



Idaho State Senate

SENATOR CHUCK WINDER
ASSISTANT MAJORITY LEADER

Senator Brent Hill, President Pro Tempore
Speaker Scott Bedke
Co-Chairmen of Legislative Council
Hand Delivered
Idaho State Capitol
Boise, Idaho

January 20, 2015

Dear President Pro Tempore Hill, Speaker Bedke and Co-Chairmen of the Legislative Council:

In April of 2013, the Idaho Legislature passed HCR 22 and 21, authorizing the Legislative Council to appoint an Interim Legislative Committee to undertake and complete a study on the process of the State acquiring title to and control of public lands controlled by the federal government in the State of Idaho. This Committee met during the Legislative Interims of 2013 and 2014. Attached you will find the Final Report of the Interim Legislative Committee on Public Lands.

In the Report, you will find a brief history of public lands controlled by the federal government in Idaho, legal and economic issues pertaining to a possible transfer of federally controlled public lands, a summary of testimony, Committee recommendations and dissenting views as well as other important inclusions. Not to be overlooked is a comprehensive understanding of two things by the Committee, both discussed in the Executive Summary. First, the Committee understands that most Idahoans believe that land management sources located closer to both the people and lands affected will produce superior results. Second, the Committee agrees that the State's efforts to maintain lands must improve and that continued collaboration and public efforts to this end are necessary. The Report lists the Committee's thoughtful solutions based upon this awareness.

On behalf of the Committee and myself, please accept our sincere gratitude for the authorization of and appointment of the Committee. It is our hope that the findings of the Committee are useful to the House and Senate in moving forward with any legislative decisions regarding the acquisition of federally controlled public lands.

In addition, I want to acknowledge and thank the members of the Committee for their time, their mindfulness and for their overall service to the Committee and the people of Idaho. As always, it is a pleasure serving the citizens of Idaho.

Sincerely

A handwritten signature in blue ink that reads "Chuck Winder".

Senator Chuck Winder

Co-Chairman

Interim Committee on Public Lands

**Federal Lands Interim Committee
Report to the 63rd Idaho Legislature
HCR 21 (2013)
January 30, 2015**

Senator Chuck Winder, Chairman

Senator Bart Davis

Senator John Tippetts

Senator Sheryl Nuxoll

Senator Michelle Stennett

Representative Mike Moyle

Representative Terry Gestrin

Representative Stephen Hartgen

Representative Mat Erpelding

Former Representative Lawrence Denney

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Acronyms/Abbreviations

| | |
|------------|---|
| Art. | Article |
| BLM | Bureau of Land Management |
| cl. | Clause |
| Committee | Federal Lands Interim Committee |
| CRS | Congressional Research Service |
| ESA | Endangered Species Act |
| FLPMA | Federal Land Policy and Management Act |
| HCR | House Concurrent Resolution |
| IDL | Idaho Department of Lands |
| Land Board | Idaho State Board of Land Commissioners |
| MUSYA | Multiple-Use Sustained-Yield Act |
| NEPA | National Environmental Policy Act |
| NPS | National Park Service |
| PAG | University of Idaho Policy Analysis Group |
| PILT | Payments in Lieu of Taxes |
| Pub. L. | Public Law |
| Sec. | Section |
| SRS | Secure Rural Schools |
| U.S.C. | United States Code |

I. Introduction

The Sixty-second Legislature of the State of Idaho approved House Concurrent Resolution (“HCR”) No. 21 that appointed a legislative committee to study the process by which the State might acquire title to and control of public lands controlled by the federal government in Idaho. HCR 21 resulted in the commission of the bipartisan, bicameral Federal Lands Interim Committee (“Committee”) to investigate how best to go about acquiring title to federal lands in Idaho. This report is the culmination of the Committee’s work.

II. Executive Summary

The United States disposed of some 70% of its landholdings between 1781 and modern times. In the late 1800s and 1900s, the federal government began to transition from a policy of land disposal toward retention and conservation. Today, the federal government manages approximately 62% of Idaho. While the federal government has existing authority to dispose of lands, particularly those of the United States Forest Service and the Bureau of Land Management (“BLM”), those disposal authorities are often restricted and therefore rarely used.

In the Committee’s numerous meetings and hearings around the State, it heard consistent support for continued public access to public lands regardless of their management by the federal government or the State. The Committee found little support for the sale of any federal lands to private entities after being transferred to the State except where limited sales or exchanges might consolidate retained lands. The Committee also heard widespread sentiment that current management of federal lands is not producing the array of multiple use benefits contemplated by the organic statutes that control federal land management such as the National Forest Management Act, the Federal Land Policy and Management Act (“FLPMA”), and the Taylor Grazing Act. It also found many Idahoans believe a government that is closer to both the people impacted by governmental decisions and the lands managed by the government would produce better results.

The Committee undertook a review of both economic and legal analyses. Economic analysis suggests that under certain assumptions of quantities of commodities and prices for those commodities, the State might economically manage transferred federal lands with the additional benefit of private sector employment and the taxes received by the State on income and sales generated as a result. This economic approach likely would work best on a graduated basis over many years.

Legal analysis suggests that litigation of state claims to ownership of federal lands would be a time-consuming and expensive endeavor without a great deal of certainty as to the outcome. While the State could make good faith legal arguments for the transfer of federal lands, the federal government and intervenors similarly could assert good faith legal defenses. While not eliminating litigation as a future alternative, the Committee found litigation is not the preferred path to resolve federal land management issues. The Committee determined that if litigation were a panacea, it would have succeeded decades ago.

The Committee coalesced around the concept of continued support for collaboration with the federal government to increase the State’s control over federal lands, be it through current

models of collaboration on specific landscapes, the expansion of the trust model that is currently employed by the State to manage its endowment lands, or through legislation of the type that recently prompted Forest Service approval of treatment of nearly 2 million acres of federal forest lands in Idaho at high risk of wildfire due to insect and disease mortality.

The Committee also recommends exploration of interstate cooperation, such as compacts with the federal government.

While the Committee learned much over the last two years, it has primarily learned how much more work needs to be done to improve the management of federal lands through State efforts. For this reason, the Committee also recommends the continuation of this effort by a commission or office dedicated to exploration and implementation of the best ideas and practices arising not only out of Idaho but out of other similarly situated western states whose citizens similarly conclude that there has to be a better way.

III. Background

A. Brief History of the Issues

1. History of Federal Lands¹

Initially, the federal government did not own any land within the original 13 states. Rather, ownership of lands between the Appalachian Mountains and Mississippi River were ceded by these states to form the Union. The basis for the federal government's ownership of any lands was the Property Clause of the U.S. Constitution that gave Congress authority over lands, territories, and other property of the United States. The Property Clause states in its entirety:

The 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

¹ The Congressional Research Service (“CRS”) is housed in the Library of Congress and provides nonpartisan analysis of issues at the request of members of Congress. CRS has produced several reports on the question of federal lands ownership that provide a useful source of historical and current information. The factual setting for this memorandum is excerpted from three CRS reports produced in 2007 and 2012. No effort is made to specifically cite the extensive quotes and information gleaned from the CRS reports that support the following overview. The CRS reports are Kristina Alexander, Cong. Research Serv., RL 34267, *Federal Lands Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention*, (2007); Ross W. Gorte, Cong. Research Serv., R 42346, *Federal Land Ownership: Overview and Data*, (2012); Federal Land Ownership: Carol Hardy Vincent, Cong. Research Serv., RL 34273, *Federal Acquisition and Disposal Authorities*, (2012).

shall be so construed as to Prejudice any Claims of the United States, or of any particular State.²

While the Property Clause forms the basis of Congress's power over federal lands, the Constitution is silent as to the methods of disposing of property of the United States. The clause has, however, been read by the Supreme Court as conferring plenary power; that is to say, complete in every respect. Congress may limit the disposition of public lands through any manner consistent with its public policy views. Congress acts as both proprietor of the public lands and as the legislature over the lands with complete authority to make "needful rules" that it determines are necessary. While in some instances the states have concurrent jurisdiction over federal lands, for instance hunting and fishing laws, any conflict between state and federal laws will bring into question the state law based on the Constitution's Supremacy Clause.³

A corollary to the Property Clause is the "equal footing doctrine" that arises out of the clause preceding the Property Clause.⁴ That clause addresses how new states are to be admitted into the Union. The doctrine has come to mean the equality of constitutional rights and power among the various states of the Union. While this concept is now a truism, it was not favored at the Constitutional Convention. That body struck from the Constitution two sentences that required states to be admitted on the same terms as the original states. During the Convention, James Madison of Virginia insisted that the western states should not be degraded by entry into the Union on lesser terms than the original states. Nevertheless, the Constitutional Convention overrode Madison's protests and voted to delete the requirement of equality from what would become Art. IV, Sec. 3, c.1 of the Constitution.⁵ Prior to this vote, however, Georgia and Virginia had already ceded land to the United States upon the express condition that new states would be formed therefrom and admitted to the Union on an equal footing with the original states.⁶ When Louisiana was admitted to the Union in 1812, the principle of equality of states was extended to those states created from territories purchased from foreign sovereigns.

The initial policy of the federal government was disposal of federal lands to both states and private landowners to pay Revolutionary War debts, to finance the new government, and later to encourage the development of infrastructure and settlement of the new territories. President Washington signed into law the Northwest Ordinance of 1789 by which the United States officially laid claim to lands northwest of the Ohio River, east of Mississippi River, and

² Art. IV, Sec. 3, cl. 2. Nearly all case law and commentary focuses on the first part of that clause with little or no attention paid to the portion of the clause stating that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." Further research would be necessary to determine what, if any, impact that second half of the clause has on this analysis.

