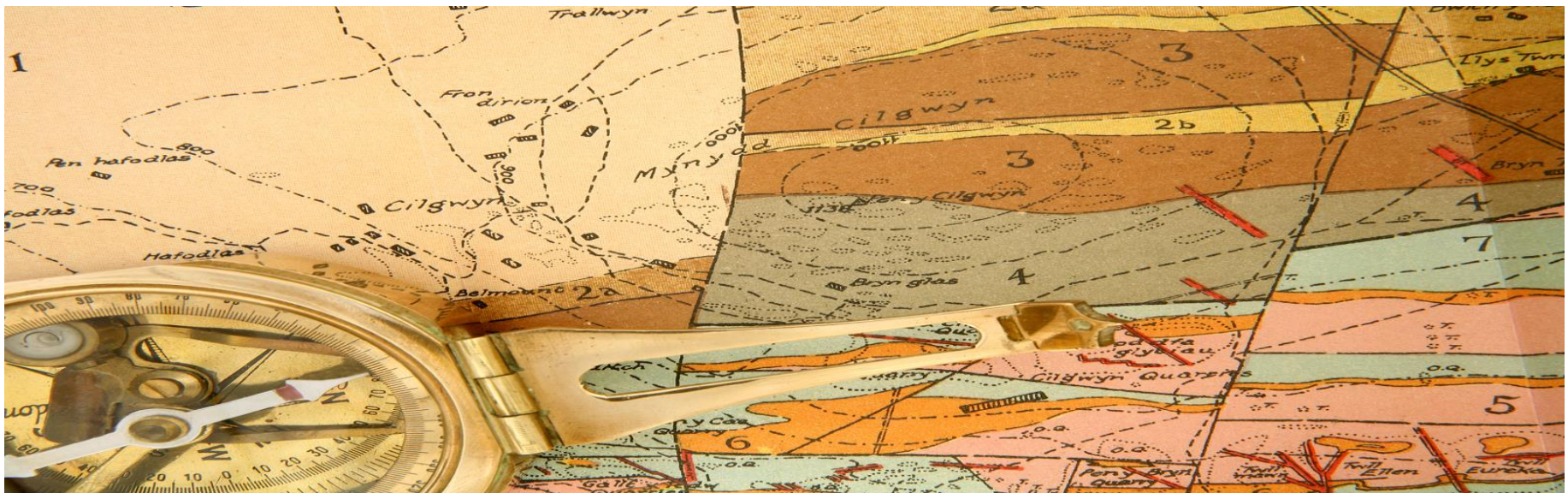


Strategies for the Use of Federal Land Exchanges in Support of Mining Projects

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Hogan Lovells, Denver

April 13, 2015



Introduction

1. Small Tracts Act

2. Administrative Land Exchanges

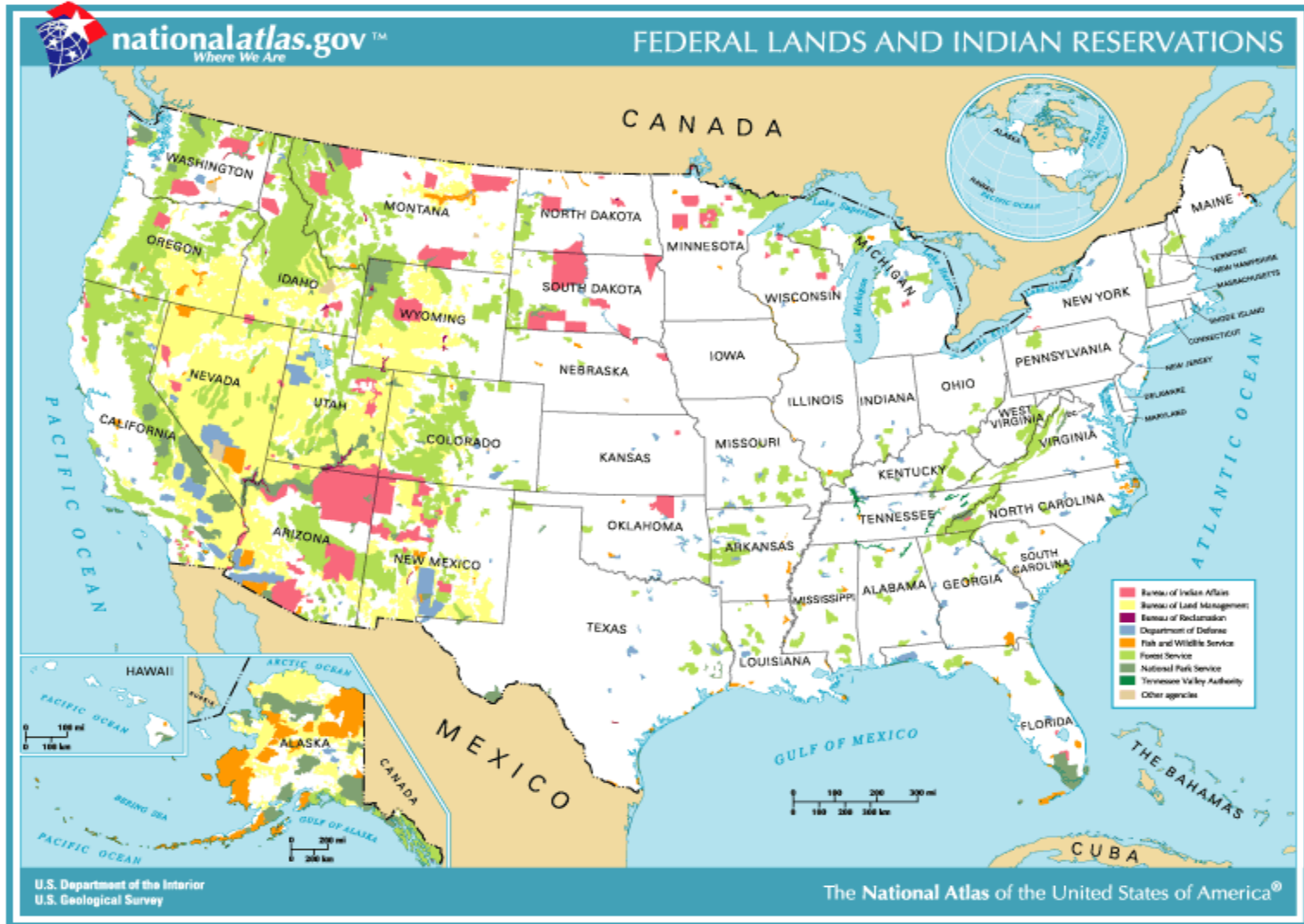
Forest Service Land Exchanges in Detail

Strategic Approaches

3. Opposition to Land Exchanges



Public Lands in the United States



Small Tracts Act

- Small Tracts Act of January 12, 1983 (the “Small Tracts Act”)
- Secretary of Agriculture may convey qualified parcels through sale, exchange, or interchange.
- Small Tracts Act limits the sale, exchange or interchange to one of three categories of tracts of land:
 - parcels encroached on;
 - road rights-of-way; and
 - mineral survey fractions.

Step 1: Does the Small Tracts Act Apply?



