



Shaping the Future of the West



The Art of the Deal:

Crafting Smart State Trust Land Exchanges in Arizona

***A Sun Corridor Legacy Program
Policy Technical Report
Prepared by the Sonoran Institute***



Sonoran Institute

Mission

The Sonoran Institute inspires and enables community decisions and public policies that respect the land and people of western North America.

Vision

The Sonoran Institute contributes to a vision of a West with:

- Healthy landscapes—including native plants and wildlife, diverse habitats, open spaces, clean air and water—from northern Mexico to western Canada.
- Vibrant communities where people embrace conservation to protect quality of life today and in the future.
- Resilient economies that support prosperous communities, diverse opportunities for residents, productive working landscapes, and stewardship of the natural world.

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The nonprofit Sonoran Institute, founded in 1990, works across the rapidly changing West to conserve and restore natural and cultural assets and to promote better management of growth and change. The Institute's community-based approach emphasizes collaboration, civil dialogue, sound information, local knowledge, practical solutions and big-picture thinking.

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Acknowledgements



There are nearly 9.3 million acres of state trust land in Arizona that are held in trust for a variety of beneficiaries. Such a large amount of land can certainly provide solid returns in perpetuity for its beneficiaries, as mandated by the Arizona-New Mexico Enabling Act and the Arizona State Constitution, as well as be managed for the people of Arizona. The Arizona State Land Department, which manages state trust land, needs the tools to meet both goals; the ability to conduct land exchanges is one such tool.

Conducting land exchanges involving state trust land and other lands, including federal land managed by the Bureau of Land Management, allows land to be managed for the appropriate purpose and by the organization best suited to do so. For example, isolated parcels of state trust land suited for conservation can be exchanged for BLM land nearer to urban centers better designed for development. In the event of an exchange, the ASLD can sell or lease the land for development and provide a return to the beneficiaries that would not have been available on the isolated parcel, while the BLM can manage and conserve the exchanged parcel as it does the surrounding parcels. Each entity fulfills its goals. Here, we present the current status on state trust land exchanges in Arizona, various exchange processes, a number of case studies of varying degrees of success from which to learn, and a series of recommendations for Arizona to undertake.

This Sonoran Institute report is the final in a six part series of Sun Corridor concept papers and is the product of great collaboration. I offer my gratitude to Peter Culp and Matthew Rojas of Squire, Sanders, and Dempsey, LLC for providing insightful research and legal memo, and Dan Hunting and Dave Richins of Sonoran Institute, the authors, for synthesizing the research provided. Thanks to Erika Mahoney, Sonoran Institute intern, for her layout and design work. Lastly, I am indebted to the Thomas R. Brown Family Foundation for their generosity in supporting our work in the Sun Corridor to improve the management of state trust land.

A handwritten signature in black ink that reads "Luther Propst". The signature is written in a cursive, flowing style.

Luther Propst
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February 2011

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Contents

2	Executive Summary
3	The Puzzle
5	Examples of Trapped Values
7	Limitations on the ASLD’s Ability to Enter into Land Exchanges
8	Latest Land Exchange Authority Sought in Prop. 110
10	Efforts in Western Maricopa County
13	The Administrative Land Exchange Process
	The Role of BLM in Administrative Land Exchanges
	Developing the Exchange Proposal
	Evaluating the Proposal
	Processing and Documentation
	Decision Analysis
	Title Transfer
15	The Congressional Land Exchange Process
	The Role of the BLM in Congressional Land Exchanges
18	Recommendations
	Comprehensive Trust Reform
	Define a Single, Specific Exchange
	Identify In-holdings as Potential Candidates for a Federal-State Exchange
	Continue to Lay the Foundation for an Exchange in Western Maricopa County
19	Additional Case Studies
	West Desert Wilderness Exchange
	The Federal-Utah State Trust Land Consolidation Act
21	End Notes



Executive Summary

Perhaps the most elusive tool to increase returns to the beneficiaries of Arizona's state trust lands is land exchange authority. A 1936 amendment to the Arizona-New Mexico Enabling Act of 1912 granted land exchange authority to Arizona, however the state has repeatedly failed to amend its constitution to take advantage of this opportunity so exchanges remain extremely difficult to undertake in Arizona. A quick look at a map of Arizona's land tenure clearly illustrates the challenges of trapped value in-holdings, checkerboard land ownership patterns, and the effect these have on development patterns. The ability to exchange state trust land that has little income generating potential for other land better suited to supply beneficiaries a financial return would be a boon to the trust and provide the best management scenarios for the varied landscapes containing state land.

Arizona State Land Department (ASLD) manages nearly 500,000 acres of in-holdings throughout the state, much of it trapped within federal lands such as National Parks, Monuments, and Forests, federal military reservations, and land held by Bureau of Land Management (BLM). These federal and state land in-holdings present an additional challenge due to the different management missions of the federal agencies and the ASLD.

The mission of the BLM is to sustain the health, diversity, and productivity of the Nation's public lands for the use and enjoyment of present and future generations. The primary mission of the ASLD is to generate revenue for the beneficiaries of the trust, with conservation as a secondary goal. While the BLM's goal is to manage lands for optimum use by future generations, the state land department is charged with maximizing the economic return on its lands.

A key to reconciling the conflicting missions is to allow exchanges between the agencies to clean up in-holdings, particularly in western Maricopa County, where solar development opportunities are plentiful to meet the economic opportunity mission of ASLD and landscape-level land conservation is possible for BLM. An exchange in Western Maricopa County has the added benefit of offering increased security for future operations at Luke Air Force Base. Additional opportunities for land exchanges exist in southern Arizona to ensure the continued operation of the area's critical military facilities.

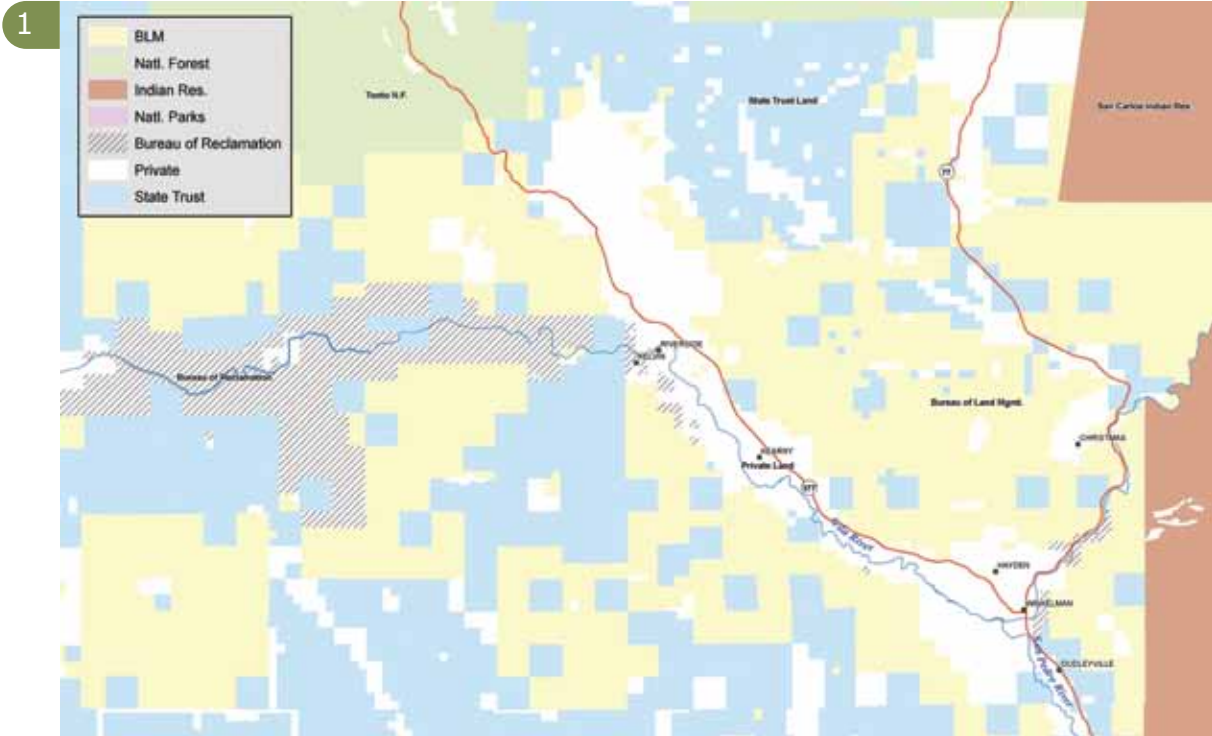
There are two processes for completing a land exchange, one administrative and one congressional. They offer varying degrees of success and timeframes for completion. A number of case studies from across the west are included in the report to serve as examples of best practices or provide insight into what can be done differently and better. Arizona can learn from these and create a solution that serves the beneficiaries, the state, and the agencies with which land exchange is possible.