³ Art. VI, cl. 2.

⁴ The equal footing doctrine is discussed in greater detail in Section V(A) of the report.

⁵ 2 M. Farrand, *The Records of the Federal Convention of 1787*, 1911 ed. at 454. Some observers disagree with this interpretation of the records of the Constitutional Convention.

⁶ *Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845).

south of the Great Lakes. For the first time, the federal government would be sovereign over these new lands and establish the process for their admission into the Union rather than through the expansion of existing states and their sovereignty under the Articles of Confederation. The first state carved from the Northwest Territory was Ohio pursuant to the Enabling Act of 1802. The Act stated that Ohio, “when formed, shall be admitted into the Union upon the same footing with the original States in all respects whatever.”

In 1812, the General Land Office was established to administer the disposal of federal lands. Later in the 19th Century, Congress enacted numerous laws to grant, sell, or otherwise transfer federal lands into private ownership through statutes such as the Homestead Act of 1862 and the General Mining Law of 1872. Right-of-way grants to railroads were provided as incentives to create the nation’s transportation system. Between 1781 and 2006, nearly 816 million acres of the public domain were transferred from the federal government to private ownership. Nearly all of that transfer occurred prior to 1940. Another 328 million acres were granted to the states with nearly a third of that acreage having been granted to the new state of Alaska in 1958. In total, the federal government disposed of 1.275 billion acres of the 1.841 billion acres it acquired from original state cessions, foreign treaties, and land purchases.

In the late 1800s and through the 20th Century, Congress began to shift its approach toward withdrawal of, or reservation of, lands. Withdrawn lands were lands removed from disposal under some or all of the disposal laws while reserved lands were reserved for a particular national purpose. Early withdrawals were primarily designed to retain lands for future disposal or for Indian trading posts, military reservations, mineral reservations, and other public purposes. For example, Yellowstone National Park was created by an Act of Congress in 1872 as a “pleasuring ground” for future generations. President Theodore Roosevelt began the practice of withdrawing federal lands to protect wildlife in 1903. The Forest Service was begun in 1905. The Taylor Grazing Act of 1934 managed vast swaths of the West “pending their disposal” but the Act also marked the shift in federal law toward ending general disposal of lands and retaining those lands in federal ownership—in this instance for the creation of grazing districts for the orderly use of federal lands by the cattle and sheep industry.

As the debate over federal retention continued, Congress created the Public Land Law Review Commission in 1964 to review existing public land laws and regulations and examine the policies and practices of federal agencies that administered those lands. The Commission’s 1970 report contained 137 legal and policy recommendations. The first recommendation was that federal lands should be retained in federal ownership. This eventually led to the passage of FLPMA that formally ended the previous disposal policy by declaring the policy of the United States to retain public lands in federal ownership unless as a result of FLPMA’s land use planning process it was determined that “disposal of a particular parcel will serve the national interest.”⁷

Displeasure in the West with FLPMA’s announced reversal of policy and federal oversight and management of retained lands led to the “Sagebrush Rebellion” of the 1970s to force the federal government to divest its western land holdings. These efforts took the form of state and local legislation, court challenges, federal administrative changes, and efforts at federal

⁷ 43 U.S.C. § 1701(a)(1).

legislation. The efforts generally failed for a number of reasons that can be loosely categorized as lack of success in federal court and lack of political will in both Congress and in the Administration. The rebellion tended to subside in the public's eye but concerns have not fully dissolved and in some cases have exacerbated over the intervening decades in the view of some state governments and western state citizens. This has led to recent efforts such as those in Utah with its passage of the Transfer of Public Lands Act that demanded that the United States extinguish title to public lands and transfer them to Utah on or before December 31, 2014. Idaho's HCR 21 and 22 are further evidence of the continuing discontent within the Legislature with federal land management in Idaho.

2. Early Developments Affecting Idaho Lands

Present day Idaho was part of the Oregon Compromise with Great Britain of 1846. From 1848 to 1853, present-day Idaho was part of the Oregon Territory. From 1853 to 1859, Idaho was divided between the Oregon Territory and Washington Territory. In this period, the eastern boundary of the Oregon and Washington Territories was the Continental Divide. Then, when Oregon became a state in 1859 with its present boundaries, all of Idaho became a part of Washington Territory. The gold discoveries in northern Idaho caused a shift in population to the mining communities and it appeared the capitol of the Washington Territory would move from the Puget Sound area to be near the new mines.

Political maneuverings finally resulted in the creation of the Territory of Idaho on March 4, 1863. Its western boundary with Oregon and Washington was as it is today, however, it encompassed all of Montana and most of Wyoming, a territory then larger than Texas. The three mining regions of this enormous territory were hundreds of miles from each other and were separated by great mountain ranges. As a result, the Montana Territory was stripped out with its present boundaries in 1864 and, when the Wyoming Territory was created in 1868, Idaho's present boundaries were permanently fixed.

Four months after President Lincoln signed the bill creating the Idaho Territory, a government was initiated for the area. Idaho's Admission Act, which is discussed in greater detail in Section V(A), below, set forth the requirements the territory had to meet in order to be admitted on an "equal footing in all respects whatsoever" with existing states. The Admission Act's resolutions adopted by Congress contain certain disclaimers to unappropriated public lands. Section 12 of the Idaho Admission Act states in part: "The state of Idaho shall not be entitled to any further or other grants of lands for any purpose than as expressly provided in this act." The other lands expressly provided for in the act were sections of endowment lands given to the State for the purpose of providing funds for the schools, universities and other institutions of the State. In addition, Article XXI, Section 19 of the Idaho Constitution contains disclaimer language to the same effect that reads:

And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been

extinguished by the United States, the same shall be subject to the disposition of the United States. . . .

3. Current Federal Land Ownership⁸

The federal government continues to own⁹ and manage approximately 635 million acres throughout the nation. Four specific land management agencies manage over 600 million of those acres: the National Park Service (“NPS”), BLM, Fish and Wildlife Service, and the Forest Service. Additionally, the Department of Defense administers another 19 million acres. These lands comprise approximately 28% of the total land base of the United States. The White House’s FY2012 Budget estimated the value of all federal lands in 2010 at \$408 billion. Federal land ownership in the states varies from less than one percent in Connecticut to more than 80% in Nevada. Not surprisingly, the 11 states with the greatest percentage of federal ownership are located in the West, including Idaho where, as of 2010, the federal government managed 61.7% of the state, making it the fourth highest percentage of any states behind Nevada (81.1%), Utah (65.5%), and Alaska (61.8%).

From 1990 to 2010, federal land ownership actually declined by more than 18 million acres through numerous individual acquisitions and disposals, the bulk of which came in Alaska through disposal of BLM acres. Exclusive of Alaska, federal western landholdings increased slightly over that period by approximately 93,000 net acres. Idaho experienced a 70,000 acre increase in federal ownership in the 20 years between 1990 and 2010. Overall, nearly half of the land in the 11 contiguous western states is federally owned. By contrast, the federal government owns 4% of the lands in the rest of the country.

4. Current Federal Disposal Authorities¹⁰

There is no central legislative authority for the disposal of federal lands managed by the BLM, Forest Service, Fish and Wildlife Service, and NPS. Each agency operates under different organic statutes and regulations.

The NPS does not have general authority to dispose of NPS lands. They can only be disposed of by future acts of Congress.¹¹ Nor does the Fish and Wildlife Service have general authority to dispose of its lands. Like the NPS, refuge lands can be disposed of only by a future act of Congress.¹² The Forest Service, however, has numerous authorities to dispose of its lands although many of these authorities are constrained by the land use planning process or

⁸ See CRS Report R 42346.

⁹ Some commenters argue that the public lands are owned by citizens of the United States and merely managed by federal agencies, such that the agencies do not “own” any lands. References to federal ownership in this memorandum are an expression of jurisdictional authority.

¹⁰ CRS Report RL 34273.

¹¹ This statement sets aside, for the moment, whether disposal of NPS lands is required by contract.

¹² See note 11, above.

requirements that limit disposals to specific geographical areas or particular administrative properties or facilities. The oldest statutory disposal authority dates back to 1897 which allowed the President to revoke, modify, or suspend any executive orders and proclamations issued under a statute authorizing the President to create forest reserves. The forest reserves were reserved from the public domain and eventually came under the authority of the Forest Service when it was established in 1905. Other statutes such as the 1911 Weeks Law and the Bankhead-Jones Farm Tenant Act of 1937 authorized land disposal. In 1983, Congress passed the Small Tracts Act to authorize disposal of Forest Service lands valued at no more than \$150,000 and upon satisfaction of various conditions.

The BLM has land disposal authorization including exchanges and sales pursuant to FLPMA, transfers to other governmental units for public purposes, patents under the 1872 General Mining Law (that have for a number of years been withheld by a series of Congressional moratoria) and geographically limited sale authority. A significant example of the latter authority is the Southern Nevada Public Land Management Act that allowed the Secretary to sell or exchange certain lands around Las Vegas. Other authorities that have been used previously for disposal have expired, namely the Federal Land Transaction Facilitation Act that expired in 2011 and that provided for the sale or exchange of BLM lands identified for disposal under land use plans.