- Parcels Encroached On
- Road rights-of-way
- Mineral Survey Fractions

Mineral Survey Fractions



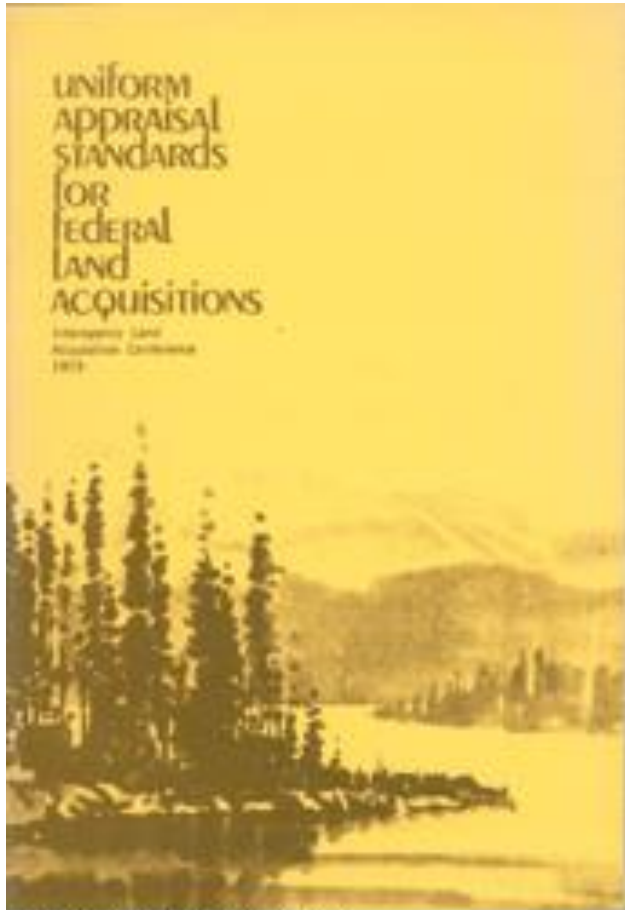
Step 2: Initiate Conveyance

- Make request in writing to the District Ranger.
- No specific form or substantive requirement for this request.

Step 3: Public Interest Determination

- Forest Service must determine that such conveyance is in the public interest
- Factors include efficiency, consistency with law and Forest Plans, and resource protection and values

Step 4: Valuation

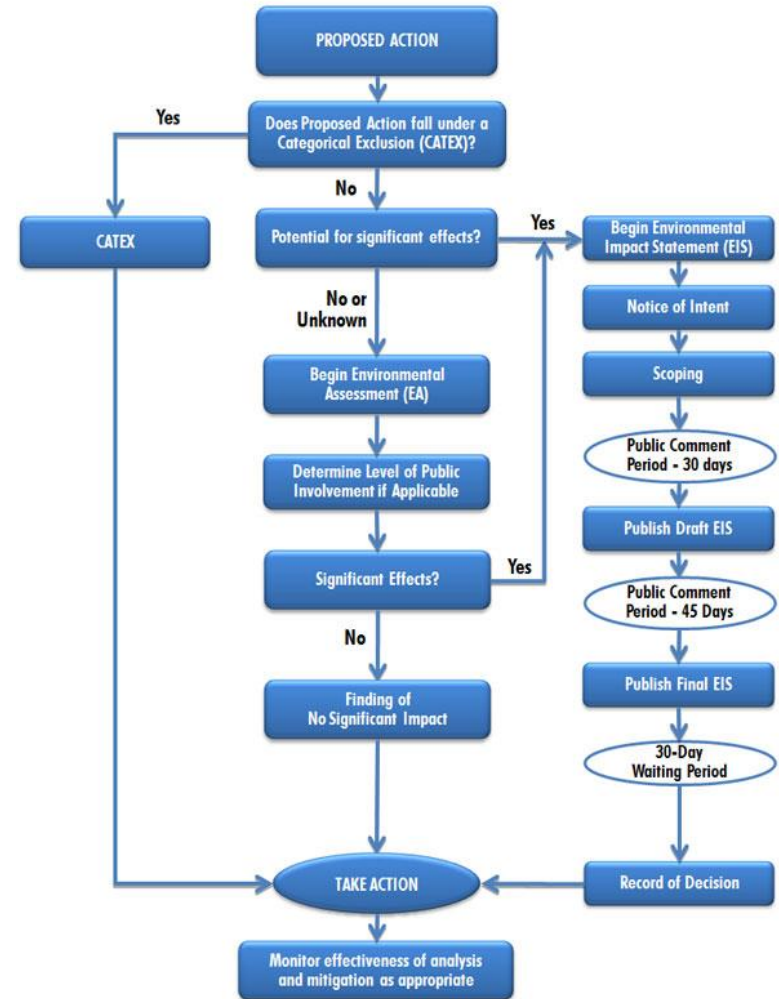


1973 Cover of Yellowbook

- Non-Federal and Federal tracts must be of equal value
- Valuation developed by recognized appraisal methods following
 - Forest Service appraisal procedures, and
 - The Uniform Appraisal Standards for Federal Land Acquisition (“Yellow Book”).

