INHOLDINGS

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Inholdings—non-federal property surrounded by federally managed public lands—are a legal and cartographic oddity. Despite being physically surrounded by public lands that are managed pursuant to federal law, inholdings are not subject to federal regulation. Instead, inholdings fall under the jurisdiction of the local government within whose boundaries they are located, and can be developed like any other private property, subject only to local land use regulations and other generally applicable laws. As a result, inholdings can pose significant challenges to public lands management, ranging from access and boundary disputes to adverse impacts on wildlife, habitat, watersheds, and cultural and historic resources.

This Article develops a structural account of the law of inholdings that has been missing from legal scholarship and makes three key contributions to the literature. First, it provides a descriptive analysis of what inholdings are, why they matter, and the legal challenges they present. Second, it identifies how the structural infirmities in local governance of inholdings and the limitations of various federal and private law responses to those infirmities have created a governance gap in addressing the land use challenges posed by inholdings. Third, it develops a normative case for rethinking what local governments can do to narrow the governance gap and offers concrete policy proposals to incentivize local governments to deploy their land use authority over inholdings in ways that align with—or at least are less detrimental to—surrounding public lands management. By putting the literatures of local government law, land use law, and federal public lands law into conversation, this Article's account of inholdings offers a promising and under-theorized governance model about how heterogeneous landscapes can be managed to achieve land use goals that transcend legal boundaries.

Table of Contents

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Introduction

Black Canyon of the Gunnison National Park in Colorado was designated as a national park in 1999 to protect one of the steepest, deepest, and narrowest canyons in North America.[1] Remote and far less frequented than other national parks,[2] Black Canyon is in many ways the opposite of the privatized luxury

1. *Black Canyon of the Gunnison National Park*, NPS History, https://perma.cc/FRB5-TJSE.
2. *See Annual Park Ranking Report for Recreation Visits in: 2021*, Nat'l Park Serv. (Feb. 28, 2022), https://perma.cc/FJ44-R953 (select "National Park" from park type dropdown menu)

found in Vail and Aspen, on the far side of the mountain ranges to the north. In 2010, however, a Colorado real estate developer constructed a 5,000 square foot luxury mansion—including a private helicopter landing pad—within the park's boundaries, and threatened to build a second, more massive residence along the canyon rim inside the park.[3]

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An hour outside of Philadelphia, Valley Forge National Historical Park is the site of one of the most famous episodes of the Revolutionary War, the Continental Army's winter encampment under General Washington.[4] Surrounded today by suburban development, the historical park protects numerous artifacts and historic landscapes from the Revolutionary period, and its wetlands and open space provide wildlife habitat and recreational opportunities.[5] In the past two decades, however, multiple private developments have been approved for construction inside the park's boundaries, including sixty-two luxury residential homes, as well as a half-million square-foot corporate conference center.[6]

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With millions of visitors annually, Grand Canyon National Park is an "iconic geologic landscape" and home to ancestral Native American sites.[7] Both the park and the surrounding Kaibab National Forest are remote and arid land-

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(showing that Black Canyon ranks 48th out of the sixty-three national parks for 2021 annual visitation numbers).

3. Phil Taylor, *Park Service Finds Nemesis in Colorado Mansion Developer*, N.Y. TIMES (Apr. 30, 2010), https://perma.cc/YB8E-JT2J (describing the events leading up to the construction of the mansion in 2010 by developer Tom Chapman, and the additional development that he has indicated he plans to pursue on this inholding, as well as other inholdings he owns within other public lands in Colorado).

4. *Valley Forge National Historical Park: Overview of History and Significance*, NAT'L PARK SERV. (Dec. 10, 2021), https://perma.cc/GC27-W5WB.

5. *Id.*

6. *See* Michael Rubinkam, *New Homes in Valley Forge?*, WASH. POST (Dec. 30, 2001), https://perma.cc/F52D-9J2Y (describing a 2001 luxury home development proposal for within the park); John Hurdle, *Fight over Land Use at Valley Forge*, N.Y. TIMES (May 30, 2008), https://perma.cc/4B2J-AMLW (describing a 2008 conference center proposal for within the park); Kurt Repanshek, *Valley Forge Development Gains OK*, NAT'L PARKS TRAVELER (Oct. 8, 2008), https://perma.cc/TTW5-FH7G (noting that the local government's zoning approval for the property on which the conference center was to be built allowed for "a building footprint of over a half-a-million square feet").