The citizens of the state of Arizona should authorize land exchanges for ASLD, but only as part of a broader reform package for the department. Defining a single, specific exchange to begin the process will allow the public to get comfortable with the process of facilitating an exchange. Western Maricopa County presents the perfect opportunity; thousands of acres of state trust land are trapped within wilderness areas and national monuments. By laying the foundation for a transparent, public exchange, Arizona's electorate can witness the benefits and finally embrace the authority for the department, which can unlock value, improve development patterns, and most importantly, increase returns to the trust.



Viewed on a map, Arizona’s land ownership looks like pieces of multiple puzzles were mixed into the same box, shaken around, poured out, and forced together. Arizona’s mix of federal, Indian, state, local, and privately owned lands often resembles a poorly assembled jigsaw puzzle (Figure 1).

Land Ownership in Central Arizona source: Sonoran Institute



What does this mean for state trust land? Trapped value, incoherent development patterns, and a land management nightmare. Currently, the Arizona State Land Department (ASLD) manages nearly 500,000 acres of in-holdings, land that is completely surrounded by protected lands. Many of the state trust parcels are trapped inside existing national parks, wilderness areas, and conservation designated land. These land parcels are difficult to sell and offer limited access due to the federal land surrounding them. To these in-holdings add trust land trapped in and under the flight paths of Arizona’s military installations, and it becomes clear that Arizona is in dire need of the land exchange authority sought in eight different ballot propositions since 1990.

In 1910, Congress passed the Arizona-New Mexico Enabling Act establishing the rules governing state trust land, in both states. In 1936, language was added that authorized land exchanges and stated that those involving public land required authorization by Congress.

"The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: Provided that such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder." (Added June 5, 1936, c.517, 49 Stat. 1477)



However, the Arizona Constitution was never amended to allow these exchanges. New Mexico, which manages state trust land under the same Enabling Act, did amend its constitution and has been allowing exchanges and benefitting from them for years.

It is important to understand state trust land is not public land owned by the state of Arizona in the usual sense. The land is held in trust by the ASLD to benefit a specific set of beneficiaries. The state's education system is the largest of these beneficiaries, with smaller holdings dedicated to prisons, hospitals, and other entities. This nuance is important to understand when evaluating land exchange authority. Arizona's options to sell or trade trust land are highly constrained by its legal obligations as trustee.

State trust land is typically managed for maximum economic yield while federal land is generally managed for conservation or public use. Challenges arise when these lands are in close proximity and management goals come into conflict. This problem is especially acute where federal and state lands are in a checkerboard pattern.

The ability to exchange land is a critical tool for the ASLD to maximize value for trust beneficiaries. Land exchange authority would allow trapped parcels to be swapped for other federal and or private lands, presumably with better development potential, thereby unlocking value that could flow to trust beneficiaries and allowing more coherent land use patterns in Arizona.

This potential for economic development is even greater when the preservation of military bases is considered. A study by the National Governors Association's Center for Best Practices in September, 2004, praised Arizona's actions to preserve military bases from encroaching development, but pointed out that the acquisition of property around the base by the military is the most permanent way to protect bases. Exchange authority could facilitate continued positive economic impact from military bases in Arizona by exchanging land that cannot be developed due to the 2001 enactment of the Preservation of Military Airports Act, which prohibits residential housing on land surrounding a military airport.

The problem is visible on a map of state trust land and the solution is clear: Arizona voters need to amend the constitution and provide exchange authority to ASLD. This will unlock value that has been trapped through a century or more of incomprehensible land tenure. Land exchanges can increase revenue to the trust, rationalize development, improve development patterns, and allow the conservation of key land for future generations.

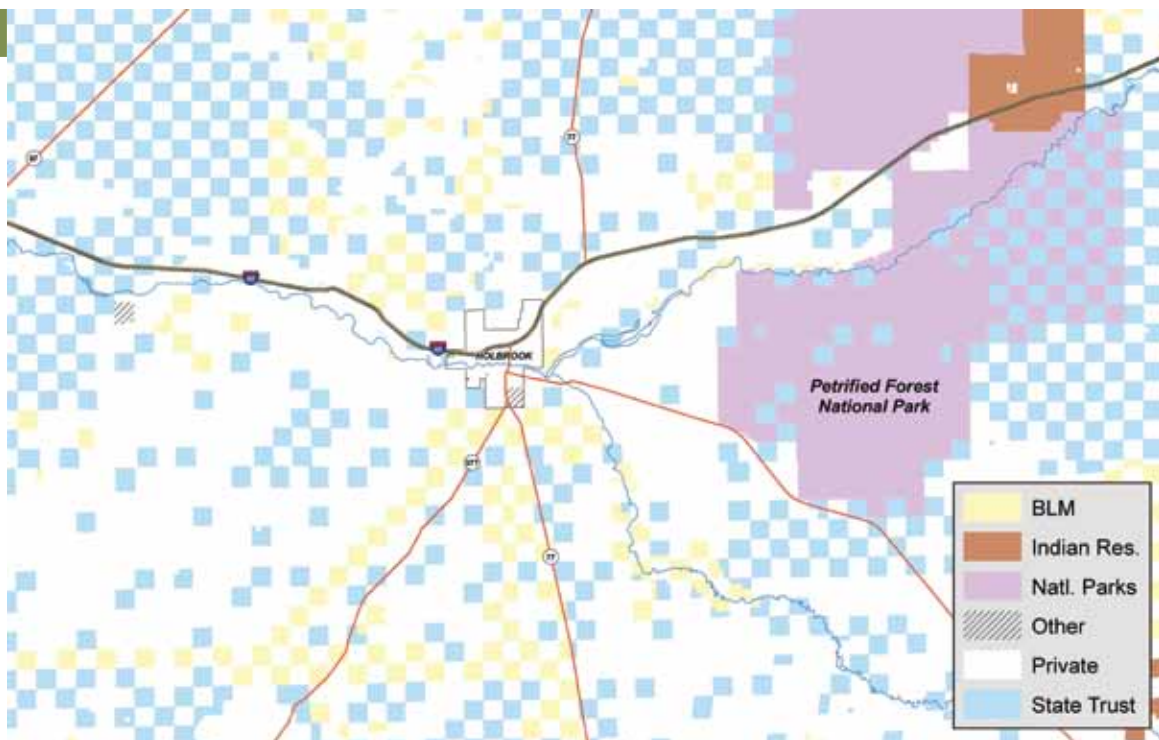


Examples of Trapped Land

Perhaps the most visually striking example of trapped state trust land can be found in a band across northern Arizona that generally follows the path of U.S. I-40 from the New Mexico border to Kingman. Close to 80 miles wide from top to bottom in many places, the band features a checkerboard of private, BLM, National Forest, and state trust lands. On the western end of the strip, state trust land is surrounded by Lake Mead National Recreation Area. Further east, state trust land parcels are located completely within Petrified Forest National Park (Figure 2).