Step 5: NEPA Scoping

Conveyance is subject to review under the National Environmental Policy Act (“NEPA”).

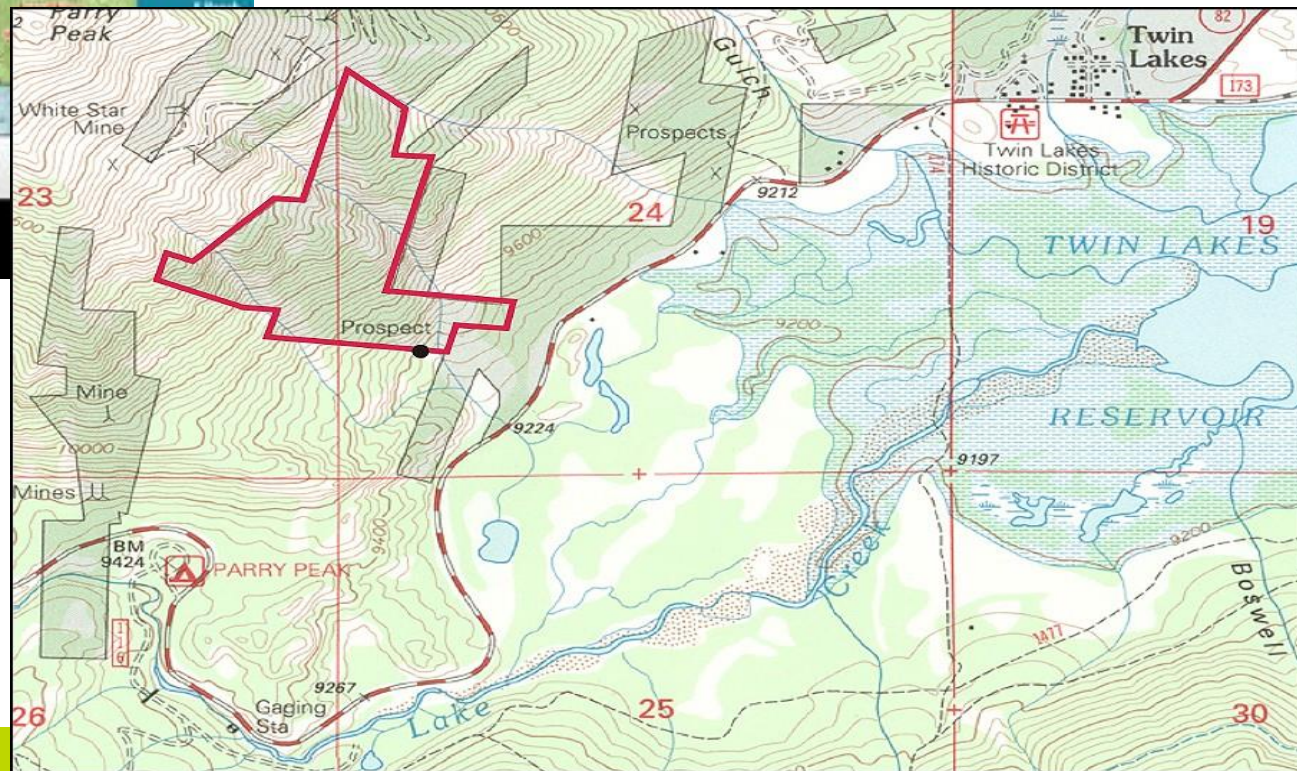
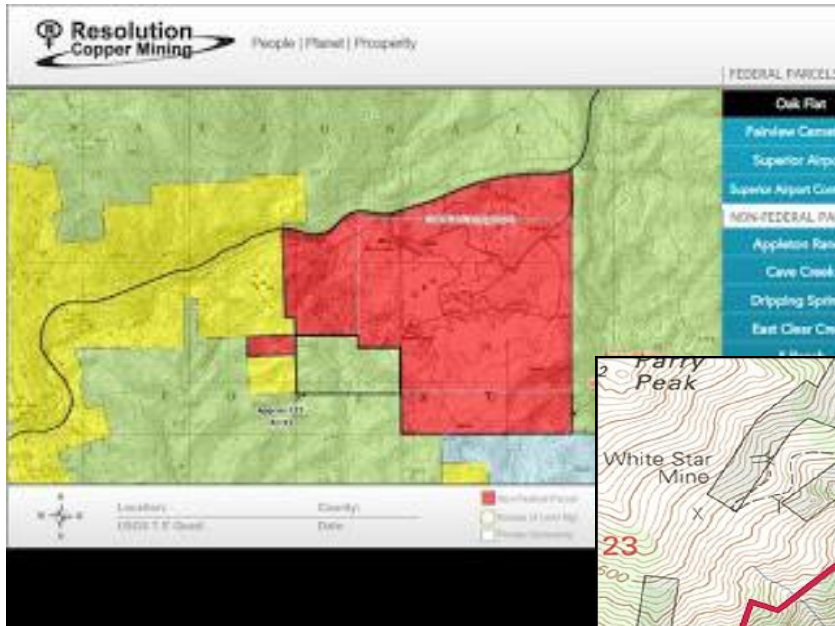