7. *Grand Canyon National Park: Park Statistics*, NAT'L PARK SERV. (Dec. 14, 2021), https://perma.cc/VCB7-V78T.

scapes, where water sources are limited and wildfire risks ever-present.[8] Despite these conditions, developers have proposed and received land use approvals for construction of a several-million square foot, 2,000-unit residential and retail complex within the national forest.[9]

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When thinking about our public lands—national parks, national forests, historic battlefields, wildlife refuges, and the myriad of other federally protected lands across the county—one probably does not envision luxury mansions, shopping malls, or corporate conference centers.[10] Yet the developments described above are completely legal and permissible land uses within federal public lands, not the result of rogue private actors or the privatization efforts of the Trump administration. How is this possible? The answer is that these private developments—and many others—have occurred on inholdings. Inholdings—non-federal property surrounded by federally managed public lands—are a legal and cartographic oddity.[11] Despite being physically surrounded by public lands, which are regulated by federal land use management agencies pursuant to federal law,[12] inholdings, as non-federal land, are not subject to the same federal oversight. Instead, the owner of an inholding is free to use and develop their property as any other private property owner could, subject only to local land use regulations and any other generally applicable laws.[13] Thus, the develop-

8. *See id.*

9. *See* Emery Cowan, *Comments on Tusayan Development Project Top 200,000*, Ariz. Daily Sun (Mar. 2, 2020), https://perma.cc/A9LU-DZ9W (describing the development proposal and opposition to it); Phil Taylor, *Iconic Park Battles Massive Development on Its Doorstep*, Greenwire (Apr. 9, 2015), https://perma.cc/TK3R-TKQF (noting that the development proposal "calls for up to 2,176 residential units").

10. Unless otherwise indicated, this Article uses the term "public lands" to describe federal lands under the jurisdiction of any of the four public land management agencies (National Park Service, Fish and Wildlife Service, Forest Service, and Bureau of Land Management). *See infra* Part I.A. The term "public lands" is sometimes used to refer more narrowly to describe only those federal lands under Bureau of Land Management jurisdiction; the term is also occasionally used to refer more broadly to land owned by any governmental entity, whether federal, state, or local; however, unless otherwise indicated, this Article uses the term as described above.

11. *See* Carol Hardy Vincent et al., Cong. Rsch. Serv., RL34273, Federal Land Ownership: Acquisition and Disposal Authorities 1 n.5 (2019) [hereinafter Federal Land Ownership], https://perma.cc/R7PT-67PW ("An inholding can be characterized as private, state, or other nonfederal lands that are surrounded by federal lands, typically within a unit of a federal land management agency.").

12. *See infra* Part I.A.

13. Most regulation of land use of private land is accomplished through local governments, which have been delegated authority to exercise police powers to regulate land uses by their states. *See* Stewart E. Sterk et al., Land Use Regulation 6 (3d ed. 2020). Land use

ments proposed in the three examples described above are allowed because the land use regulations of the local government within whose boundaries the particular inholding was located permitted them.[14]

Inholdings are the legacy of federal policies that historically encouraged private development and settlement on the public domain.[15] Once estab-

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may also be regulated through state laws (such as state Growth Management Acts) in some states, as well as generally applicable federal laws, and private land use controls (such as restrictive covenants or conservation easements). *See id.*

As to which type of local government has jurisdiction over an inholding, it depends on the specific location of an inholding. If an inholding is located within an unincorporated area of a county, then the inholding will fall under the jurisdiction of the county; if it is located within the boundaries of a city, township, or other incorporated municipality, then it will fall under the jurisdiction of that municipality. The local governments with jurisdiction over the three inholdings described in the introduction reflect the variation in types of local governments that have jurisdiction over inholdings: Montrose County, Colorado, has jurisdiction of the inholding in Black Canyon National Park; Lower Providence Township, Pennsylvania, had jurisdiction of the inholding in Valley Forge National Historical Park; and the incorporated town of Tusayan, Arizona, has jurisdiction of the inholding in Kaibab National Forest. *See* Taylor, *supra* note 3; Repanshek, *supra* note 6; Cowan, *supra* note 9.