It comes as no surprise to Westerners that while the U.S. has disposed of approximately 70% of its holdings since the earliest days of the Republic, the remaining 30% that it retains are largely found in the 11 contiguous western states, including Idaho. Nor is it a surprise that while the two primary land management agencies—the Forest Service and BLM—have land disposal authorities, they are constrained by legislative and practical limitations. The continuing discontent with the status quo in Idaho is reflected in HCR 21 and 22.

5. Previous Idaho Land Transfer Deliberations

a. Early Efforts

Shortly after Idaho statehood in 1890, the first National Irrigation Congress convened in Salt Lake City in September 1891. The congress prepared a written memorial to the United States Congress, adopting a resolution favoring the granting of all public lands in the arid western states to those states “in trust, upon such conditions as shall serve the public interest,” except the mineral estate, for the purpose of developing irrigation. The memorial complained of the federal government’s inability to prevent wildfire on the public domain with a consequent loss of “stumpage value of the timber alone[] estimated, without extravagance, at \$100 million per year.” The memorial also expressed concern for loss of forests serving as “the chief conservators of the water that is to irrigate the valleys below.” Idaho’s delegate to the committee drafting the memorial was Arthur D. Foote, who designed and developed the irrigation project that would become Arrowrock Dam. In an appendix to the memorial setting forth the state-by-state condition, Idaho stated that it should own the forested public lands so as to preserve them and the water supply that they provided. Idaho also announced that it should own the public grazing land in order to generate revenues that would pay the expense of protecting the forests. Finally, Idaho declared that it should own the irrigable land to likewise obtain revenue from their sale with which to regulate and distribute the irrigation water so that it might “produce the

greatest benefit to the commonwealth and to the individual irrigator.” The Idaho appendix complained that, “Under the care of the General Government the forests of this State are being destroyed with terrible rapidity, and there appears no hope of change in this policy.” In apparent response to questions about the State’s ability to administer all of the public lands within the state, the answer was given, “It would seem like questioning the ability of our people to govern themselves, to question their ability to administer the waters, lands, and forests upon which their livelihood depends.”

¹³Congress passed the Carey Act of 1894 that authorized the General Land Office to transfer up to one million acres each to Idaho and other western states. Under the Carey Act, Idaho ultimately acquired three million acres for state-managed reclamation projects. In debates over the Reclamation Act of 1902, western states opposed a proposal to cede all public lands to the states for reclamation under state sovereign authorities because states wanted the federal government to take the lead on reclamation. In 1929, President Hoover proposed to cede all unallocated federal lands to the states except mineral rights. The states opposed this proposal because, as Senator William Borah was quoted to say, “It was like handing the states an orange with the juice sucked out of it.”

In the post-World War II era, hearings were held throughout the West in response to legislation introduced by a Wyoming senator to cede all public lands to the western states. The Idaho Legislature responded with Senate Joint Memorial No. 6 (1947) which affirmed that the federal government was better able to promote conservation, development, and use of the lands. Eastern Idaho users of the federal lands, including stock growers, farmers, sportsmen, and businessmen, opposed the Wyoming proposal. The legislature feared that ceded lands would be sold into private ownership. Following the Sagebrush Rebellion of the late 1970s and early 1980s, Idaho established an interim committee to study all matters related to management and control of unappropriated public lands in the State. The committee ultimately voted to take no stand regarding the State’s control of unappropriated public lands and recommended additional study.

b. Idaho Federal Lands Task Force (1996-2000)

The Idaho State Board of Land Commissioners (“Land Board”) appointed a Task Force in 1996 to look at the alternative methods of managing federal lands within the State.¹⁴ The Task Force concluded that the current federal land management process resulted in uncertain decision-making, community destabilization, and environmental deterioration. It further found that significant changes in the process were necessary to correct those problems. The Task Force recommended pilot projects to test those procedural action alternatives.

¹³ The following information in this subsection is taken from the testimony of Idaho Deputy Attorney General Steven W. Strack.

¹⁴ For more information about the report *see* Dr. Jay O’Laughlin’s testimony posted on the Committee’s webpage including a copy of the report and a subsequent working group report on federal land pilot projects in Idaho.

Concurrent with the work of the Task Force, Dr. O’Laughlin and University of Idaho Policy Analysis Group (“PAG”) produced a report entitled “History and Analysis of Federally Administered Lands in Idaho,” published June 1998. Similar to the Task Force report, this PAG analysis provided alternate governance models for federal land management short of a change of ownership of federal lands. The three management models chosen for consideration were the collaborative approach, the trust model, and the cooperative model.

Following the Task Force’s report to the Land Board in 1998, the Land Board established an eight-member working group to identify specific pilot projects on Idaho’s federal lands. The Working Group recommended five pilot projects for consideration. These pilot projects were selected under an assumption that the State would neither manage, control, nor own the federal lands where the projects were to occur, thus requiring congressional legislation to authorize federal agency participation in any of the pilot projects. In total, five pilot projects encompassing 10.8 million acres of federal land, virtually all of which was National Forest System lands, were selected. Of these five, the one that made the most progress was the Clearwater Basin Stewardship Collaborative encompassing 2.7 million acres of the Clearwater and Nez Perce National Forests with a goal of restoring elk habitat and other species habitat consistent with social objectives and historical conditions. Legislation was introduced in Congress but it did not pass, primarily on Administration statements that no additional statutory authority was needed.

6. Other Western State Activities

In addition to the Idaho Legislature’s adoption of two concurrent resolutions in 2013, a number of other western states similarly took action that year on the matter of transfer of federal lands. Some of those efforts succeeded; some did not. In **Colorado**, legislation was introduced to require the federal government to extinguish title to all agricultural public lands and transfer title to the state. That legislation failed. In **Montana**, the House and Senate passed a joint resolution requesting an interim study evaluating the management of certain federal lands, assessing risks and identifying solutions. In **Nevada**, Assembly Bill 237 was enacted into law creating the Nevada Land Management Task Force to study the transfer of public lands in the state. In **New Mexico**, legislation died that would have defined public lands for transfer from the federal government to the state and developing a mechanism for that transfer. It would have also created a Public Lands Transfer Task Force. In **South Carolina**, the House passed a resolution expressing support for western states seeking transfer of federal lands and urging Congress to engage in good faith communications and cooperation to coordinate that transfer. In **Utah**, a law was passed to require the Public Lands Policy Coordinating Office to conduct a study and establish reporting requirements. In **Wyoming**, a law was passed to create a task force to investigate legal recourses to compel federal relinquishment of ownership and management of lands within the state.

B. Idaho House Concurrent Resolutions

1. HCR 21 (2013)

This resolution authorized the Legislative Council to appoint the Federal Lands Interim Committee. The resolution required the issuance of a progress report to the second regular

session of the 62nd Idaho Legislature and a report of the Committee's findings, recommendations, and proposed legislation, if any, to the first regular session of the 63rd Idaho Legislature. The resolution also spoke to the appointment of non-legislative members of the Committee.

2. HCR 22 (2013)

This concurrent resolution was much more extensive than HCR 21, consisting of 60 recitals laying out a case for transfer of federal lands based on a contract theory between the State and the federal government. Those recitals were followed by resolutions demanding immediate transfer to Idaho of title to all federal lands within the State. It called for cooperation from the federal government, intention to cede back national park lands, wilderness areas, national monuments, Department of Defense lands, and Department of Energy lands, the creation of the Federal Lands Interim Task Force, and consideration of sale of transferred lands and distribution of proceeds from sales.

IV. The Committee's Work

A. Charge

The Federal Lands Interim Committee was a two-year interim committee formed in 2013 pursuant to the authority of HCR 21 and 22. Specifically, the Committee was charged to (a) study "the process for the State of Idaho to acquire title to and control of public lands controlled by the federal government," (HCR 21, 1.21-23), and (b) "review how to manage access, open space, sustainable yields and the multiple use of the public lands and determine, through a public process, the extent to which public land may be sold." (HCR 22 at 8, 1.24-28). The Committee was directed to make a progress report to the Sixty-second Idaho Legislature and a final report to the Sixty-third Idaho Legislature. The progress report is available on the Committee's website at www.legislature.idaho.gov/sessioninfo/2013/interim/lands_ProgressReport.pdf.

The Committee wishes to extend its appreciation to former Committee members Representative Eric Anderson and Representative Grant Burgoyne, who have been ably replaced through the service of new members Representative Terry Gestrin and Representative Mat Erpelding. The Committee expresses its gratitude to former Committee member Representative Lawrence Denney, who retired from the Legislature following his election as Idaho's Secretary of State.

The Committee also appreciates the work of the Committee staff, Katharine G. Gerrity, Ray Houston, and Mike Nugent. The Committee extends its appreciation and condolences to the family of Toni Hobbs who ably assisted in our deliberations. The Committee was originally co-chaired by Senator Chuck Winder and Representative Lawrence Denney.

B. Meetings and Hearings

The Committee met in open session in Boise on August 9, October 28 and December 4, 2013 and on March 14, 2014. The committee held public hearings in Kamiah and St. Maries on

September 11, 2014, in Sandpoint on September 12, 2014, in Idaho Falls and Soda Springs on October 9, 2014, and in Twin Falls and Hailey on October 10, 2014.

C. Summary of Select Public Testimony

This section of the report provides a brief summary of some of the testimony received by the Committee. Readers are encouraged to go to the Committee's website to obtain the full testimony and documents received during the Committee's meetings and hearings, which are located at www.legislature.idaho.gov/sessioninfo/2013/interim/lands.htm.

