the states is a step towards

Moreover, if increased access to public land is the ultimate goal, transferring ownership to the states provides little certainty of this result, especially for hunters. The Sportsmen's Access Coalition,¹⁷⁷ a network of outdoor recreation advocates and conservationists, fear that state management of public lands would result in environmental degradation and a closure of land to outdoor recreation.¹⁷⁸ The opponents of so called "public land transfer" regimes fear that once states take possession of federal lands, without FLPMA's multiple use and sustained yield mandate, such lands will be haphazardly administered, sold to private parties for a quick profit, or leased to corporations, risking environmental degradation.¹⁷⁹ The Coalition references proposed bills in recent years by congressmen from Alaska, Nevada, and Idaho which would transfer federal land to states in varying degrees.¹⁸⁰ Under the guise of supporting the sage grouse in Idaho, managing forest lands for timber production in Alaska, and returning sovereignty to Nevada, each of these bills would frustrate existing federal land management policies and reduce access to public land.¹⁸¹

Many environmental advocates similarly fear the transfer of BLM land to the states. With such transfers, environmental plans required by NEPA and those in compliance with FLPMA could be avoided altogether.¹⁸² Some scholars believe that in addition to the loss of public access, "de-federalization of the BLM lands will result in the destruction of wilderness, . . . a decline in science-based management, . . . increased environmental costs, . . . and an irretrievable loss of national heritage lands."¹⁸³ Others predict a state takeover of federal public lands would frustrate Endangered Species Act (ESA) compliance.¹⁸⁴ Much of

privatization that will jeopardize the country's natural treasures). *But see* Zhang, *supra* note 99 (a conservative publication arguing that a history of "[h]eavy-handed federal land seizures . . . in coordination with radical environmentalist groups and almost always without the support of state leaders, Native American tribes, and the people who work the land such as miners, ranchers, farmers, loggers, etc." have been going on for decades).

177. SPORTSMEN ACCESS, <http://www.sportsmenaccess.org> [<https://perma.cc/LF6W-QV27>] (The forty-three member coalition includes groups like: The National Wildlife Federation, The Wildlife Management Institute of Washington D.C., Remington, the Theodore Roosevelt Conservation Partnership, and others.).

178. *See* TRCP, *supra* note 7.

179. *See* Hal Herring et al., *This Land Was Your Land: Why the battle over public lands is one sportsmen must win*, FIELD AND STREAM (Apr. 28, 2017), <https://www.fieldandstream.com/keep-public-lands-in-public-hands> [<https://perma.cc/3U3L-9Q9Z>].

180. *See* Dani Dagan, *The Latest Threats to Public Land Are Less Obvious Than H.R. 621*, TEDDY ROOSEVELT CONSERVATION P'SHIP (Feb. 7, 2017), <http://www.trcp.org/2017/02/07/still-fired-up-h-r-621-ten-threats-public-lands> [<https://perma.cc/3JQV-RT2E>] (describing S.273, H.R. 622, H.R. 232, H.R. 1106).

181. *See id.*

182. *See* Michael C. Blumm, *The Case Against Transferring BLM Lands to the States*, 7 FORDHAM ENVTL. L.J. 2 (2011).

183. *Id.* at 395.

184. *See* John Ruple, et al., *Shooting the Albatross: Why a State Takeover of Federal Public Lands Would Make Endangered Species Act Compliance More Expensive and Difficult*, 39 ENVIRONS ENVTL. L. & POL'Y J. 115, 116 (2016).

this has to do with the massive expense of administering public lands. In Utah alone, the estimated annual cost of managing federal public lands is \$280 million, while Utah's state wildlife resources budget was \$85 million in 2016 merely 30 percent of that total.¹⁸⁵ Other western states face similar budget constraints.

Thus, if an extension of the PTD requires surrendering BLM and USFS lands to the state, the public access problem would only be replaced by different environmental issues and new restrictions on recreation. While the PTD offers some promise for access in unique situations where state public lands are landlocked by private property, it has yet to be used as effectively with respect to federal lands issues.

CONCLUSION

The surest way to preserve access to public land in the first place is to preserve the land itself. Importantly, this means that the federal government should be reluctant to relinquish its lands to western states. FLPMA, NEPA, the ESA, the Organic Act, the Wilderness Act, and other federal statutes protect wildlife and property on federal lands and can preserve those lands for generations to come, while western states with limited are in no better positioned to maintain public lands as effectively.

Because the federal government administers a comprehensive statutory framework to safeguard the integrity and sustainable use of public lands, access becomes the priority. To reduce the western checkerboard problem, the BLM should continue to pursue amicable land transfers and work with the politically active coalition of conservationists, outdoorsmen, and environmentalists who share the common goal of improving access to public land in the West. Furthermore, condemnation actions should take a backseat to negotiated sales and land exchanges. This approach will help avoid a major *Kelo*-esque political controversy.

Read with the benefit of hindsight, *Leo Sheep Co.* seems consistent with what the American public would have preferred as an alternative to the *Kelo* decision. The *Leo Sheep Co.* Court emphasized the importance of just compensation and private property rights when it refused to allow the BLM to quiet title to property through implied easements arising from necessity. By forcing the BLM to purchase private lands—even those with an uncontroversial public purpose—the Court forced the BLM to involve the public in its decision to take private property. This outcome contributed to the fight to reauthorize the LWCF. Because the BLM cannot pursue land transfers, exchanges, or condemnation actions without congressionally appropriated LWCF funds, the BLM must to some extent confront the political process and the will of the people before it can seize private land. This type of attenuated check on the BLM, alongside FLPMA's necessity requirement, provides a useful mechanism for courts to avoid another *Kelo*-type controversy.

185. See Herring, et al., *supra* note 179.

Unanticipated consequences of the Pacific Railway Acts aside, the fact that the American public enjoys vast acres of public lands for outdoor recreation is a modern miracle. Public lands can be enjoyed by all and represent a timeless consensus regarding the value of outdoor exploration and recreation. On these lands, comparative silence adorned by a chorus of natural sounds await all who seek refuge from America's urban cacophony. Thoreau contemplated that "[l]ife consists with wildness. The most alive is the wildest. Not yet subdued to man, its presence refreshes him."¹⁸⁶ His words suggest that preserving access to natural wilderness also serves to preserve our most animate selves. Humanity emerged from the wild, and when we return to it, we live in solidarity with elements of who we have always been. Continued access to this timeless sanctuary is an American imperative; an objective central to this country's national identity.

186. See THOREAU, *supra* note 2, at 69.