14. While the development proposals on the three inholdings described above were approved by local land use regulators, ultimately, not all of the proposed developments on these inholdings went forward. The inholding within Valley Forge was ultimately acquired by the federal government in a land exchange to avoid the proposed conference center/hotel/museum development from going forward. *See* Kurt Repanshek, *Land Swap Moves American Revolution Center out of Valley Forge National Historic Park,* NAT'L PARKS TRAVELER (July 1, 2009), https://perma.cc/XE7U-BEHB. The proposed second luxury residence within Black Canyon National Park appears not to have been built (yet); as of 2010, the developer sold the "proposed mansion property to an out-of-state buyer for an undisclosed price but said he believes the building plans are still in the works." Taylor, *supra* note 3. The fate of the inholding within Kaibab National Forest remains in limbo; the local government had issued approvals for the development and an access application for the development was submitted to the Forest Service in 2020, which was preliminarily accepted (after an earlier access application was rejected in 2016) and the Forest Service is currently evaluating whether to grant the inholder's access request through surrounding public lands. *See* Letter from Heather Provencio, Forest Supervisor, Forest Service, U.S. Dep't of Agric., to Craig Sanderson, Town of Tusayan Mayor, and Stilo Development Group, USA LP (Sept. 28, 2020), https://perma.cc/3ZXY-GVW7 (providing the September 2020 response from the Forest Service indicating the 2020 access application addressed some of the concerns that led to the rejection of the 2016 access application, while still posing other potential concerns, and informing the applicant that the application would be evaluated and that they should contact the Forest Service to discuss next steps). As of early 2022, there has been no final decision made yet by the Forest Service on the access application. *See Tusayan Ranger District Easement Proposal*, U.S. FOREST SERV., https://perma.cc/R4W7-WTZJ.

15. The rights of indigenous peoples, who inhabited the country prior to any assertion of public dominion by the federal government or any private property claims by non-indigenous settlers, were largely overlooked—or actively undermined—throughout the history of U.S. federal public land policy. While outside the scope of this Article's analysis of inholdings, other scholars have thoughtfully examined the complex issues raised by indigenous claims to public lands. *See, e.g.*, CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN IN-

lished—whether through homesteading claims, patented mining claims, railroad grants, or other means—private ownership rights remained valid, even as federal policy later evolved to withdraw surrounding lands from the public domain and designate much of them as federally protected public lands. Inholdings comprise a significant presence within federal public lands: there are inholdings within public lands in every state and within almost every category of federally protected lands, from national seashores to national forests to national parks.[16] Approximately 17% of the 232 million acres of land within the National Forest and National Grassland systems is privately owned; in many eastern national forests, the percentage of privately-owned land within forest boundaries approaches 50%.[17] In the National Park System, where private landholdings amount to a comparatively modest 3% of the system's 84 million total acres, they still equate to 2.6 million acres—totaling approximately 10,000 separate parcels—of developable private property.[18]

This patchwork of land ownership creates a "cartographic chaos" that one scholar has wryly observed "[o]nly 'a lawyer badly in need of business' would [have] consciously design[ed]."[19] Inholdings pose numerous challenges to the management of surrounding public lands, ranging from potential adverse impacts on wildlife habitat, watersheds, and historic and aesthetic resources; to complicating federal land management decisions about wildfire mitigation, resource renewal, and public access; to fueling real estate speculation by investors trading in inholdings.[20] And although local governments could regulate land use activities on inholdings in ways that mitigate some of these challenges, the legal, fiscal, and political incentives of local governments with regulatory authority over inholdings often fail to align with federal management of surrounding public lands: the benefits to the locality (in terms of tax revenue or fulfillment of other public needs) from approving development on inholdings often outweigh the diffuse costs imposed on the broader public.[21]

In light of the infirmities of local governance of inholdings, a variety of federal and private law responses have been deployed to address the land use challenges posed by inholdings. For example, the federal government can ac-

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DIAN NATIONS (2005); Jessica Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531 (2019); Issac Kantor, *Ethnic Cleansing and America's Creation of National Parks*, 28 PUB. LAND & RES. L. REV. 41 (2007).