During the August 9, 2013 meeting of the Committee, Dr. Jay O'Laughlin, Ph.D., Professor of Forestry & Policy Sciences, Director of Policy Analysis Group, College of Natural Resources, University of Idaho, provided the members with a history and analysis of federally administered lands in Idaho. Dr. O'Laughlin also provided the Committee with a detailed explanation of the Secure Rural Schools and Community Self-Determination Act of 2000, also known as the Craig-Wyden bill.

Dr. Donald J. Kochan, Professor of Law, Chapman University School of Law, addressed his legal analysis and case study of Utah's Transfer of Public Lands Act and his perspective on Idaho's opportunities. He also discussed in detail his legal theory of the federal government's compact-based "duty to dispose" of public lands.

Following the academic presentations, the committee was briefed by Mr. Steve Strack, Deputy Attorney General, Natural Resources Division of the Office of the Attorney General, on the Idaho Constitution and his research on the Founders' understanding of state and federal authority over public lands. He also addressed past efforts by the State of Idaho and other states to study or obtain the transfer of federal lands and conclusions that he drew from those efforts. In addition, Mr. Strack provided the members with information associated with constitutional and other legal requirements for management of any federal lands that might be transferred.

Mr. Andy Brunelle, U.S. Forest Service, addressed the committee regarding responsibilities associated with management and use of national forests in Idaho. Mr. Kurt Wiedenmann, Branch Chief for Resources, BLM Idaho State Office, provided members with information regarding the challenges and progress associated with Idaho public lands management. The final speaker of the day was Mr. David Groeschl, State Forester/Deputy Director, Forestry and Fire, Idaho Department of Lands. Mr. Groeschl addressed a hypothetical federal lands transfer, including an analysis of the potential impacts of legislation similar to Utah's Transfer of Public Lands Act. He addressed the location of potentially transferable lands, potential timber harvests, potential revenue and potential costs as well as estimates associated with infrastructure development over a period of time. He testified that, using the assumptions and numbers as presented, Idaho's acquisition of 16.4 million acres of land could generate a net profit of \$51 to \$75 million annually for public schools or other state institutions after the lands were brought fully under state management.

At the October 28, 2013 meeting of the Committee, representatives from the offices of Congressman Mike Simpson and Congressman Raul Labrador provided correspondence from the two congressmen. Congressman Simpson attached to his letter a report from the CRS on the

topic of federal land management agency appropriations and revenues for Idaho. CRS is a nonpartisan research arm of the Congress operating under the authority of the Library of Congress. Congressman Simpson provided the information with the explicit statement that he was not advocating any particular outcome of the Committee's deliberations and with a caveat that the information in the CRS report was a "snapshot in time" that addressed expenditures and revenues for a single fiscal year of some federal land management agencies with responsibilities in Idaho. Congressman Labrador's letter commended the Legislature for establishing the Committee, especially in light of his conclusion that the federal management system is broken due to outdated laws, ill-advised regulations, and overwhelmed federal agencies. He noted his legislation, H.R. 1294, the Self-Sufficient Community Lands Act, as an example of how to improve management of federal lands within the State. He also called for reform of major land management statutes including the National Environmental Policy Act ("NEPA"), FLPMA, and the Endangered Species Act ("ESA").

Also during the Committee's October 28, 2013 meeting, members heard from a number of diverse panels. The Committee requested that panels address the perceived benefits and/or concerns relating to the present state of management, control and ownership of public lands held by the federal government in the State of Idaho as well as perceived benefits and/or concerns should management, control or ownership be transferred to the State. Panels included a tribal interest panel, a sportsmen/wildlife interest panel, a grazing interest panel, an environmental interest panel and a timber interest panel. Representatives from the Coeur d'Alene Tribe, Shoshone-Bannock Tribes, and the Nez Perce Tribe appeared before the Committee to oppose transfer of federal lands to the State. These representatives raised concerns about the impact of a federal land transfer on both on-reservation and off-reservation rights such as hunting, fishing, grazing, timbering, and gathering. They also raised concerns about the impact of a transfer on U.S./Tribal treaty obligations. At the same time, they expressed their own frustrations in dealing with the federal government.

Representatives of conservation and recreational groups appeared on behalf of the Idaho Conservation League, Idaho Rivers United, Boise Area Mountain Bike Association, Boise Climbers Alliance, Winter Wildlands Alliance, American Alpine Club and Outdoor Alliance, and The Wilderness Society. They variously expressed concerns about loss of access, loss of public lands, the cost to the State to manage the lands, perceived negative impacts on Idaho's outdoor recreation industry, and related concerns.

Representatives from the sportsman/wildlife panel testified about their members' use of federal lands currently and questions that arose from the concept of transfer of these lands to the State. For example, the representative of the Idaho Outfitters and Guides Association asked how the State might assess outfitters for operating fees and administer permits for 400 licensed and permitted outfitters currently operating on federal lands. Others also raised questions about the cost of fire suppression and rehabilitation and trail management.

Another panel consisted of livestock grazing representatives. Generally these panelists supported the resolution establishing the Committee and the Committee's goal to determine if there was a better way to manage federal lands through State ownership or control. They expressed significant frustration with the current federal management regime and its impacts on their industry as well as the ripple effect on the small communities in rural Idaho that depend on

their industry for commerce. They desired more information on how the State might implement grazing on newly-acquired lands including questions related to State grazing fees that are currently higher than federal grazing fees, competitive leasing of State grazing allotments, and whether the State would continue to manage these lands for their maximum long-term financial return.

The timber interest panel uniformly expressed frustration with federal current management of national forest lands and particularly the situation in which thinning of national forests by wildfire costs a great deal of money and adds to carbon loading of the atmosphere whereas thinning of national forests by active timber management produces income and eliminates carbon loading by wildfire. The representatives expressed interest in knowing how the State would properly fund State management of national forests including adequate professional staffing to perform on-the-ground management functions. The panelists spoke of current collaborative models such as the Clearwater Basin Collaborative. While expressing support for the collaborative approach, they expressed concerns that too many acres needed active management for a collaborative approach which is often very slow and very costly. Various models were discussed including (1) outright land ownership by the State, (2) State management while leaving ownership in the federal government, (3) State contracting with the federal government, and (4) federal or State control of the lands with private sector involvement.

During the December 4, 2013, the Committee heard public testimony and also received testimony from Idaho County Commissioner Jim Chmelik, Valley County Commissioner Gordon Cruickshank, and Blaine County Commissioner Larry Schoen. Three other county commissioners addressed the Committee: Boise County Commissioner Jamie Anderson, Shoshone County Commissioner Larry Yergler and Custer County Commissioner Wayne Butts.

Mr. Jack Lyman of the Idaho Mining Association presented the Committee with information associated with the federal classification of minerals. He noted that federal mining law allows individuals and companies to acquire the right to minerals through the process of discovery.

Mr. Seth Grigg with the Idaho Association of Counties presented the Committee with the results of a survey of 132 county commissioners throughout the State. He told the Committee that one-half of the commissioners responded with thirty-four of Idaho's forty-four counties being represented. Mr. Grigg noted that the association adopted a resolution at its fall, 2013, meeting to support the work of the Committee to explore the transfer of ownership of certain federal lands from the federal government to the State of Idaho, provided that if there is a transfer of federal lands to the State, the State would permanently provide continuous funding to respective counties for the State-owned lands.

The Committee also took testimony from a group of presenters associated with various collaborative efforts in Idaho and elsewhere. Members providing testimony included Mr. Will Whelan and Mr. Rick Tholen, with the Idaho Forest Restoration Partnership, Mr. Bill Higgins with the Clearwater Basin Collaborative, and Mr. Tom Richards with Northwest Management, Inc. The final testimony of the December, 2013, meeting was provided by Ms. Sandra Mitchell with the Idaho State Snowmobile Association and Mr. David Claiborne, Idaho State ATV

Association, who provided the Committee with information and perspectives of motorized recreationists in the State.

At the March 14, 2014, meeting, the Committee heard testimony from Michael Bogert, James Caswell, Steve Allred, and Mr. Jim Riley. Messrs. Bogert, Caswell and Allred have worked both at the federal and state levels regarding management of public lands and gave their perspectives about collaborative and cooperative projects that work and what does not work as well. Mr. Riley gave his opinion about how BLM lands are managed in Oregon as a possible model for Idaho.

Also at this meeting were representatives of the BLM, the American Exploration and Mining Association and the Utah Public Lands Coordination Office who testified about issues regarding the potential listing of the sage-grouse under the ESA and measures being taken to mitigate the loss of habitat for the sage-grouse. The BLM representative said that BLM is dealing with strategic fuel breaks, planning for fire resistant vegetation, treating areas of cheatgrass and removing juniper trees as it serves as a cover for predators for the sage-grouse and is a water-consuming tree. He added that progress depends on funding but a lot of this is about being strategic and that BLM is making good progress and it is a long-term investment.

During 2014, the Committee held seven public hearings. Those hearings were held in Kamiah and St. Maries on September 11, Sandpoint on September 12, Idaho Falls and Soda Springs on October 9, and Twin Falls and Hailey on October 10. During these public hearings the Committee heard from 150 witnesses with 99 persons testifying in Kamiah, St. Maries and Sandpoint. All of the Committee's minutes are on its website. A good majority of the persons testifying in Northern Idaho were in favor of the State controlling the public lands instead of the federal government. In the central and eastern Idaho meetings the testimony was quite the opposite, with a majority of persons content with federal ownership of the public lands. Some persons who spoke in favor of the status quo regarding public land ownership did express frustration with federal land managers.