State Trust Land Along Interstate 40 source: Sonoran Institute

2



Elsewhere, state trust land is located alongside or within designated wilderness areas or BLM national monuments. For example, both the Eagletail Mountains and Hummingbird Springs wilderness areas are located on BLM lands, but contain in-holdings of state trust land (Figure 3). This land pattern creates difficulties in maximizing the use and value of state trust land, due to the conflicting goals in management of a wilderness area and other BLM lands.

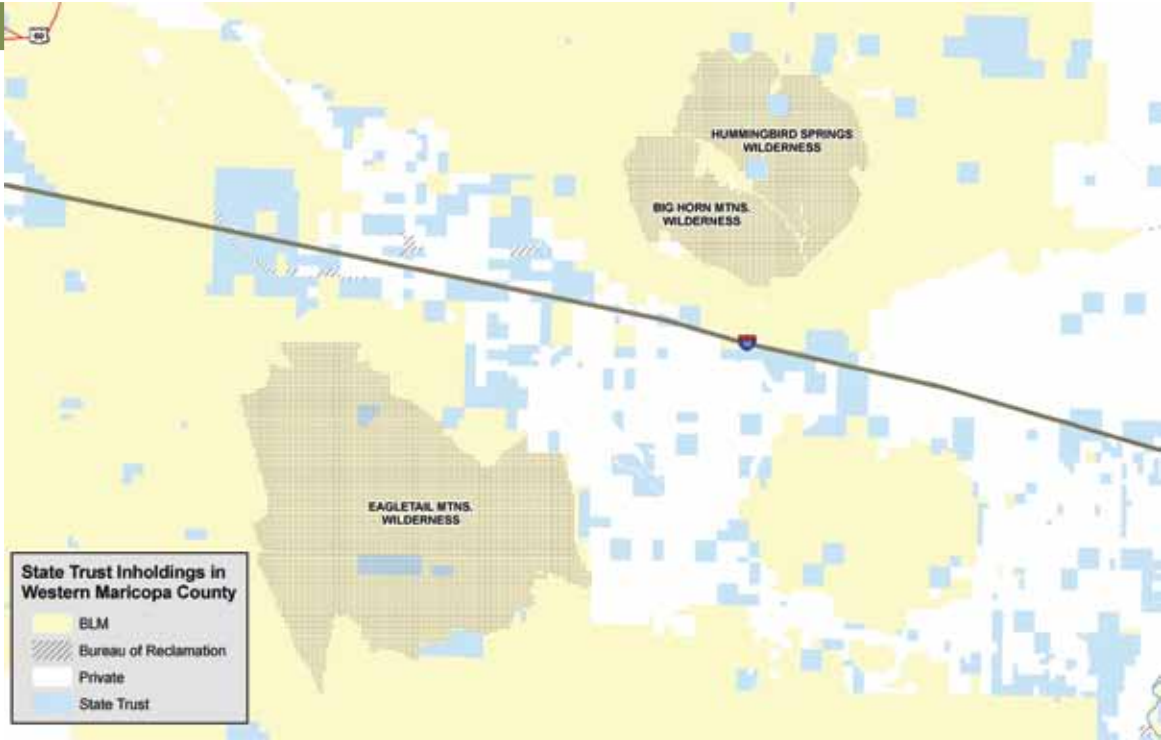
These examples highlight the difficulty that the ASLD often faces in carrying out its duty to manage state trust land for the benefit of Arizona schools. The greatest economic gains are typically found in selling or leasing state trust land for commercial development or natural resource extraction. However, these uses frequently conflict with the management of adjacent federal lands and are often impractical to undertake on isolated trust land parcels.

Exchange authority is needed to allow for land tenure adjustments and consolidation of remote state trust parcels in return for lands near urban areas. This will also allow for the preservation and protection of lands with significant conservation value.



Western Maricopa County In-holdings *source: Sonoran Institute*

3





Prior to 1990, the ASLD had engaged in a number of large-scale land exchanges. Parcels acquired near the path of development of urban areas generally created significant benefits for the trust. However, in 1990 the Arizona Supreme Court ruled in *Fain Land and Cattle Company v. M.J. Hassell* that the ASLD had no constitutional authority to engage in land exchanges because they constituted sales without public auction.¹ Although the state's Enabling Act was amended in 1936 to allow land exchanges, the court held that these transactions were still prohibited by the state constitution.² Although the *Fain Land and Cattle* decision was justified based on the trust responsibility, the paradoxical result was that this decision often prevents trust lands from being put to the highest and best use. Ultimately, resolution of the issue will require a constitutional amendment.

Since the 1990 decision, eight constitutional amendments to grant land exchange authority to the ASLD have been placed on the ballot, but voters have rejected all of them. Land exchange measures have failed due in large part to concerns about the appraisal process for the exchanged lands, the perceived losses to the public and windfalls to private interests in such transactions, and misunderstanding of the purposes of state trust land. During the 2010 election cycle, another constitutional amendment, Proposition 110, authorizing land exchange authority in limited cases was referred to the ballot and narrowly defeated.





Latest Land Exchange Authority Sought in Prop. 110

Despite previous defeats at the ballot box, administrators of the trust, the public, and legislators continue to try to get land exchange authority in place. The most recent attempt to restore land exchange authority to Arizona was captured in Proposition 110, on the November 2010 ballot. The Arizona State Senate referred this measure, titled the "Military Installation Preservation Act," to the voters.³ The referendum provided for two primary purposes for land exchanges:

- 1 To assist in preserving and protecting military facilities in this state from encroaching development.
- 2 For proper management, protection, or conversion to public use of state lands.⁴



While the first category appears limited, it provided significant flexibility in developing land exchange transactions to protect military installations. The second category is sufficiently broad that almost any trust-related purpose could potentially fit within its range of meaning as long as it related to a public use in some way.

The language of the measure appears to have been deliberately targeted at overturning the Arizona Supreme Court's decision in *Fain Land & Cattle Co. v. Hassell* which found that exchanges of public lands are equivalent to sales. In addition to broadly authorizing exchange activity, the measure specifically declared that "land exchanges are not to be considered sales for the purposes of this article."⁵

However, the measure did not grant unlimited exchange authority. In an effort to mitigate long-standing public mistrust of land exchanges, the parties with whom the State may make land exchanges were clearly defined: "Exchanges may be made for land owned or administered by other state agencies, counties, municipalities and or the United States or its agencies."⁶ Land exchanges with private parties would not have been permitted under the measure, addressing a significant element of public concern.

Proposition 110 identified the public process by which an exchange would be approved. The measure required the preparation of two or more independent appraisals demonstrating that the "true value" (a constitutional term essentially meaning appraised value) of the lands received is greater than or equal to the value of lands traded.