16. *See infra* Part I.B (discussing the location and extent of inholdings within various types of public lands).
17. *See infra* note 114 and accompanying text.
18. *See infra* note 110 and accompanying text.
19. *See* Stephen Stuebner, *Private Rights vs. Public Lands: Thousands of Inholdings Create Conflicts Inside Federal Lands*, HIGH COUNTRY NEWS (Feb. 16, 1998), https://perma.cc/N66R-7JWG (quoting Professor George C. Coggins).
20. *See infra* Part I.C (discussing these and other types of adverse impacts posed by development on inholdings).
21. *See infra* Part II.A.

quire inholdings outright—through voluntary purchases, land exchanges, or the use of eminent domain—or acquire less-than-fee interests, such as development rights or scenic easements.[22] Congress has also on occasion authorized that federal land use regulations be made directly applicable to privately-owned inholdings pursuant to its power under the Property Clause.[23] Land trusts and other non-profits may also step in where federal funding is lacking and acquire conservation easements, which run with the land and permanently limit development by owners of inholdings.[24]

While these legal tools have undoubtedly reduced the extent of land use challenges posed by inholdings, they nonetheless suffer from a number of limitations. The value of privately-owned inholdings to be acquired far outstrips the amount of federal funding available,[25] and the cost of scenic easements and other less-than-fee interests has proven nearly as expensive as fee purchases.[26] Eminent domain is legally prohibited in many parts of the federal public lands system, and politically fraught even where allowed.[27] The federal land exchange program has been plagued by decades of controversy and, in some cases, outright corruption.[28] Although some degree of direct federal regulation over non-federal lands like inholdings is constitutionally permissible pursuant to the Property Clause, Congress has rarely authorized it and federal courts have cast doubts on how broadly this power extends.[29] Private law tools, such as conservation easements, offer valuable alternatives, but can only be utilized if inholding owners are interested in selling or donating such easements. And both federal acquisition and private conservation easement efforts must compete with deep-pocketed private developers speculating on inholdings for their development potential or for leverage in land exchanges.[30]

22. *See infra* Part II.B.
23. *See infra* Part II.B.
24. *See infra* Part II.B.
25. *See* NAT'L PARKS CONSERV. ASSOC., AMERICA'S HERITAGE FOR SALE 2–3 (May 1, 2008) [hereinafter AMERICA'S HERITAGE FOR SALE], https://perma.cc/VLR6-Q6WQ (describing the vast discrepancy between the funding needed to acquire inholdings and the annual funding appropriated by Congress to the Land and Water Conservation Fund, the designated source of federal funding for inholding acquisitions).
26. *See infra* Part II.B.
27. *See infra* Part II.B.
28. *See infra* Part II.B.
29. *See infra* Part II.B.
30. *See, e.g.*, Jason Blevins, *Red Mountain New Battleground in Property Rights,* DENV. POST (Aug. 13, 2020), https://perma.cc/AR4E-LBET (quoting Doug Robotham, the Colorado director of the Trust for Public Lands, describing the "speculative business of buying inholdings and then developing or reselling" them); U.S. FOREST SERV. & RUCKELSHAUS INST. OF ENV'T & NAT. RES., UNIV. OF WYO., PRIVATE LANDS CONSERVATION TOOLKIT AND TRAIING FOR WYOMING LAND MANAGERS 9 (2011), https://perma.cc/Q5JR-8SQN ("In many of Wyoming's real estate markets, private land inholdings are considered valuable and thus are also vulnerable to development.").

To the extent that lawmakers have recognized the gap in inholdings governance, the focus has been on reforming federal legal tools to make them more effective. For example, the recent passage of the Great American Outdoors Act of 2020 ("GAOA")[31] provides a much-needed and long-overdue annual funding allocation to the Land and Water Conservation Fund ("LWCF"), much of which is dedicated to federal acquisition of inholdings.[32] Scholars and policymakers have also called for reforms to the federal land exchange program and for more robust utilization of direct federal regulation of inholdings pursuant to the federal government's powers under the Property Clause, as well as for more federal support for and coordination with conservation easement programs run by land trusts and other private organizations.[33]