V. Key Issues

A. Legal Issues

HCR 22 asserted that Idaho and the United States entered into a binding contract upon admission of the State into the Union on July 3, 1890. HCR 22 contended that the scope of that contract included a duty of the United States to dispose of all of its lands within Idaho for the benefit of the State in exchange for Idaho foregoing aspects of sovereignty such as taxation of those lands. The theory is that the federal government's failure to fully perform its duties has resulted in a breach of the contract with consequent damages to the State, the remedy for which should be either federal compliance with the contract now or perhaps a court order compelling the United States to transfer those lands to Idaho. Professor Donald Kochan, Chapman University School of Law, testified before the Committee on the validity of Utah's Transfer of Public Lands Act and the possibility for Idaho to follow a similar approach. Professor Kochan presented a colorable basis for his "enforceable compact/contract theory" of the federal government's duty to dispose of lands in Utah and Idaho.

He averred that based on U.S. Supreme Court precedents Idaho could make a good-faith legal argument that it had a contract with the United States upon entry into the Union.¹⁵ Assuming that a contract existed, the more difficult question is the scope of that contract. Did it include a duty by the United States to grant to Idaho more lands than it has granted under the 1890 compact or to otherwise sell more (all) federal lands in Idaho?

“Equal footing” is a constitutional law doctrine upon which states are admitted into the United States with the same legal rights as already existing states. Since Tennessee became a state in 1796, Congress has included in each state’s act of admission a clause providing that the state enters the Union “on an equal footing” with the original States in all respects. U.S. Supreme Court cases discussing the “Equal Footing Doctrine” are of little help because the court has limited the doctrine to state lands beneath the bed and banks of navigable waters and without consequence to the vast majority of public lands in Idaho that are uplands. Under the Equal Footing Doctrine, Idaho has already obtained title to those submerged lands and they are therefore not at issue.

The Property Clause of the U.S. Constitution, quoted in Section III(A)(I), above, does not inhibit the ability of the United States to have contracted for disposal public lands in Idaho, nor does it inhibit the United States’ ability to make future contracts for disposal of its lands in Idaho, but it does not answer the question of the scope of the contractual duties between the United States and Idaho. The Property Clause suggests that Congress was authorized to set the terms of disposal of the lands in the 1890 contract in exchange for admission of Idaho into the Union, including most notably any terms related to timing of the United States’ duty to sell or otherwise dispose of federally managed parcels within the State.

Idaho Constitution, Art. XXI, Sec. 19, also quoted above, suggests that Idaho understood the terms by which the U.S. was granting lands to the State in 1890 and that the U.S. was not bound to sell other lands within the State. This section of the Constitution disclaims the State’s interest in any additional public lands “until the title thereto shall have been extinguished by the United States.” The Supreme Court and the Ninth Circuit have held that this type of disclaimer, which is common in western state enabling acts and constitutions, is consistent with the Property Clause.

The quoted phrase from the Idaho Constitution is ambiguous. HCR 22 focuses particularly on Section 7 of the Idaho Admission Act that requires five percent of the proceeds of sales of public lands within Idaho, “which shall be sold by the United States” subsequent to the admission of Idaho into the Union, to be paid to the State to fund schools. One interpretation holds that these phrases require the U.S. to sell all lands within Idaho. An alternate interpretation is the phrases merely acknowledge that the United States has the authority to sell additional lands in the future within the State’s borders, similar to language in current federal law that requires

¹⁵ Deputy Attorney General Steve Strack testified before the Committee to discuss, among other things, the State’s historical records and any light they might shed on the intentions of Idaho’s territorial government on admission into the Union. Mr. Strack was unable to find any indication in the records that the delegates to Idaho’s constitutional convention considered federal reservations or federal grants of land in Idaho to be subject to a contract or “compact” for disposal of federal lands.

standard grades for apples “which shall be sold.” 21 U.S.C. § 20. Said another way, does the statute require an apple producer to sell its apples, or if the apple producer sells its apples it must comply with certain standards?

As is the case in the federal lands debate, one could reasonably read this statute as a statement of Congress’s assumption that apples will be sold following the law’s passage, just as one could reasonably read the Idaho clauses as assuming that federal lands would be sold in the future, but none of the clauses appears to require a sale. Where questions of statutory interpretation arise, the courts have held that those questions are to be resolved in favor of the United States and against the grantee, in this case Idaho. A court, if possible, will also construe Property Clause matters in a way that avoids a constitutional debate and that is least disruptive to settled expectations of third parties.

Other arguments supporting the concept of a contract for the disposal of all lands invoke the U.S. Constitution’s Enclave Clause and the Taylor Grazing Act of 1934. These constitutional and statutory provisions are not particularly helpful since there are countervailing arguments that unappropriated public lands within the state had already been withdrawn by the time Idaho had become a state and were further withdrawn under the Taylor Grazing Act. Under these arguments, FLPMA merely codified what was, then, already a prevailing practice under federal law which was the policy of retention.

Assuming there is a breach or partial breach of the contract by the United States, it is fairly easy to delineate the numerous damages that have been caused to the State of Idaho. A more difficult question is whether Idaho could, by “specific performance,” obtain an order from a court compelling the federal government to dispose of more lands or grant more lands to the State. There are significant questions about the State’s ability to obtain a court order of specific performance. And even Professor Chapman’s presentation included arguments to persuade Congress to act as an alternative to litigation.

Assuming the federal government conveys lands to Idaho, to what purposes could the lands be put? Article IX, Section 8 of the Idaho Constitution requires that all lands received by grant or acquisition from the federal government must be used to secure the maximum long-term financial return to the institution to which the land is granted or to the state if not specifically granted. This is consistent with Idaho Admission Act, Section 12, limiting the State’s use of land grants for the enumerated purposes. Idaho Constitution Article IX, Section 8, also requires that general grants of land from Congress to Idaho should be carefully located and preserved according to Idaho law and held by the State in trust “subject to disposal at public auction for the use and benefit of the respective object for which said grants were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all State lands. . . .” The federal Act of 1894 established the process by which the lands would be carefully located and preserved.

In response to an inquiry from Committee member Senator Tippetts, Deputy Attorney General Strack opined on the impact of Article IX, Section 8 should Idaho receive title to lands

currently in federal ownership.¹⁶ Deputy Attorney General Strack concluded that if Idaho received federal lands by congressional action, Article IX, Section 8 would require the State to maximize the financial returns from the land unless the terms of the conveyance direct that lands be managed for purposes other than maximization of financial returns in which case the terms of the conveyance would control. Mr. Strack also concluded that if any unappropriated federal lands were acquired through a court decree, such lands would be subject to the constitutional provisions and would have to be managed for maximum financial return to the State. His conclusions did not address the consequences of acquisition of federal lands other than by grant or court decree such as by land exchange. Extrapolating from Mr. Strack's conclusions, it follows that any grant or acquisition of lands from the executive branch of federal government should dictate the purposes for which the lands are to be used if other than maximizing financial gain to the state. Otherwise, the acquisition may invoke Article IX, Section 8 and require the State to maximize the long-term financial return from the acquired lands. Similarly, any grant or acquisition that should be exempted from disposal at state auction should explicitly say so. Alternatively, Article IX, Section 8 could be amended, pursuant to Article XX, to allow state acquisition of federal lands without being subject to disposal or maximum financial return.

B. Economic Issues

1. Cost Analysis

The Policy Analysis Group in the College of Natural Resources at the University of Idaho was established by the Idaho Legislature in 1989 to provide objective analysis of the impacts of natural resource proposals.

Committee Co-Chair Denney asked PAG to analyze the cost of the possible transfer of federal lands to the State, including employment effects. PAG produced Issue Brief No. 16, a copy of which is available on the Committee's website, to determine whether a transfer of federal lands to the State would make or lose money. The Issue Brief presented various scenarios considering the economic impact of a transfer of federal lands to the State. The Issue Brief also considered two economic reports resting upon different assumptions, one produced by the Idaho Department of Lands¹⁷ and another produced by the Idaho Conservation League.¹⁸ It also considered the economic analysis prepared by CRS at the request of Congressman Mike Simpson.

¹⁶ Letter from Steven W. Strack to Senator John H. Tippetts, Sept. 18, 2014, on file with the Committee.

¹⁷ See testimony of Idaho State Forester David Groescl, August 9, 2013, that the State could generate an annual net profit following transfer of federal lands to the State.

¹⁸ Dr. Evan Hjerpe, on behalf of the Idaho Conservation League, presented his economic analysis of HCR 22 to the Committee at its December 4, 2014 meeting. He projected lost state revenues and taxes in the billions of dollars over twenty years. Dr. Hjerpe provided input and suggestions to PAG for its draft analysis. He also offered the Committee an additional critique of the final PAG report by letter dated December 5, 2014.

Using three different timber-quality price scenarios and assuming that wildland fire management costs would be the annual average cost experienced on federal lands prorated to the Department of Lands proposal, the State, according to the Issue Brief, could expect net income from timber sales ranging from a loss of \$6 million per year under the low-end scenario, a profit of \$45 million per year under the medium scenario, and a gain of \$129 million per year under the high-end scenario. Net income would be reduced by \$19 million per year if the State of Idaho were to provide recreational opportunities similar to those currently available on transferred lands as well as highway maintenance. Payments to counties through the so-called Payments in Lieu of Taxes, or “PILT,” program and the Secure Rule Schools program, on the land subject to transfer, totaled \$32 million in 2012. The costs of management of BLM lands net of grazing and mineral receipts would be \$53 million per year.