Although the required analyses were similar to those frequently employed with regard to land exchanges, it is important to note three critical differences:

First, the measure required the preparation of two or more independent analyses on the following: the fiscal impact on local agencies; the physical, economic, and natural resource impacts on the nearby communities; and the impact on local land uses and land use plans. The fiscal impact analysis was limited by its terms to cover each county, city, town, and school district in which “the lands involved in the exchange are located.” This unusual formulation could have been interpreted to mean that the analysis had to assess the impact on each affected local government entity; however, another reading would have limited the required scope of analysis only to those entities in which all of the exchange lands are located.

Second, the scope of analysis on “physical, economic, and natural resource impacts” appeared to be deliberately narrower than analyses that have been conducted for similar types of federal land exchanges and was specifically limited to impacts on the “surrounding” or “directly adjacent local community.” A broader analysis under the National Environmental Policy Act (NEPA) might be required for exchanges involving federal lands.

Finally, Proposition 110 required a public process surrounding the exchange, comprised of six weeks of public notice, comment, and hearings on the transaction. The measure required a finding that the exchange would be in the best interests of the trust, followed by a voter referendum in which voters are asked to approve any proposed exchange that survived this process.

An unanswered question was whether state trust land could be set aside for conservation as open space, a key concern for fast-growing urban areas in the West. The exchange authority provided by Proposition 110 appears to have been broad enough to allow conservation of state trust land for public use and recreation. The language “conversion to public use of state lands” was broad and undefined in the constitutional amendment and the guiding implementation statute.⁷ State trust land with conservation and recreation value could have been exchanged for federal or other state land with a greater potential for development. The exchanged state trust land could have then been placed under a conservation easement or other legal instrument that dedicated the land to “public use” to meet the goals of Proposition 110.

In addition to authorizing land exchanges, Proposition 110 allowed for the disposition of land, interests in land, or restrictions on state land without a public auction. This broad authority could have been applied to avoid incompatible land use that would cause encroachment on military installations or to enable military combat readiness and allow full spectrum test and training operations. This would have allowed the outright sale or disposal of lands, without auction, for virtually any purpose connected to a military objective. Military airspace maps show a significant amount of trust land could have been potentially affected by this provision.

The exchange and disposition tools proposed in Proposition 110 authorized a broad range of potential state land dispositions that are not possible under current law. These tools could have been applied to trust land with some relationship to military lands or airspace as well as to undertake exchanges for the broader purposes of “proper management, protection or conversion of lands to public use.” Both tools could have led to resolution of state trust land in-holding issues.



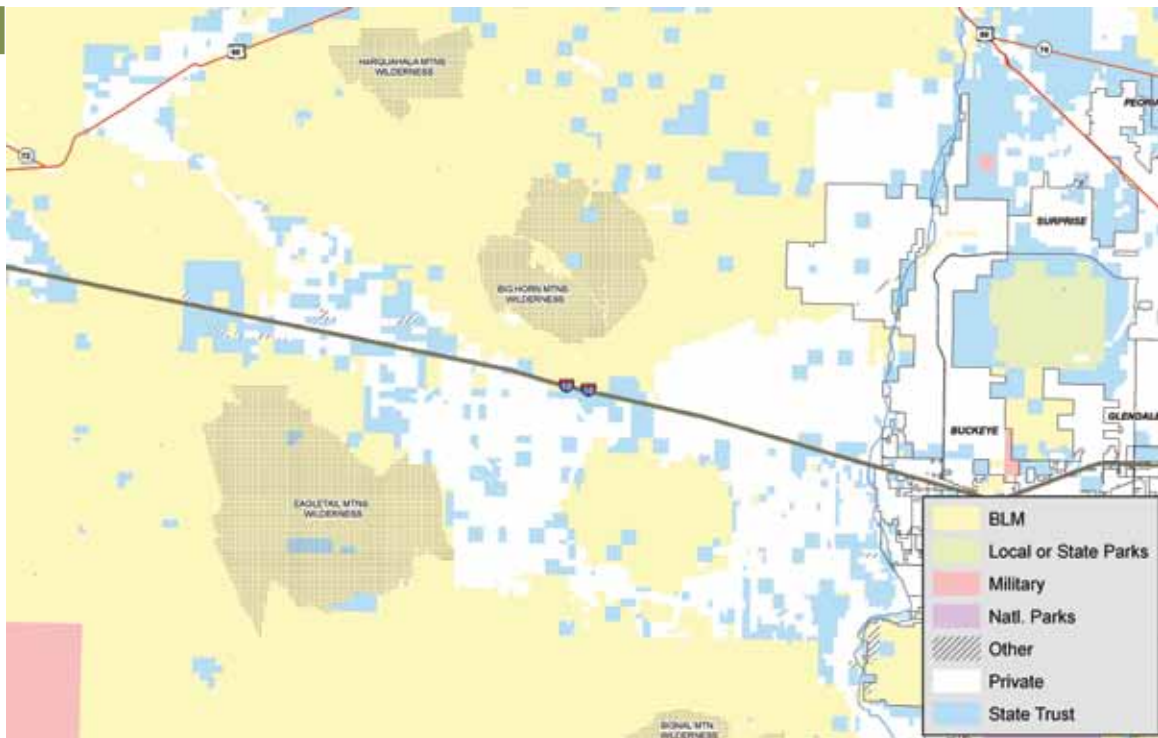
Efforts in Western Maricopa County

In 2007, the Sonoran Institute, in partnership with a group of environmental organizations, began work on a proposal to protect upwards of one million acres of public land managed by the Bureau of Land Management (BLM) in western Maricopa County (Figure 4). The Sonoran Institute is seeking to develop a proposal that will allow the BLM and the ASLD to conduct a land exchange in the context of this proposal. The goals of this exchange would be to:

- 1 Allow federal agencies and the ASLD to consolidate state and federal ownership currently held in checkerboard ownership or as in-holdings into consolidated, larger parcels of land.
- 2 Facilitate effective management and enhance the economic value of state trust land by consolidating larger blocks of state trust land near metropolitan areas where land is economically most valuable.
- 3 Allow for the conservation and conversion to recreational use of state trust land that is located near metropolitan areas by exchanging it for BLM land that is more suited to development.

Land Use in Western Maricopa County *source: Sonoran Institute*

4





A successful exchange in Idaho, similar to the proposal in development for western Maricopa County, serves as a model.

Idaho Land Enhancement Act

The Idaho Department of Lands (IDL) developed a land exchange proposal cooperatively with the United States Forest Service (USFS) Region 1 and Region 4, BLM, and the City of Boise.⁸ The City of Boise acted as the exchange facilitator due to their interest in the exchange of state-owned lands within the Boise Foothills to the BLM and USFS to preserve open space. After a series of proposals and counterproposals, the agencies reached agreement on a conceptual legislative land exchange package that included a previous administrative exchange proposal known as the Pitts Exchange between IDL and the USFS.

The Idaho Congressional delegation offered support for the exchange, and Senator Larry Craig introduced legislation for the Idaho Land Enhancement Act (ILEA). The ILEA was signed into law by President George W. Bush in November 2006, encompassing both the Pitts and the Boise Foothills exchanges. The exchange bill authorized the BLM to transfer 605 acres to the state and the USFS to transfer 7,232 acres to the state. Idaho would transfer 7,655 acres to the BLM and 4,155 acres to the USFS.⁹ The bill would also transfer administrative jurisdiction of about 2,111 acres of BLM land to the USFS.¹⁰ It provided an opportunity to complete the exchange by equalizing the values between only the state and federal agencies, avoiding the need to equalize between IDL and BLM, as well as IDL and USFS. IDL additionally made a cash payment of \$315,000 from the Land Bank to the USFS.