This Article examines another option for narrowing the inholdings governance gap that has been largely overlooked by both lawmakers and scholars: whether and how the incentives of local governments with regulatory authority over inholdings might be realigned to encourage local land use decisions that mitigate, rather than exacerbate, the adverse impacts of inholdings on surrounding public lands. While local land use regulation cannot replace the federal and private law mechanisms described above, this Article contends that local land use law offers under-leveraged opportunities for narrowing the inholdings governance gap. Local governments—which in most states are delegated broad authority over land use[34]—have a powerful set of legal tools that could be deployed to mitigate the adverse impacts posed by development on inholdings. From zoning to subdivision regulations to a variety of other land use tools—such as transferrable development rights programs and design review—land use law plays a key role in how intensively any privately-owned property may be developed, and can address concerns about the intensity and type of development on particularly sensitive lands. Furthermore, local governance of inholdings offers numerous strategic advantages, in terms of implementation, flexibility, sustainability, fiscal efficiencies, and amplifying effects.[35]

This Article's analysis of inholdings is long overdue and highly relevant. At stake are not only the values associated with our public lands—conservation, recreation, resource management—but also a more nuanced understanding of how heterogeneous landscapes can be managed to achieve land use goals that

31. Pub. L. No. 116-152, 134 Stat. 682 (2020).

32. *See infra* Part II.B.

33. *See infra* Part II.B.

34. *See* 5 TREATISE ON ENVIRONMENTAL LAW § 10.03 (2020) ("The land use law of the majority of the fifty states traditionally has been embodied in state enabling legislation for zoning and subdivision ordinances which have authorized action by the municipalities and localities rather than by the state itself.").

35. *See infra* Part III.A.

transcend legal boundaries.[36] While the land use challenges posed by inholdings may be eliminated some day through wholesale federal acquisition, political and fiscal realities make such an outcome unlikely; even with the recent influx of funding to the LWCF as a result of the GAOA, there are still far more inholdings than there is federal money to acquire them.[37] In fact, the passage of the GAOA in 2020, combined with rapidly rising real estate values during the COVID-19 pandemic, makes this Article's analysis of inholdings particularly timely. Visitation to public lands throughout the country surged when the pandemic limited much of American life in 2020, as did property values of private property near those public lands—including inholdings.[38] Furthermore, as private property values and inflation continue to escalate at near-unprecedented rates, acquisition costs for inholdings are also likely to increase,[39] making it all

36. While there are a minority of voices that object to the entire conceit of federally protected lands, this Article takes as a given that federally protected public lands are normatively desirable and in the public interest. This view is in line with the vast majority of scholarship and public opinion. *See, e.g.*, PUB. OPINION STRATEGIES, AMERICAN VOTERS VIEW CONSERVATION AS PATRIOTIC, AND STRENGTHENING ON THE ECONOMY; BROAD SUPPORT FOR CURRENT CONSERVATION LEGISLATION 2 (2012) (stating that 76% of Republicans and 70% of Democrats agree that "[o]ne of the things our government does best is to protect and preserve our national history . . . through national parks, forests, and other public lands").

37. *See* Will Katcher, *GAOA Signed into Law, Fully Funding LWCF*, BE OUTDOORS (Aug. 4, 2020), https://perma.cc/R7ZE-C3C3 (noting even with the much-needed influx of funds to the LWCF as a result of the GAOA of 2020, "[a]fter decades of Congress redirecting LWCF funds, the program currently has a massive backlog of projects awaiting funding"); *America's Best Idea at Risk,* COAL. TO PROTECT AMERICA'S NAT'L PARKS, https://perma.cc/5RS8-LWYY (estimating that it would cost two billion dollars just to acquire the privately-owned inholdings within national parks, without even factoring in the costs to acquire inholdings within other types of public lands).

38. *See, e.g.*, Jason Blevins, *Coronavirus Drives Blistering Sales of Colorado Mountain Homes, Sets 2020 as Historic High Mark*, COLO. SUN (Dec. 28, 2020), https://perma.cc/WQ2N-HVEU; Prashant Gopal, *Rich Buyers Seeking Open Space Fuel a Housing Boom in the U.S. West*, BLOOMBERG NEWS (Oct. 29, 2020), https://perma.cc/G28A-VQ9D.