In total, after subtracting all costs from timber net income, the proposed transfer of 15.8 million acres of land administered by the Forest Service, the BLM, and the National Wildlife Refuge System would cause the State to (a) lose \$111 million per year under the low end timber receipts scenario, (b) lose \$60 million per year under the medium scenario, or (c) profit by \$24 million per year under the high end scenario. New jobs as a result of an increase in forest products and supporting industries would range from a low of 3,375 to a high of 12,275, creating wages and salaries ranging from just under \$100 million per year to a high of \$363 million per year. Income taxes from those jobs would range from \$16 million per year to \$58 million per year. These estimates take into account the loss of approximately 3,000 federal jobs and associated State income taxes as a result of a transfer of the federal lands to the State.

2. Other Economic Impacts

The Committee believes that a thorough review of Idaho law would be necessary prior to transfer of federal lands to confirm the intended consequences of the transfer on the economic status of the State treasury and related impacts to county governments. For example, if title to the federal lands containing oil, gas, or minerals suddenly passed to the State of Idaho and no supplementing legislation were passed, impacts could occur to certain funds of the State and to some local units of government. Section 33-903, Idaho Code, provides that ninety percent (90%) of any monies received by any department of state government from the federal government from sales, royalties, bonuses or rentals of oil, gas or mineral lands shall be placed in the public school income fund. Additionally, Section 57-1306, Idaho Code, provides that ten percent (10%) of the monies received by the State from the federal government from sales, or rentals of oil, gas or mineral lands of the federal government shall be disbursed to the counties impacted by mineral leases on a proportionate basis. These two code sections would merit further review to determine how oil, gas, and mineral leasing royalties, bonuses, or rental income obtained from State-owned lands, after acquisition from the federal government, might continue to be placed in the public school income fund and be deposited in the general fund of the county of origin. Similarly, Section 57-1201, Idaho Code, may need amendment to provide for distribution of grazing lease funds to counties on lands acquired by the State of Idaho from the federal government. Consideration should also be given to Idaho’s receipt and distribution of federal funds pursuant to the Idaho Abandoned Mine Reclamation Act (Idaho Code 47-1701, et seq.).

3. Current Federal Revenue Sharing¹⁹

a. Payments in Lieu of Taxes

The Committee heard testimony from several county commissioners that counties with federal land in their boundaries rely upon the PILT program for providing essential services. PILT payments partially compensate for revenue lost as a result of tax exemptions for federal lands. In 1976, Congress directed the Secretary of the Interior to make PILT payments to units of local government having certain federal lands within their jurisdiction. Pub. L. 94-565 (Oct. 20, 1976). These federal lands, called “entitlement lands,” include the BLM, the National Forest System, the National Park System, and some lands administered by the Bureau of Reclamation and the U.S. Army Corps of Engineers. In Idaho, over 32 million acres of federal lands are offset with PILT payments. This covers 96% of federal lands within the State.

PILT payments are not based directly on revenues generated on federal lands. Payments are based on a formula that takes into account local population, the amount of federal acreage, and certain federal payments made during the preceding fiscal year. PILT payments can be used by local units of government in any manner selected. Basically the law insures that, subject to a limitation on population, each eligible unit of local government receives some return from the “entitlement lands.” At the end of the 113th Congress, passage of the continuing appropriations resolution and an omnibus lands bill resulted in PILT funding for FY2015 totaling \$442 million. PILT’s future and funding beyond FY2015 is uncertain.

b. Secure Rural Schools and Community Self-Determination Act²⁰

In 2000, Congress passed this statute with an intent to continue subsidization of rural economies in the face of declining timber receipt payments and other economic opportunities especially where federal lands dominate a county’s jurisdiction. Pub. L. 106-393, 114 Stat. 1607 (Oct. 30, 2000). Counties could, under the law, opt for either receiving 25% of gross revenues shared with counties from national forest timber sold and harvested or monies pursuant to the law’s formula based on an average of three years in a selected period during the 1980s. The law was reauthorized several times, most recently via Pub. L. 113-40 (Oct. 2, 2013), and generated more than \$300 million per year for rural counties. It was not extended and failed to pass as part of the end-of-Congress legislation in 2014 that addressed PILT. Congressional proponents secured pledges to address SRS early in the 114th Congress but its fate is uncertain as of this writing. Predictably, loss of the SRS payments is particularly difficult for counties relying upon these payments to fund local roads and schools.

c. 25% Fund

Congress passed the National Forest Revenues Act in 1908, 16 U.S.C. 500, to provide 10% of net revenues generated by the sale of timber and other forest products on National Forest

¹⁹ For additional information, see materials provided to the Committee by Dr. O’Laughlin.

²⁰ For background information on the Secure Rural Schools (“SRS”) program, see PAG Issue Brief No. 14 (Aug. 2011).

lands to the states. In 1976, the percentage was increased to 25% of gross receipts. The funds are specifically designated for use on roads and schools in counties where the revenues were generated and are now referred to as the “25% Fund.” The payments are calculated based on a proportion of a National Forests’ acreage administered by the Forest Service within each county. Timber sales provide the primary source of revenue, although revenue from grazing allotments, recreation user fees, admission fees, and other activities are also included. Similarly, BLM returns a portion of grazing fees and mineral lease fees and permits to states and counties under provisions of the FLPMA. When the SRS extension failed in the 113th Congress, the 25% Fund became the sole rural county funding source tied directly to timber sales. It will generate approximately \$50 million to all rural counties from 2014 distributions.

VI. Issues needing more development

A. Implementation Strategies

As with any federal issue of consequence, solutions may be found in one or a combination of all three of the federal branches of government. Idaho could demand transfer of federal lands from the federal agencies, but Obama Administration acquiescence seems highly unlikely. Instead, Idaho should consider whether to attempt to convince Congress to exercise its plenary powers under the Property Clause to transfer or sell federal lands within the State.

Idaho could litigate its contract theory but may prefer to closely observe Utah’s efforts to similarly obtain federal lands within that state. Utah passed a state law demanding transfer. The U.S. did not comply. This leaves Utah with a similar question as to whether litigation is necessary and appropriate. Idaho could, for example, analyze litigation commenced by Utah and file an amicus curiae brief in support if meritorious. Finally, Idaho may want to simultaneously press for Congressional action and support Utah in litigation.

If the 63rd Idaho Legislature chooses to engage Congress or the courts, it should do so only after devising an implementation strategy appropriate to one or both branches of the federal government. Such strategies might require or suggest cooperation with like-minded states. Several options are discussed in the next section.

B. Partnerships With Other States

1. Interstate Compacts²¹

The U.S. Constitution, Art. I, Sec. 10, cl. 3 states:

No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State

This so-called “Compacts Clause” promotes the ability of states to work cooperatively on issues of the day while maintaining Congress’s power to approve or deny such cooperation.

²¹ The following information is summarized from the information provided by the Council of State Governments.

Particularly, compacts that alter the balance of political power between the state and federal government or that intrude upon a power reserved to Congress may be invalid unless approved by Congress. Here, it might be argued that an interstate effort to wrest control of lands from the federal government could be seen as an intrusion upon Congress' plenary power over those lands under the Property Clause of the Constitution. Because of the potential application of the Compacts Clause and Property Clause as well as the potential advantages of an interstate compact, this issue should be explored further. As a preliminary step, states may want to approach Congress with proposed federal legislation encouraging the states to enter into an interstate compact for these purposes. The Council of State Governments, National Center for Interstate Compacts, can provide assistance in the appropriate approach to interstate compacting. An advantage of the compact approach is that congressional consent to the compact essentially "federalizes" state law so as to insulate state laws from further attack under either the Supremacy Clause or the Property Clause of the U.S. Constitution.

2. Uniform State Laws

Another method of interstate cooperation may be undertaken through drafting of uniform or model state statutes that would bring clarity and stability to a multi-state effort. One organization that might assist in this approach is the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission. Since its founding in 1892, the Uniform Law Commission has produced more than 300 uniform acts, perhaps the best known being the Uniform Commercial Code. One of the requirements for approval of a uniform law is that no fewer than 20 states must approve the model statute. Once approved, the uniform statute is submitted for consideration by the state legislatures for enactment. If the western states do not want to work through the Uniform Law Commission, the states may informally agree as to how they would approach a uniform statute for consideration by the western state legislatures without the need for 20-state approval.

3. Joint State Litigation

As alluded to above, Idaho may wish to litigate its contract theory for the transfer of federal lands or it may wish to observe other states' efforts before committing to litigation. Assuming an interest in litigation, further discussions should be held with the Idaho Attorney General to determine his interest and willingness to proceed either on Idaho's behalf only or as part of a joint litigation effort with other state attorneys general. This effort could be coordinated through the Council of Western Attorneys General. Assuming the Attorney General does not want to pursue litigation but the Legislature wants to proceed, further review would be necessary to determine the proper parties to that litigation and the acquisition of counsel, perhaps through the Governor's Office or in the private sector.