This exchange is significant not only because of its size, complexity, and length of time to complete, but also due to the legislative nature of the exchange. The success of the exchange depended upon several factors. First, the facilitation by the City of Boise between the agencies, the Idaho Congressional delegation, and the interested public was critical in maintaining an open, transparent process. Second, the City of Boise assisted in the valuation process by funding contracts involving environmental assessment, cultural and historic surveys, mineral potential reports, and timber cruises and appraisals. The scopes and deliverables for these contracts were reviewed and approved by BLM, USFS, and IDL. Lastly, the support and guidance of the Idaho Congressional delegation was essential.

The exchange provided IDL an opportunity to acquire productive timber lands in northern Idaho and dispose of lands with open space qualities more suitable for long term management by federal public land agencies.



Whether in western Maricopa County or elsewhere in Arizona, proposed land exchanges have generally involved a trade of state land for federal land. As noted, the state's ability to exchange trust land has been curtailed by the *Fain* decision. However, the federal government has two mechanisms by which to exchange land.

Administrative land exchanges are processed through the federal agencies that control the underlying federal lands using a detailed bureaucratic process. However, the state of Arizona would still need to amend its constitution to complete its half of any exchange. The constitutional change requires a vote of the people. As noted above, all past attempts to authorize state trust land exchanges have failed at the ballot box.

Congressional land exchanges are carried out through an act of Congress, potentially overriding both administrative and state restrictions on the exchange. The Supremacy Clause of the United States Constitution allows the federal government to take action that would otherwise be in conflict with state law. Consequently, a Congressional land exchange would skirt the limitations of the *Fain* decision.



Policymakers looking to rationalize Arizona's state trust land holdings need to be aware of the advantages and shortcomings of each of these methods. An administrative exchange involves a formal process that may be somewhat easier and predictable at the federal level than passing an act of Congress. However, approval by the voters is required to finalize the exchange, and Arizonans have been notoriously hesitant to approve the necessary constitutional change. On the other hand, a Congressional exchange might be better if it is deemed easier to secure the votes of a few hundred legislators in Washington than to convince Arizona voters to back an exchange. Pushing an exchange bill through Congress that dictates the terms of an exchange without input from the state at large may meet with stiff political resistance in a state that has been skeptical of federal interference in state affairs.

The Administrative Land Exchange Process



The administrative land exchange process establishes the “normal” procedure for exchanges involving federal lands and the expectations for federal agencies and advocacy groups that support or oppose the exchange. This process also details the multiple steps required to perform any exchange. The BLM has clarified their role in the exchange process.

The Role of the BLM in Administrative Land Exchanges

In light of the desirability of a land exchange between ASLD and the BLM in western Maricopa County, an examination of BLM’s land exchange procedures is in order. The BLM has a formal administrative process to conduct land exchanges. Procedures for these exchanges are spelled out in the *Bureau of Land Management Land Exchange Handbook*.¹¹ The handbook presents a detailed roadmap for initiating and completing a land exchange with BLM.

The BLM handbook divides the exchange process into five major steps:

- Developing the Exchange Proposal
- Evaluating the Proposal
- Processing and Documentation
- Decision Analysis
- Title Transfer

Developing the Exchange Proposal

Development of the proposal begins with informal discussions with BLM officials. Land use plans, natural resource concerns, and funding issues can be worked out in these meetings before the formal exchange proposal is complete. This phase of the process may take from 60 days to several years to complete.

Evaluating the Proposal

The next task is to evaluate the proposal, which by BLM’s estimation typically takes 160 days. This involves preparing a formal feasibility report, estimating total costs of the exchange, and submitting a formal agreement to initiate the exchange. Review of these documents is required by both state and local offices of BLM.

Processing and Documentation

This phase includes publishing notice of the exchange, soliciting public comment, and performing appraisals of the properties to be exchanged. It also includes extensive documentation of mineral, cultural, and natural conditions of the areas. A land exchange with a federal agency will typically require a NEPA analysis. This analysis assesses the environmental impact of the exchange and also considers effects on historical or cultural resources in the area. Although BLM estimates 130 days to process the exchange, a NEPA analysis can take from one to three years.



Decision Analysis

Both local and Washington BLM offices must review the decision package and make recommendations that are ultimately published, providing the public an opportunity to protest the decision. Another 130 days is allotted for this stage of the exchange process.

Title Transfer¹²

The actual exchange of land occurs after the mandatory 45-day protest period. If no protests are registered, the conveyance documents can be filed with the relevant county, completing the transaction.



Three Peaks Exchange

One of the more recent federal land exchanges, the Three Peaks Exchange in Iron County, Utah, was an administrative land exchange completed in May of 2008. The exchange transferred ownership of 950 acres of state trust land located inside the boundary of the Three Peaks Recreation Area in exchange for 330 acres of BLM land. The Utah State and Institutional Trust Lands Administration (SITLA) land included important scenic areas, such as the geologic feature of Three Peaks, which are now managed for their recreational and aesthetic values. SITLA acquired land with development potential, including a 160-acre industrially-zoned parcel with rail and utility access, located only 10 miles from Cedar City.

The Three Peaks Exchange was originally proposed in 2002, but was delayed pending extensive joint planning by the BLM, Iron County, and local citizens. During that time, the BLM completed an Environmental Assessment (EA) in 2005.¹³ The Three Peaks Exchange is an excellent example of resolving the sometimes mutually exclusive relationship between the goals of a state land trust, and the character of the state trust lands themselves. The EA very carefully documents the purpose and need for the action. While the exchange was successful, it illustrates the lengthy nature of the administrative land exchange process even in cases where the amount of land exchanged is relatively small.



Despite the Arizona Supreme Court's ruling in *Fain Land & Cattle Co.*, the United States Congress may arrange state trust land exchanges. Pursuant to Supremacy Clause principles, the federal government can specifically authorize the exchange of lands irrespective of Arizona's state constitutional limits and the federal laws and regulations that otherwise govern the conduct of an exchange. In essence, Congress can authorize a federal "taking" of state land in exchange for appropriate compensation in the form of other federal replacement land.



Through a Congressional land exchange, Congress can authorize the federal government to acquire state and private lands by donation, purchase, or exchange. Generally, a Congressional land exchange occurs through a specific act of Congress authorizing the exchange of lands. This legislation, like all Congressional bills, must be sponsored by a member of Congress.

Congressional land exchanges vary considerably in their purpose, scope, and character. In some instances, Congress will pass legislation authorizing a federal agency to acquire more lands for a specific purpose. The legislation will describe the lands to be acquired, the available methods of acquisition, and authorize the appropriation of funds. A deadline may be included as part of the legislation, and issues of current land uses may be addressed. It is then up to the agency to appropriate the funds and acquire the lands through donation, purchase, or exchange. In short, the act of Congress may authorize and enable the exchange, but not actually perform the exchange. In other cases, a state and federal agency may have already agreed to terms of the exchange through a series of negotiations that include appraisal of the lands to be exchanged; the sole purpose of the act is to enable the transaction to proceed.

A Congressional land exchange can be simpler than an administrative land exchange and take less time in some circumstances. However, a review of successful exchanges clearly suggests that, although a Congressional exchange can overcome limitations on state trust land use like those imposed by the Arizona constitution, Congressional exchanges should be built upon much of the same information that underlies an administrative exchange. One advantage of a Congressional exchange is that Congress may waive the requirements of the administrative process and simplify the exchange. However, political considerations limit the practical application of this approach to the extent that land exchanges appear questionable. Congressional land exchanges are frequently subject to accusations of corruption and favoritism.¹⁴ The following example of a Congressional land exchange illustrates the potential and the challenges of such an exchange.