39. In addition to the well-documented frenzy in the current housing market in metropolitan areas, *see, e.g.*, Francesca Mari, *Will Real Estate Ever Be Normal Again?*, N.Y. TIMES (Nov. 12, 2021), https://perma.cc/T557-6WRG, rural areas where inholdings are more likely to be located are also seeing near-unprecedented rising real estate prices, *see, e.g.*, Blevins, *supra* note 38; Gopal, *supra* note 38; Talia Kaplan & Connell McShane, *Big Money Investors Looking for Inflation Hedge Turn to America's Homestead*, FOX BUS. (Nov. 17, 2021), https://perma.cc/S3HZ-SPP5 ("[A]s demand for land and remote homes continues to increase, so do prices . . . an example of those price hikes, noting that a home in Big Sky, Montana was listed for $10 million dollars one year ago and is about to sell for $16 million." (describing the current real estate market in Montana)); Michael Kaminer, *Head for the Hills: Texas Is Facing an Unprecedented Land Rush*, PENTA (June 1, 2021), https://perma.cc/UBJ6-RG34 ("[T]he 2020 boom turned out to be just a curtain raiser to a frenzied 2021. First-quarter 2021 sales of large-acreage rural properties grew more than 37% statewide compared to 2020. . . . Rural land prices, which had already risen 3.1% in 2020, have also soared 9.5% year to date in 2021." (describing the current rural real estate market in Texas)).

the more critical to better understand the structural constraints and strategic advantages of local land use regulation, so that funding priorities can be allocated accordingly.

Conceptualizing the inholdings governance gap and how it might be narrowed requires that we understand what inholdings are, why they matter, and the legal challenges they present. To that end, this Article develops a structural account of the law of inholdings, drawing on federal public lands law, constitutional law, property and land use law, and local government law. This seemingly ad hoc collection of legal doctrines that form the law of inholdings underscores why a holistic account of the subject has been missing from the legal scholarship.[40] Despite being situated at the juncture of multiple doctrinal areas, inholdings occupy a liminal place—both physically and doctrinally—in between public lands and private property. By putting the literatures in conversation, this Article provides valuable insights into under-theorized connections between federal public lands law, land use law, and local government law.

A preliminary caveat is warranted here: In developing a governance model of inholdings that gives renewed attention to the role of local governments, I am cognizant of the mixed record of local governments as collaborative partners in federal public lands management, as well as the normatively problematic calls that some localities and states have made for greater control over federal public lands.[41] This Article, while orthogonal to that debate, does not situate local

40. The subject of inholdings has appeared occasionally in public lands scholarship about external threats to public lands, as well as in a handful of case studies about the management of inholdings within a specific unit of the public land system. While this scholarship provides valuable insights into some of the legal issues raised by inholdings, none offers a comprehensive account of the governance challenges of and legal responses to inholdings; in particular, the role of local governance in mitigating development pressures on inholdings is largely undeveloped in existing literature. *See, e.g.*, Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976); Joseph L. Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709 (1980); J.F. Lambert, *Private Landholdings in the National Parks: Examples from Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL. L. REV. 35, 36–37 (1982); Charlotte Thomas, *The Cape Cod National Seashore, A Case Study of Federal Administrative Control over Traditionally Local Land Use Decisions,* 12 B.C. ENV'T AFFS. L. REV. 225 (1986); Randy Tanner, *Inholdings Within Wilderness: Legal Foundations, Problems, and Solutions*, 8 INT'L J. WILDERNESS 9 (2002); Lee Breckenridge, *Reweaving the Landscape: The Institutional Challenges of Ecosystem Management for Lands in Private Ownership*, 19 VT. L. REV. 363 (1995); Dennis L. Lynch & Stephen Larrabee, *Private Lands Within National Forests: Origins, Problems, and Opportunities*, *in* THE ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM 189, 210–12 (Harold K. Steen ed., 1992).

41. The public lands literature on these topics is immense. For an overview of some of the key issues, see Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective* 2005 UTAH L. REV. 1127, 1128 (2005) ("The notion of devolved authority—given the important role of federal lands in local economic and social affairs—has also been a longstanding theme in public land policy; it holds that state and local governments are entitled to a prominent role in establishing management objectives. . . . From the begin-

governments as co-equals to federal authority over *public lands*. Rather, its focus is on the existing regulatory authority local governments have over inholdings, *privately-owned property* that is under the existing jurisdiction of local governments, and how that authority could be deployed in ways that align with—or at least are less detrimental to—surrounding public lands management. As such, this Article contextualizes local governance of inholdings as a supplement to, not replacement for, federal governance.