VII. Preliminary Findings

A. Summary of Testimony For and Against Transfer of Federal Lands to Idaho

1. Pros

Supporters of transferring federal lands to the State of Idaho often compare Idaho to North Dakota and say that since North Dakota has access to its lands and resources, its economy

is stronger and per-pupil spending on education is higher. They argue that since only 3.9% of land in North Dakota is owned by the federal government, the state has greater opportunities for economic development, and because of this, the state weathered the recession better and can afford to spend more on education. They also point out that 10 of the 12 public lands states are below the national average in per pupil spending, with only Alaska and Wyoming being the exceptions.

Of great importance to the story of the settlement of Idaho is that the State is rich in resources. While Idaho has been referred to as an “oasis” because it possesses an abundance of water and rich soil, its land is not conducive to irrigation and farming throughout the State. Consequently, a large portion of the State was not homesteaded. However, just because the land was not transferred to private ownership does not mean it has no value or that the State could not benefit from appropriate development. As noted earlier, the federal government derives revenues from mining, drilling, logging, grazing and other activities, a portion of which are then transferred to the State. It was stressed that if the State had ownership of the land, it would receive more of the current revenues the land produces, and further economic development would lead to increased revenue to both the State and its citizens.

Testimony was received about examples of where federal inefficiency and mismanagement abound. These problems are not attributable to the efforts of capable federal employees, but are, instead, symptomatic of the non-functioning federal land management policies and processes. Such examples include the size and frequency of forest fires, bark beetle infestation, deterioration of ranges, water resource impacts, and rampant wild horse and burro populations. They also include the failure to produce the jobs, realize the revenue, and meet the nation’s energy needs through increased oil and gas production and its timber and lumber needs through increased harvesting of timber while reducing fire and disease risk to the forests.

1. Cons

Opponents of transferring federal lands to the State testified that Idaho cannot afford to take over federal lands and maintain them, even if the federal government gave them to the State, which it will not do. A transfer could cause a net financial loss to the State, and to the endowments supporting K-12 education and other beneficiaries. Transfer of federal lands would not extinguish the State’s and its citizens’ obligations to comport with federal environmental laws on the new State lands, such as the Clean Water Act and the Endangered Species Act. Fighting wildfires costs millions of dollars. Federal law enforcement fights crimes (like the well-publicized kidnapping in the Frank Church wilderness or drug running). Our local sheriffs and police departments do not have the manpower or budgets to adequately take over jurisdiction, let alone manage roads and trails on former federal lands. Current access to state lands is difficult and seemingly discouraged. Several asserted that the Idaho Department of Lands (“IDL”) does not have the resources, staff, or expertise associated with a takeover. IDL is constitutionally required to seek the highest return for endowments and is under no obligation to manage lands solely for public use or recreation. Simply put, opponents emphasized that the State would face significant pressure to sell those lands to the highest bidder followed by loss of access.

B. Committee Findings

The Committee was both humbled and encouraged by the significant interest of Idahoans in the ownership and management of the vast swaths of the State that are currently under federal control and management. Whenever and wherever the Committee met, be it in the Statehouse or in the communities around the State, Idahoans participated vigorously and sincerely in the discussions. Two themes emerged, however, as the Committee received testimony and asked questions in those meetings.

First, no one seems content with the status quo. The Idaho Federal Lands Task Force commissioned by the Land Board determined 15 years ago that the delivery of goods and services as well as intangible and intrinsic values from federal lands had not met the changing expectations of the public in general or of Idaho's citizens in particular. That was a statement reflecting the three decades prior to the 1998 report of the Task Force. Now, after four and one-half decades, that problem statement has taken on even greater meaning and urgency. Again, this is not meant as an indictment of the professionals that work in those federal agencies. Rather, it is a reflection of declining federal budgets in the face of expanding federal mandates for the values that federal lands currently produce. As a unanimous United States Supreme Court succinctly put it:

“multiple use management” is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, “including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historic values.”²²

It is also a reflection of the litigious nature of federal land management that can stall management for years. This reality is exemplified in the on-again, off-again efforts of the Idaho Panhandle National Forest's efforts to stop the decline of old-growth and mature forests through removal of understory trees and ground vegetation.²³ Initial plans to thin 277 acres were met with administrative and judicial appeals from environmental groups. The District Court ruled in favor of the Forest Service. The Ninth Circuit Court of Appeals reversed the District Court and imposed an injunction. The Ninth Circuit then reversed itself. That led to additional litigation in the District Court that again ruled in favor of the Forest Service. Another appeal to the Ninth Circuit followed in which the Court again affirmed the District Court's decision in favor of the Forest Service.

Most Idahoans seem united in their view that the current federal management system is out of balance. The charge to this Committee was to determine whether the State might better strike that balance for the benefit of its citizens.

A second theme emerged. Idahoans do not want to lose access to public lands regardless of whether they are managed by federal agencies or by the State. For this reason, the Committee

²² *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (citations omitted).

²³ *See Lands Council v. McNair*, 629 F.3d 1070, 1073-74 (9th Cir. 2010).

recommends, below, that any transfer of federal lands to the State should be structured to prevent sale of those lands except where sale would actually enhance management and access such as where a sale or land exchange might help block up State lands resulting in greater access and certainty as to jurisdiction. Currently, the number of private inholdings in both federal and State lands leads to jurisdictional confusion, private and public land trespass, and less public land access.

On balance, the Committee believes that Idaho can do a better job managing federal lands that are subject to multiple use mandates without endangering access to those lands. The Committee's specific policy recommendations are set forth in the next section.

VIII. Committee Recommendations

A. Policy Recommendations

1. Amend federal law.

The Committee recommends that the Legislature should work with Idaho's Congressional Delegation to amend the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 16 U.S.C. §§ 528-31. MUSYA codified the concept of multiple use management for the Nation's national forests. The Act codified the term to mean:

The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will be meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related surfaces over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

Id. at § 531(a). This definition has withstood the test of time.²⁴ It was similarly adopted for the BLM in FLPMA some sixteen years later and expanded to identify some of those multiple uses including recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values. 43 U.S.C. § 1702(c).

MUSYA also defines "sustained yield" to mean "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." 16 U.S.C. § 531(b). These federal land management themes of multiple use and sustained yield have not been

²⁴ MUSYA is inapplicable to federal minerals. 16 U.S.C. § 528.

amended in fifty-five years, and for good reason. They succinctly set out management aspirations in fulfillment of the public's expectations from the federal public lands. For a number of reasons set forth in this report, the Committee believes that current management of federal lands is falling short of the multiple use and sustained yield goals and mandates of MUSYA and FLPMA.

MUSYA should be amended to allow states to manage federal lands to meet the multiple use and sustained yield goals of the statute with an emphasis on achievement and maintenance "in perpetuity" of a high-level annual or regular periodic output of renewable resources *without impairment of the productivity of the land*. Idaho could be a pilot-project for this amendment. In fact, MUSYA Section 3 (16 U.S.C. § 530) already authorizes the Secretary of Agriculture to cooperate with Idaho and its counties in the development and management of the national forests. The proposed amendment would go farther and mandate Idaho management of certain federal lands for multiple uses and sustained yield in a manner in which the resources become financially self-supporting and are no longer a liability on the national treasury.

Perhaps ironically, perhaps not, this recommendation is very similar to Idaho's proposal at the National Irrigation Congress the year after statehood in which the State sought to hold public lands in trust upon conditions that would serve the public interest and to use proceeds from the sustained yield produced from those lands to offset the cost of federal land management. The unacceptable federal management of the public domain in the Idaho Territory led to the memorial adopted by the National Irrigation Congress. The time has come to put these basic, common sense ideas into effect. If codified, the amendment would breathe life into the State's motto, *Esto Perpetua*. The Legislature should fund an ongoing effort, as recommended below, to determine how best to craft federal legislation and work with the Congressional Delegation toward passage by Congress and signature by the President.

2. Specify uses and nonalienation of transferred federal lands.

The Committee urges that federal legislation transferring lands to Idaho should specify whether the lands must be managed for their maximum long-term financial return or, alternatively, for other purposes without regard to maximization of financial returns. The legislation should also state whether such lands could be sold by the State. The Committee opposes sale of federal lands transferred to the State unless sale will enhance management and access of retained State lands.

3. Consider transfer of federal lands into a trust or collaborative model.

The Committee urges transfer of federal public lands to Idaho for management under the collaborative or trust models where that management will provide for continued or improved public access, better environmental health, and better economic productivity.

The Committee found merit in the testimony of Dr. O'Laughlin from the University of Idaho College of Natural Resources regarding the utilization of the trust land management principle. Of course, this is not a new concept to the State since IDL currently operates on a trust model for its management of endowment lands for the benefit of the state school system. In December 2000, the Federal Lands Task Force Working Group recommended the trust model as

one of three approaches to federal land management outside the context of the transfer question. This recommendation followed the report of the Idaho Federal Lands Task Force in 1998 that “if all other things were equal, the trust model of resource management will provide the highest degree of clarity, accountability, enforceability, and sustainability of these three alternatives.” This is because the trustees are bound by a fiduciary duty to their beneficiaries to manage the lands for the beneficiaries, in stark contrast to currently administered federal lands that face a morass of confusing and conflicting statutory and regulatory mandates. See PAG Report No. 1, *Idaho’s Endowment Lands: A Matter of Sacred Trust* (August 2011) 2nd Ed., available at www.uidaho.edu/cnr/pag/publications.