Petrified National Forest Expansion

In spite of the current legal barriers to performing administrative land exchanges in Arizona, legislative land exchanges conducted through Congress have been successful in the state. These land exchanges have enabled protection of some state trust land parcels with high conservation values, authorizing their transfer to the management of federal agencies, while providing ASLD with other land more appropriate and suitable for revenue generation.

The Petrified Forest National Park 1993 General Management Plan proposed adding 97,800 acres to the park in order to protect significant paleontological and archaeological resources on neighboring lands.¹⁵ Concerns about theft of petrified wood, fossil, and archaeological relics on adjacent lands led to the crafting of a legislative proposal to expand the park's boundaries.

The Petrified Forest Expansion Act of 2004 did just that, revising the boundary of the Park to include an additional 125,000 acres and authorizing the acquisition of private interests in lands within the boundaries of the Park by donation, purchase, or exchange. It also authorized the acquisition of state land, but did not specify the method. The proposed expansion area included land parcels within a checkerboard of private, BLM, and state trust land in-holdings (Figure 2). Nearly 35,000 acres of state trust land were captured within the new boundary of Petrified Forest National Park. To date, however, formal federal acquisition has not yet occurred. The ASLD has provided park officials with rights of access to the trust land, and the park is providing policing services on the land, but the trust has not yet realized any benefit or exchange as a result of the legislation.

Part of the problem with the expansion of Petrified National Forest was that Congress authorized the appropriation of funds, but did not actually appropriate them. This has inhibited the purchase of private lands. Ranchers have been willing to sell their lands, but Congress has failed to produce the required money.¹⁸ Other private parties acquired control of 15,000 acres within the park, intending to exchange it for other federal lands with high development value. That exchange proposal was stymied when Arizona Congressman Rick Renzi, who supported the exchange, was investigated by the FBI, putting a chill on transactions of which he was a part. The Congressional bill authorizing the exchange, worth about \$100 million and in its final stages, is considered "dead as a dinosaur."¹⁹ This exchange illustrates Arizona's ongoing problems with appearances of impropriety in negotiating land exchanges, which reinforce a long-standing, negative public perception of these forms of exchanges. This perception presents one of the most significant challenges to executing land exchange transactions in Arizona.



The Role of the BLM in Congressional Land Exchanges

The BLM often plays a role in Congressional land exchanges during interstate land exchanges or if Congress requests guidance regarding a specific exchange proposal.¹⁸ Congressional requests for information such as maps, survey notes, brochures, or similar items are handled directly by the appropriate BLM field or state office. However, requests for assistance in developing a legislative land exchange will involve the Legislative Affairs Group in BLM's Washington office.¹⁹

BLM's participation in the development of land exchange legislation is sometimes initiated via contact between BLM and Congressional staff. Congressional staff members often request formal or informal comments on a legislative land exchange proposal from the BLM. According to BLM policy, responses to these requests should always be reviewed for consistency with Administration policy, reflecting the importance of addressing political considerations in Congressional land exchanges.²⁰

The BLM Handbook recognizes that Congressional land exchanges vary considerably in the way they operate, the necessity of NEPA analysis, and appraisal requirements. The BLM therefore develops an approach tailored for each Congressional land exchange. Furthermore, the enabling legislation frequently omits common requirements of land conveyances, such as hazardous materials assessments, title standards, and certificates of inspection and possession. It may fall to the BLM, and by extension other proponents of the land exchange, to address these issues to the satisfaction of the public.²¹

BLM's participation in a Congressional land exchange can range from attending hearings and testifying on specific proposals to meeting and corresponding with Congressional staff to limited lobbying on behalf of land exchange proposals. However, there are some notable limitations. For example, the agency will only testify on legislation that has been introduced, not on draft legislative proposals, and as a matter of policy it will generally not testify with less than one week's notice of a hearing. All meetings with members of Congress or their staff must be coordinated through the Legislative Affairs Group. And ultimately, the BLM retains a fair amount of discretion to decide if it will testify and who should testify.²²



Comprehensive Trust Land Reform

Despite past failures at the ballot box, land exchange authority is still a worthwhile goal. Educating Arizona's voters on the merits of ASLD land exchanges has been a primary focus of this paper. As Arizona's complicated land picture becomes clearer, the opportunity to unlock trapped value for the trust beneficiaries can entice the public to finally endorse a reform proposal. Comprehensive reform to the operations of the Trust must be coupled with exchange authority. A long history of shady land deals in Arizona has left voters understandably skeptical of complex transactions involving trust land. A reform package needs to emphasize an open and transparent process that will maintain the value of the trust while setting aside key lands with conservation values for future generations. Furthermore, Arizona needs to participate in land exchanges as an equal partner with federal agencies. Under the current system, land exchanges are only possible under a process that is driven by lawmakers in Washington. Arizona voters deserve a voice in determining the future of their trust land.

Define a Single, Specific Exchange

Polling data suggests strong support for a single, specific trust land exchange with a conservation component. An exchange involving clearly mapped land that shows a demonstrable public benefit, such as a new park, may well receive popular support. A successful referendum on a specific exchange could build public support for exchanges in general and increase awareness of trust land reform issues. This measure would ideally feature an exchange involving the preservation of a well-known conservation landmark and would be the subject of an educational campaign to raise awareness and voter support.

Identify In-holdings as Potential Candidates for a Federal-State Exchange

A likely candidate for this demonstration exchange is found in western Maricopa County where an outreach process has been underway for several years to identify federal lands suitable for conservation. Trapped within these federal lands are 24 parcels of state trust land totaling over 13,000 acres. This exchange could be coupled with a Congressional exchange measure, effectively using the state referendum process to identify and authorize exchange of a particular area under state law, and then using Congressional authority to complete the exchange rather than waiting to proceed under the more burdensome administrative process. Alternatively, as the Idaho case study illustrated, a public process facilitated by a local entity could achieve a similar end goal, with the Arizona congressional delegation shepherding legislation authorizing an exchange agreed upon by the stakeholders involved.

Continue to Lay the Foundation for an Exchange in Western Maricopa County

In western Maricopa County, discussions are underway to identify a process to select the lands to be exchanged, determine their value and compatibility with surrounding land uses, and coordinate between federal and state agencies. This area shows promise as a model land exchange between ASLD and the federal government. If a Congressional land exchange is pursued for western Maricopa County, developing some or all of the same information and following one or more of the regular steps that are part of the *administrative process is the most advisable approach to pursuing a large landscape level land exchange proposal*.



The case studies throughout the report and below, both successful and unsuccessful, highlight the complexities involved in land exchanges with the federal government. While there are rules and guidelines for implementing these exchanges, the process is uncertain as political winds shift or unexpected forces come into play.

West Desert Wilderness Exchange

The West Desert Wilderness Exchange was a large land exchange that included provisions for an exchange of 106,000 acres of state trust land from SITLA for 106,000 acres of BLM lands in 2006.²³ SITLA had difficulty generating revenue from the trust land parcels in question as they were located primarily within federally protected wilderness study areas.²⁴ Passage of the exchange proposal led to the consolidation of federal lands and was one of the reasons cited in the Congressional record for the exchange.²⁵ In return, SITLA received lands more suitable for development and near transportation corridors such as Interstates 80 and 15.²⁶ One of the bill's sponsors stated on the record that during the hearing in front of the Committee on Resources, the BLM raised concerns in general about the appraisal of the lands in exchanges. Those concerns were partly responsible for the requirement that the exchange be approved by an independent auditor who would determine whether the values of the exchanged lands were "approximately equal."²⁷

The exchange was based on negotiated value of lands between the state and the BLM. The Congressional measure passed without effective public participation in the process, and it appears that most details of the deal remained unknown at the time of legislation.²⁸ The passage of the exchange was conditional on an independent appraiser reviewing the State's and the BLM's statements of value for the exchanged lands.²⁹ There was some public criticism about the appraisal of the lands involved in this exchange, with some alleging that the BLM had undervalued its lands involved in the trade.³⁰ This is interesting to note in light of the failure of the San Rafael Swell land exchange deal discussed below.