This Article proceeds in three parts. Part I begins with an overview of the mosaic of federal laws that govern the public lands surrounding inholdings. This Part also provides a primer on inholdings: what they are, why they exist, where they are located, and who owns them, and catalogues the types of land use challenges that inholdings can pose. Part II analyzes the governance responses that have been deployed to address the land use challenges posed by inholdings, unpacking how the infirmities of local governance and limitations in federal and private law responses create a governance gap. Part III develops a normative argument for deploying local land use regulation as a more meaningful component of the inholdings governance model and offers prescriptive proposals for how to do so. A brief conclusion follows.

I. Inholdings and Public Lands

To ground its normative analysis about the inholdings governance gap, this Part begins with a descriptive account of inholdings and the legal challenges they present. Part I.A provides an overview of the mosaic of federal laws that govern the public lands surrounding inholdings. Part I.B turns to providing a primer on inholdings, exploring in more detail their legal origins and the people and places associated with them. Part I.C catalogues the types of land use challenges that arise as a result of the divergence in ownership and regulatory authority between inholdings and surrounding public lands.

A. Federal Public Lands Management

Inholdings are unique—and pose unique governance challenges—due to their location within federal public lands. Thus, any inquiry into the law of inholdings requires a foundational understanding of the federal laws that apply

ning, the public domain has been a contested landscape."). To a certain extent, the debates over devolved control and transfer of public lands implicates threads of larger federalism debates that appear in many other doctrinal areas of the law. But the debate in public lands law stands somewhat apart from other types of federalism debates because the legal tensions are most often focused on federal versus local (as opposed to state) authority. *See* Sally Fairfax, *Old Recipes for New Federalism*, 12 Env't L. 945, 960 (1982) ("In the public lands field, localities emerge as the most diverse and potentially the most challenging rivals to federal authority.").

to the public lands surrounding inholdings. Public land law as a whole, and public land management specifically, is an enormously complex area of law and the subject of a vast body of scholarship.[42] While necessarily only touching the surface of this doctrinal corpus, this part sketches out the key federal laws that shape the land management responsibilities of the four federal agencies responsible for the vast majority of public lands where inholdings are located.

Public lands, owned collectively by the American public, are managed by federal land management agencies ("FLMAs") pursuant to the requirements of federal law. The vast majority—95%—of federally-managed public land is managed by one of four federal agencies:[43] the National Park Service ("NPS"), the Fish and Wildlife Service ("FWS"), the Bureau of Land Management ("BLM"), and the U.S. Forest Service ("USFS").[44] In administering public lands, the four FLMAs are bound by specific congressional management mandates set out in federal laws applicable to each agency—which range from the relatively narrow conservation purpose for which FWS lands are to be managed, to the dual mandate of conservation and recreation applicable to lands managed by the NPS, to the broad multi-use mandate applicable to public lands managed by the NFS and BLM[45]—as well as other broadly applicable federal laws, such as the National Environmental Policy Act ("NEPA")[46] and Endangered Species Act ("ESA").[47] A brief overview of the federal laws that shape the land management of public lands under the jurisdiction of each of the four FLMAs is discussed below.[48]

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42. The literature on public lands management is immense, and entire law school courses are devoted to the topic. For an overview of the evolution in federal land management policies that form a backdrop to much of blackletter law of public lands, see Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1130–42 (2005).

43. *See* CONG. RSCH. SERV., R40025, FEDERAL LAND MANAGEMENT AGENCIES: BACKGROUND ON LAND AND RESOURCES MANAGEMENT 22 tbl.4 (2009) [hereinafter FLMA BACKGROUND], https://perma.cc/ED72-M7JW. The remaining 5% of federally owned land is managed by a variety of other federal agencies, such as the Department of Defense and Department of Energy; while data is scant, there appear to be no inholdings within these types of federal lands. *Id.*

44. Three of the four FLMAs (NPS, FWS, BLM) are agencies within the Department of the Interior, while the USFS is an agency within the Department of Agriculture. *Id.*

45. *Id.*

46. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

47. 16 U.S.C. §§ 1531–44.