Step 6: Conveyance

- Title conveyed
- Deeds are to be free of terms, conditions and covenants, except those deemed necessary to ensure protection of the public interest.



The Use of a Federal Land Exchange



Federal Land Exchanges – Forest Service and BLM

- Administrative v. Congressional
 - Within a state
 - Between states
 - Special Circumstances
 - Resolution Cooper Mine
 - Utah (SITLA) and Ute Tribe
- Administrative land exchanges are discretionary and voluntary real estate transactions between the federal government and a private-party involving lands within the same state
- GAO Report in 2000 and related reforms

Forest Service Process in Ten Steps



The Federal Land Policy and Management Act (“FLPMA”) authorizes the Forest Service to enter into land exchanges when

- (1) the parcels to be exchanged are of equal value, and
- (2) the exchange serves “the public interest.”

Step 1 -- Informal Meetings with the Forest Service



Step 2: Formal Exchange Proposal

- Provide information related to the Feasibility Analysis.
- The proposal may be in the form of a letter:
 - legal description of the lands to be exchanged
 - map of the properties
 - environmental characteristics and condition of the lands
 - brief description of why the exchange benefits the public interest.
- Consider submitting a preliminary value estimate from a certified appraiser and a title report.

Step 3: Feasibility Analysis

Elements:

- Forest Land and Resource Management Plan Compliance and Public Interest Determination
- Preliminary Title Evidence
- Boundary Management Review
- Water Rights Analysis and Determination
- Value Consultation
- Identifying Issues, Concerns and Support
- Acquisition of Structures
- Right-of-Way Considerations



Feasibility Analysis

Forest Land and Resource Management Plan Compliance and Public Interest Determination.

- FLPMA authorizes exchanges only if, in the discretion of the Forest Service, “the public interest will be well served.”
- The public interest is likely the top priority of the agency.

Public Interest

FLPMA and Forest Service regulations require that the Forest Service give “full consideration” to whether the exchange will benefit the public including:

- better federal land management;
- meeting the needs of state and local residents and their economies;
- protecting fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values;
- enhancing recreation opportunities and public access;
- consolidating lands or interest in lands, such as mineral and timber interests and split mineral and surface estates, for more logical and efficient management and development;
- accommodating existing or planned land use authorizations; and
- promoting multiple-use values.

Feasibility Analysis

- Preliminary Title Evidence
- Boundary Management Review
- Water Rights Analysis and Determination
- Value Consultation
- Identifying Issues, Concerns and Support
- Acquisition of Structures
- Right-of-Way Considerations



Step 4: Agreement to Initiate



- Feasibility Analysis and a draft Agreement to Initiate (“ATI”) will be reviewed by the Regional Office.
- If the value of the Federal Land exceeds \$5,000,000, the Forest Service National Landownership Adjustment Team (“NLAT”) is required to review the feasibility report prior to the signing of the ATI.
- If, after this review, the Forest Service decides to move forward with the exchange, the parties will enter into a nonbinding ATI.