The Federal-Utah State Trust Lands Consolidation Act

Although this legislative land exchange for the San Rafael Swell failed, it provides a useful case study, given the issues illuminated in the exchange process generally, and the effect its failure had on the way the Department of Interior now conducts land exchanges.³¹

The San Rafael Swell is a nearly one-million-acre area of central Utah, primarily managed by the BLM. It has many wilderness characteristics and was proposed to become a federally protected wilderness area or national monument.³² There are approximately 102,000 acres of state trust land located within the San Rafael Swell area.³³ The conflicting land management goals of SITLA and the BLM were seen as a barrier to the creation of a federally protected area.

In 2002, a legislative land exchange proposal to trade state trust land within the San Rafael Swell for BLM land elsewhere was developed and supported by both agencies and members of Congress from Utah. The bill would have authorized SITLA to exchange approximately 108,000 acres of trust land for 135,000 acres of land managed by the BLM.³⁴ A key component of the trade would have given the oil and mineral interests underlying the federal lands to the State.³⁵



The bill was passed by the House of Representatives, but not by the Senate. The exchange followed the negotiated process model of the successful 2000 West Desert Wilderness Exchange. However, the San Rafael Swell exchange, proposed under a new federal administration and new political circumstances, met with additional challenges and obstacles. The exchange came under fire with allegations that the BLM land being exchanged had not been properly appraised, and the deal dissolved. The crux of the appraisal allegations was that BLM had grossly undervalued the land it planned to exchange with SITLA, in some cases without taking the mineral value of the land into account.³⁶ This allegation was of particular concern in light of the fact that the minerals were part of the land exchange.³⁷ It was determined that the monetary discrepancy between the BLM land appraisal and what it was more likely worth was as high as \$100 million.³⁸ Aside from a discrepancy in value, there is no legal bar to the federal government exchanging minerals as part of a land exchange.

An investigation by the Office of the Inspector General into the land exchange process followed, the results of which were critical of how land appraisals were completed. This led the Department of Interior to consolidate the real estate appraisal functions of the BLM, National Park Service, U.S. Fish and Wildlife Service, and Bureau of Reclamation into the Appraisal Services Directorate (ASD) in November 2003.³⁹ Appraisers in the Directorate are now charged with producing appraisals that comply with the Uniform Standards of Professional Appraisal Practice and the Uniform Appraisal Standards for Federal Land Acquisitions, and must also be reasonably supported by market information.⁴⁰ The primary reason for the consolidation was to increase the objectivity with which appraisals are done and establish consistent policies and procedures.⁴¹

Consequentially, federal land exchanges were brought back full circle to a quasi-administrative process requiring full appraisal and transparency prior to closure of the exchange deal. This case highlights the difficulty that state trust land managers can face in negotiating exchange transactions with the federal government. Shifting political circumstances and changing rules of process can set what may seem a straightforward exchange effort on its head, substantially adding to the length and expense of completing these transactions.

In 2009, the Department of Interior Inspector General evaluated the ASD and found that the ASD is weak and undermined by other bureaus, leaving it unable to function efficiently.⁴² Since the formation of the ASD, the agencies which previously conducted appraisals have all acted to usurp the ASD and reclaim appraisal of lands within their jurisdiction. The General Accounting Office (GAO) has also performed an evaluation of the ASD and found that, while the quality of appraisals has improved since ASD's inception, its appraisal policies and procedures do not fully ensure compliance with recognized appraisal standards.⁴³ Specifically, GAO found that ASD appraisers did not apply the specialized skills needed to appraise lands with significant natural resource value, and performed cursory reviews of appraisals without considering key property characteristics, such as roads and other infrastructure. GAO also identified problems with consistency from one appraisal to the next.

Exchange valuation may well be on the verge of undergoing yet another reform. Parties who wish to enter into land exchanges with the federal government should be aware of the issues surrounding land valuation; they should ensure that the appraisal of both the federal and state lands involved in the transaction can withstand a robust review by both conservative and liberal watch groups.



¹ *Fain Land & Cattle Company v Hassell*, 163 Ariz. 587, 790 P.2d 242 (Ariz. 1990).

² *Id.* at 592.

³ S.C.R. 1047 is accompanied by S.B. 1410 which provides the statutory framework for exchanges of state lands.

⁴ S.C.R. 1047 (2) Amending Ariz. CONST. Art. 10, § (12) (A).

⁵ S.C.R. 1047 (2) Amending Ariz. CONST. Art. 10, § (12) (E).

⁶ S.B. 1410 (1) Amending Ariz. Rev. Stat. § 37-604(A).

⁷ S.C.R. (2) Amending Ariz. CONST. art. 10, § (12) (A).

⁸ Idaho Land Enhancement Act, Pub. Law No. 109-371, 190 Stat. 2645, 2006.

⁹ Benna, Lawrence. July 20, 2005 testimony from hearing before the Senate Energy and Resources Committee, Subcommittee on Public Lands and Forests on S. 1131 http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1483&Witness_ID=4222.

¹⁰ Text of S. 1131 (109th) Idaho Land Enhancement Act at <http://www.govtrack.us/congress/billtext.xpd?bill=s109-1131>.

¹¹ http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.72089.File.dat/h2200-1.pdf.

¹² Bureau of Land Management Land (BLM) Exchange Handbook H-2200-1, 1-15.

¹³ <http://governor.utah.gov/rdcc/Y2005/05-5088.pdf>.

¹⁴ Kristen Wyatt, *Salazar-sponsored Land Swap Under Fire*, THE PUEBLO CHIEFTAIN (Colorado), 17 August 2010, http://www.chieftain.com/news/local/article_befd2136-a9c0-11df-99a3-001cc4c03286.html (Rep. John Salazar was recently accused of political favoritism when the public discovered that the beneficiary of the proposed land exchange was Salazar's largest political donor).

¹⁵ Petrified Forest Expansion Act of 2004, Pub. Law No. 108-430, 3 December 2004.

¹⁶ Dennis Wagner, *Petrified Forest Park Expansion Stalled*, USA TODAY, 1 April 2008.

¹⁷ Dennis Wagner, *Huge Land-swap Proposals in Doubt Due to Renzi Upheaval*, THE ARIZONA REPUBLIC, 18 March 2008.

¹⁸ BLM Exchange Handbook H-2200-1, 12-1.

¹⁹ Known within the BLM as WO-620.

²⁰ BLM Land Exchange Handbook, 12-1.

²¹ *Id.*

²² *Id.* at 12-2

²³ Lucinda Dillon, *State and BLM Swap Property*, DESERET NEWS, 5 March 2001.

²⁴ Public Law 106-301, Utah West Desert and Exchange Act of 2000. 106th Congress. 13 October 2000.

²⁵ Remarks of Mr. George Miller, Congressional Record, 11 July 2000, at 13790-91.

²⁶ Matt Kelley, *Senate Approves Plan to Swap 212,000 between Utah, Feds*, ASSOCIATED PRESS, October 2000.

²⁷ Congressional Record, 11 July 2000, at 13790.