4. Encourage and facilitate existing collaborations.

The Committee supports continuation of collaborative efforts to manage public lands better. Idaho has already proven that collaboratives work to better manage lands, create jobs, boost selective logging and improve overall forest health through cooperative land planning. Numerous collaborative efforts exist in Idaho. For example, the Clearwater Basin Collaborative and the Bitterroot River Basin Collaborative have operated for ten years thinning forests, clearing understory, restoring watersheds, and creating jobs. These collaboratives are composed of state and federal agencies, timber companies and other private enterprises, conservation groups, local governments and communities. In addition, the National Forest Foundation and the Pinchot Institute for Conservation are stellar examples of organizations specializing in sustainable forestry while sustaining rural communities all over the West.

In another example, the Committee heard testimony from IDL regarding Idaho’s response to a provision in the 2014 Agricultural Act, known as the Farm Bill that was signed into law on February 7, 2014. Section 8204 of the Farm Bill amended the Healthy Forest Restoration Act by authorizing governors to request the Secretary of Agriculture to designate landscape-scale treatment areas on national forests that are at a high risk of insect and disease mortality. Idaho responded by identifying approximately 12.6 million acres of federal forest land as suitable for treatment. Of these suitable acres, 70% were determined at high risk from insect and disease and therefore wildfire. IDL coordinated and collaborated with forest supervisors, local working groups, resource advisory committees, and other local governments and citizens to make the selections. This broad-based collaboration resulted in 50 proposed treatment areas covering nearly 2 million acres. The Chief of the Forest Service approved all of Idaho’s proposed treatment areas with only slight modifications.

While these types of collaborative efforts are important and should be encouraged, they should not be seen as a panacea. Even with the extraordinary effort expended by both the federal and state governments to designate 1.8 million acres of forest land in need of significant treatment, actual implementation has yet to occur, and may not occur for several more years, due in part to delays attendant to NEPA analysis for all but the smallest treatment areas. County Commissioner and former Senator Skip Brandt, who has been a member of the Clearwater Basin Collaborative for many years, testified that the collaboratives are no longer effective. They are at a standstill because of environmental lawsuits and federal laws such as ESA, NEPA, and the Clean Water Act. The collaboratives cannot move forward until either the federal laws are changed or the land is transferred to the State. If the land is transferred to the State and state management is challenged, plaintiffs would have to post a bond as a percentage of the stumpage

fee and possibly pay attorneys' fees if they lost a frivolous lawsuit. Nor would the Equal Access to Justice Act—an incentive to litigate—be applicable in state court. If these federal lands were state lands, NEPA would not apply, but the state Forest Practices Act and public notification requirements would apply thus assuring proper land stewardship and public notice while streamlining the approval process.

5. Do not transfer certain federal or tribal lands.

The Committee does not support transfer of National Parks, Congressionally designated wilderness areas, Indian reservations, the Idaho National Laboratory and military installations. Indian reservations were not specifically excluded from transfer in HCR 22. The Committee believes this was an oversight that it corrects here. The Committee is mindful of the treaties between the United States and various tribes in Idaho.

6. Conduct additional economic analysis.

Because Idaho operates under a constitutional requirement of a balanced budget, it is imperative, the Committee believes, that further economic analysis be undertaken, independently or collectively, to be presented to the 2016 Legislature. The analysis should explicitly state its assumptions and determine the cost of acquiring federal lands. Any transfer must be predicated on sound economic analysis showing a reasonable likelihood of neutral or positive budgetary impacts to the State's treasury following transfer and a reasonable period for implementation of the transfer. This analysis could be performed as to specific parcels in response to specific transfer proposals. The Committee recommends appropriations up to \$500,000.00 for the requisite economic analysis.

7. Support Idaho counties.

The Committee recommends that the State should support Idaho counties' jurisdiction to provide the health, welfare, and safety of their citizens.

B. Continuity of Effort

1. Reauthorize the Committee.

The Committee recommends that legislation be enacted by the 63rd Idaho Legislature and be signed into law by the Governor to allow this effort to go forward so that necessary modifications to Idaho's statutes and State Constitution can be made to effectuate these policy goals. The precise amendments to Idaho's Constitution and statutes cannot be fully articulated without more effort to survey relevant laws and determine what, if any, amendments to propose. For example, should Idaho Constitution, Art. IX, Sec. 8 be amended to allow acquisition of federal lands without the current duty to maximize financial returns from those lands, or without the current option that those lands could be sold at auction? These issues should be fleshed out by the Committee under an extension of its authority to operate, for subsequent presentation to

the Legislature.²⁵ Specifically, the Committee recommends that it be reauthorized until the first session of the 63rd Legislature adjourns *sine die*.

2. Authorize and fund a permanent commission or working group.

Simultaneously, the Legislature should consider authorizing and funding within the IDL or elsewhere a full-time, staffed position and administrative assistant and establishment of a permanent commission or working group to implement recommendations adopted by the Legislature and signed into law. The details of this commission—powers, duties, staffing—could also be fleshed out by this Committee if it is reauthorized. Transfer of federal jurisdiction should be seen as and supported as a long-term effort, worthy of annual appropriations starting at \$250,000. In Canada, the Northwest Territories gained control over Crown (public) lands in 2014 after a decade of negotiations with the federal government in Ottawa. Such a sustained effort in Idaho would require sustained public support and continuity of dedicated staff and resources.

3. Investigate use of interstate compacts.

The Committee recommends that the Legislature should develop the interstate compact concept with the assistance of the Council of State Governments and its National Center for Interstate Compacts. This would very likely include efforts to codify federal legislation to facilitate orderly transfer of lands and/or approval of an interstate compact and/or approval of collaborative or trust pilot projects. Litigation

C. Litigation

1. Delay and reassess commencement of litigation.

Assuming that Obama Administration would refuse to comply with a demand for transfer of lands, and if Congress is an unlikely avenue for redress, Idaho could consider contract law-based claims in federal court. Under general principles of contract law, Idaho might pursue either an implied-in-fact contract theory or a quasi-contract theory in federal court and request the remedy of specific performance whereby the U.S. would issue patents or otherwise transfer lands or disclaim an interest in lands to the State of Idaho.²⁶

²⁵ See, e.g., *Analysis of a Transfer of Federal Lands to the State of Utah*, University of Utah, Utah State University, Weber State University (Nov. 2014) (available at https://csee.usu.edu/file/uploads/1_Land_Transfer_Analysis_Final_Report.pdf). Senator Nuxoll also recommended consideration of a July 18, 2014 report by the Nevada Land Management Task Force to the Nevada Interim Legislative Committee on Public Lands, available at <http://leg.state.nv.us/interim/77th2013/Committee/StatCom/Lands/Other/1-August-2014/71814FinalNevadaLandManagementTaskForceReportreduced.pdf>.

²⁶ In addition to contract law claims, it may be possible for the State to raise trust law claims. Because HCR 22 focused exclusively on the contract theory of disposal, the Committee has not explored whether Idaho has an express trust relationship with the United States or whether a

Other issues that would arise in the context of litigation are whether the U.S. Supreme Court would take original jurisdiction over such a lawsuit or instead exercise its discretion to forego original jurisdiction under Article III, Section 2 of the U.S. Constitution.²⁷ Another question arises as to whether any federal court would take the case or instead find a lack of jurisdiction because the central issues are political questions. A seminal case evaluating the Political Question Doctrine is *Baker v. Carr*,²⁸ in which the court determined that a case raises primarily political questions if (a) there is a textually demonstrable constitutional commitment of an issue to another political department, (b) whether the case cannot be decided without making an initial policy determination, or (c) whether requiring a court decision would show a lack of respect due to the other branches of the government. In *Light v. United States*, 220 U.S. 523 (1911), the court held that merely trying to get the United States to agree to a transfer of lands is a political question and not a question for the courts to decide. A breach of contract claim, however, is an issue over which the courts may exercise jurisdiction.

The Committee recommends against filing litigation against the federal government at this time. It is unclear whether Utah will pursue litigation given that the United States has not met Utah's demands to transfer federal lands to the state. Given the similarities in the state enabling acts and Idaho's Constitution, Idaho should let Utah take the lead in litigation of the issues and assess later whether litigation is a good option.

IX. Conclusion

The Idaho Legislature's frustration with federal management of 62% of Idaho is thoroughly illustrated by HCR 21 and HCR 22. This frustration has manifested itself in various ways since statehood. In 1891, Idaho's delegates to the National Irrigation Congress sought control of all public lands in the state due in large part to federal policy perceived as destructive to the forests. The most recent manifestation is the overlay of contract law to hold the federal agencies accountable for performance of the duties imposed on the United States by its contract with the State upon admission into the Union. The difficult question is the extent of those duties. Utah, among the western states, has made the most effort to lay the foundation for possible litigation. Idaho can benefit by observing Utah's efforts. If Utah succeeds, Idaho could use that precedent for subsequent Idaho litigation. One may comfortably assume that any such litigation will ultimately be decided by the United States Supreme Court.

The Idaho Legislature is unlikely to redress its grievances in the administrative branch of the federal government. Congress is more likely to consider the issues, if only to allow a compact among interested states to pursue the issues.

Obviously, there is no easy path to resolve the Legislature's grievances. If there were, it is very likely that path would have already been taken. The Legislature will need to deliberate

constructive trust could be implied by a court in the interest of equity. Significant additional legal research would be necessary to determine whether a trust law claim might exist.

²⁷ See *South Carolina v. Regan*, 465 U.S. 367 (1984).

²⁸ 369 U.S. 186, 216 (1962).

whether to embark upon that significant effort. This report is intended to encourage and guide those deliberations.

Respectfully submitted,

Federal Lands Interim Committee

Senator Chuck Winder
Chairman