Step 5: Public Notice

- Notice of Exchange Proposal (“NOEP”) must be published in a local paper once per week, for four consecutive weeks
- Distributed to
 - state and local governmental entities,
 - congressional delegation
 - House and Senate Committees on Appropriations
 - adjoining landowners and authorized users of the federal lands.
- Comments on the exchange proposal may be submitted to the Forest Service within 45 days following the initial date of newspaper publication.

Step 6: Hazardous Substances Evaluation

- CERCLA requires the Forest Service to determine whether there are hazardous substances on the federal or private parcels.
- A deed transferring federal property containing hazardous substances must include notice that remediation has been completed, and that more remediation may be required



Step 7: NEPA Analysis

- After the ATI is executed
- NEPA analysis could be a categorical exclusion (“CE”), environmental analysis (“EA”), or environmental impact statement (“EIS”).
- Future use of the federal property determines the level of review under NEPA.
- A CE without a supporting decision memorandum may be used for an “exchange of land... where resulting land uses remain essentially the same.”
- Determine your preferred NEPA strategy.

Step 8: Appraisal



- FLPMA requires that the exchanged lands be relatively equal in value.
- If the market values of the exchanged properties are not equal, a cash payment to either the United States or the private party shall be paid to make up the difference

Appraisal (continued)

- The market value estimate of the properties must be based upon highest and best use of property.
- Forest Service regulations define highest and best use as the “most probable use” of the property based on market evidence as of the date of valuation.
- Ninth Circuit Court of Appeals: highest and best uses that are “reasonably probable” must be also be analyzed.

Resolving Value Disputes

- Forest Service and the Company may agree on the appraised values or either party may initiate a process to resolve a value dispute.
- “Bargaining” allows the parties to agree upon an alternative method for valuing the properties.
- Disputes may be resolved by arbitration.



Step 9: Decision on the Exchange

- After completing the NEPA analysis and reaching agreement on the land values, the Forest Service will make a decision on whether to proceed with the exchange.
- Approved by the Regional Office
- But if the value of the Federal parcel exceeds \$5,000,000, the exchange decision must be approved by USFS Washington D.C. office.
- The exchange decision may be appealed to the Forest Service for a period of 45 days after the decision is published.

Step 10: Exchange Agreement

- After the decision to approve the exchange is made, the parties may enter into an exchange agreement.
- Unlike the ATI, an exchange agreement is an enforceable contract between the Forest Service and the private party
 - may include obligations on the parties after the closing.

BLM Administrative Exchange – Similar Process

- Same State
- Public Interest
- Equal Value
- NEPA
- Appraisal
- BLM allows an “assembled exchange”



Some Land Exchanges are Uncontroversial

Deseret News

Long-sought recreational land exchange approved

By Amy Joi O'Donoghue , Deseret News
Published: Friday, Feb. 7 2014 6:27 p.m. MST



Corona Arch in Grand County is one of the landmarks SITLA will exchange with the BLM for lands more suitable for development. (SITLA)

SALT LAKE CITY — Prime backcountry recreational attractions such as Corona and Morning Glory arches in Grand County are slated to become part of the Bureau of Land Management's portfolio under a land trade approved Friday.

A record of decision was issued on the "recreational land exchange," essentially sealing a deal between the BLM and the Utah School and Institutional Trust Lands

Administration.

Objections to Land Exchanges

- Land exchanges are completed without meaningful public scrutiny and input.
- Agency procedures to evaluate environmental impacts were not adequate.
- Third-party facilitators did not disclose relationships with landowners.
- Appraisals often overvalue private land while undervaluing federal land;
- Federal agencies deal improperly with corporations with which they have close ties.
- Counties in which a private land parcel becomes public land will lose property tax revenues.
- Lands transferred into federal ownership subject to development and environmental degradation.
- The process affords the agencies too much discretion and not enough accountability to the public.



Source: Center for Natural Resources & Environmental Policy, The University of Montana (July 28, 2010)

The Primary Objection to Most Land Exchanges



BHP, RIO TINTO
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