²⁸ Janine Blaeloch, *Rep. Hansen's West Desert Land Exchange Shortchanges the Public*, SALT LAKE TRIBUNE, 25 June 2000.

²⁹ *Id.*

³⁰ Matt Kelley, *Senate Approves Plan to Swap 212,000 between Utah, Feds*, ASSOCIATED PRESS, October 2000.

³¹ H.R. 4968/S.2745 (2002).

³² Brent Israelsen, *Schools Would Gain Little in Land Swap*, SALT LAKE TRIBUNE, 30 September 2003.

³³ *Id.*

³⁴ Dan Harrie and Greg Burton, *Swap Probe Ordered*, SALT LAKE TRIBUNE, 1 October 2002.

³⁵ H.R. 4968, Statement of Rep. Chris Cannon, Utah.

³⁶ *Id.*

³⁷ The sale of Federal mineral leases is a hotly contested topic in the west, particularly in Utah and Colorado. The Federal government is consistently accused of not selling enough leases while at the same time, not selling them at high enough prices.

³⁸ Lee Davidson, *Land-Swap Appraisals Targeted*, DESERET MORNING NEWS, 18 March 2004.

³⁹ Bureau of Land Management, Lands & Realty, Real Estate Appraisal, <http://www.blm.gov/nhp/what/lands/realty/appraise.htm>, last updated 9 September 2004.

⁴⁰ *Id.*

⁴¹ Department of the Interior press release "Norton Announces Reform of Real Estate Appraisal Function." 19 June 2003.

⁴² Evaluation Report on the Dep't of the Interior's Appraisal Operation, WR-EV-OSS-0012-2009, December 2009.

⁴³ Government Accountability Office, Interior's Land Appraisal Services - Actions Needed to Improve Compliance with Appraisal Standards, Increase Efficiency, and Broaden Oversight, September 2006, <http://www.gao.gov/highlights/d061050high.pdf>.

About the Sun Corridor Legacy Program

The "Sun Corridor" refers to Arizona's megapolitan area stretching from Nogales in the south to Prescott in the north, with Phoenix and Tucson at its core. The megapolitan is growing at a tremendous rate, and that rapid growth comes with the challenge of conserving natural desert and open space while improving urban quality of life. As one of the four keystone initiatives of the Sonoran Institute, the Sun Corridor Legacy Program addresses growth and change as models for sustainable development. Our five goals include:

Promote a rail system effectively linking the entire Sun Corridor

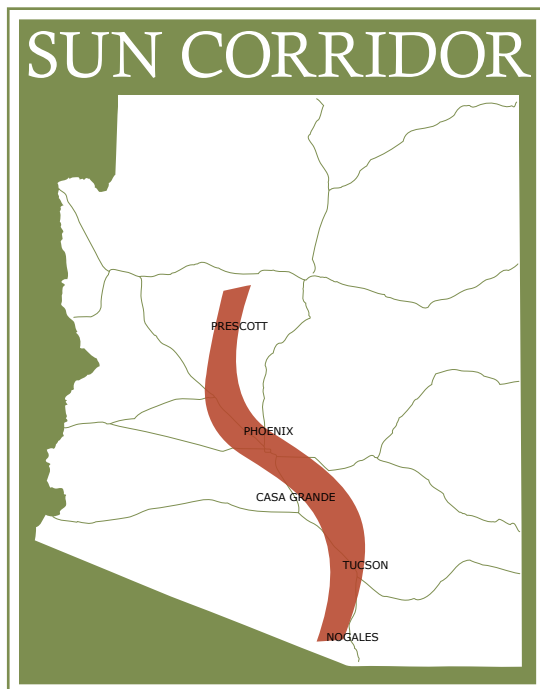
Create a world-class model for sustainable desert cities

Advance the availability of clean and secure energy for the Sun Corridor

Conserve more than one million acres in Arizona for future generations

Encourage state policies that protect and restore free flowing rivers in Arizona

The Sun Corridor's desirable climate, housing options, and relatively low cost of living are reasons why this area continues to attract new residents. The area's future quality of life, environmental quality, and economic prosperity will be determined largely by how well growth is managed. Going forward, regional solutions that comprehensively address conservation, development, transportation, water, and energy issues will be critical to a sustainable future.



Arizonans must make better decisions about how to develop communities, preserve cherished open spaces, ensure an adequate high-quality water supply, protect our quality of life, and enhance economic prosperity. New approaches to leadership are needed to make this happen and Sonoran Institute finds them through work with federal, state and local governments and stakeholder groups to determine the best mix of use and conservation for lands in this region. To find out more about the program's work, visit www.sonoraninstitute.org.



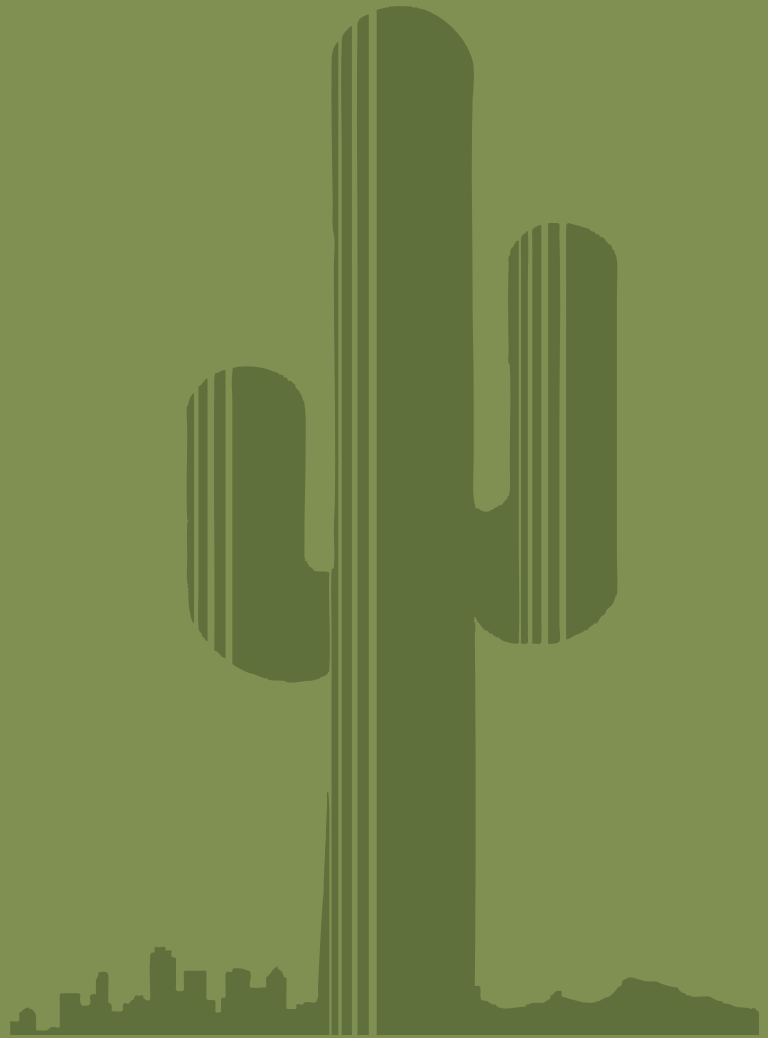
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Cover photo - Ian Dowdy

F-16 photo - U.S. Air Force photo/Tech. Sgt. Raheem Moore

Remaining photos - Mark Skalny

Landscapes depicted are simply representations of BLM and state trust land in western Maricopa County. They are not necessarily the subject of potential land exchanges.



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