48. The four FLMAs generally have management authority over discrete categories of public lands (i.e., FWS manages all public lands designated as wildlife refuges, while the USFS manages all public lands designated as national forests and national grasslands). FLMA BACKGROUND, *supra* note 43. There are also a handful of special land management systems within the federal system that may be managed by any one of the four FLMAs, depending on which agency has pre-existing authority over the designated lands: the National Wilder-

National Park Service. The NPS manages not only well-known national parks, but also a myriad of other public lands, such as national seashores, national historic battlefields, national preserves, national recreation areas, and other types of units.[49] The Park Service Organic Act established a dual mandate of conservation and recreation for lands managed by the NPS.[50] These dual mandates can be in tension and balancing them poses an ongoing management challenge for the NPS that scholars have explored elsewhere.[51] However, compared to the multi-use, sustained-yield mandates that apply to lands managed by BLM and the USFS, the relatively narrower dual mandate of the NPS means that public lands administered by the NPS are generally afforded relatively high levels of legal protections; for example, with limited exceptions, most resource extraction activities (such as mining, drilling, or grazing) are prohibited in most NPS-managed units.[52]

Each unit within the National Park System, with the exception of national monuments created by executive orders pursuant to the Antiquities Act, is created by an individual act of Congress and is thus also subject to the specific provisions of the enabling legislation authorizing its creation of that particular unit.[53] Unit-specific enabling legislation typically sets out the legal boundaries of the unit and specific purposes it has been established to protect, as well as provides for the methods by which the park can acquire additional non-federal

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ness Preservation System, National Wild and Scenic Rivers System, and the National Trails System. *Id.* In addition, public lands designated as National Monuments are usually managed by the NPS but may also be managed by one of the other FLMAs. *Id.*

49. *See* NAT'L PARK SERV., BRANCHING OUT: APPROACHES IN NATIONAL PARK STEWARDSHIP 10–11 (2003) [hereinafter BRANCHING OUT], https://perma.cc/LC9H-STWJ (noting the types of public lands the NPS manages include not only national parks but also "national seashores, national historic sites, national memorials, national preserves, and national recreation areas, among others"). The NPS also manages most National Monuments, *id.*, which, under the Antiquities Act of 1906, may be designated by the President on land that is already federally owned. 54 U.S.C. § 320301(a).

50. 16 U.S.C. § 1 ("[T]o conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations . . . ."). In 2014, the Act was repealed and recodified with substantially similar language in 54 U.S.C. § 100101.

51. *See, e.g.*, Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENV'T L. & POL'Y REV. 851 (2009) (noting how the dual mandate of NPS creates problematic land management outcomes); Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 DENV. U. L. REV. 575 (1997) (arguing that the legislative history of the Park Service Organic Act indicates that the dual mandate goals are not co-equal and that the goal of conservation should be prioritized over recreation).

52. *See* FLMA BACKGROUND, *supra* note 43, at 49–50.

53. Most units within the National Park System have been authorized through individual acts of Congress; however, national monuments administered by the NPS do not have individual enabling acts, since they are created on federal land by presidential proclamation pursuant to the Antiquities Act of 1906. *Id.* at 52–53.

lands within its boundaries.[54] Individual enabling acts govern land management within a particular unit in the National Park System if there is conflict with any general legislation.[55]

Fish and Wildlife Service. FWS primarily manages wildlife refuges, as well as certain other designated areas, such as waterfowl production areas and wildlife coordination units.[56] FWS has a comparatively narrow mandate under its organic act, the National Wildlife Refuge System Administration Act of 1966: The primary purpose of FWS lands management is "conservation, management and, where appropriate, restoration of the fish, wildlife, and plant resources and their habitats."[57] Other activities—such as recreation or resource development—are only permitted to the extent they are compatible with "the major purposes for which such areas were established."[58] In the National Wildlife Refuge System Improvement Act of 1997, Congress clarified that "compatible wildlife-dependent recreation" is the land management priority for public lands managed by FWS.[59]

As with public lands managed by the NPS, individual units within the FWS system can be created through an individual act of Congress or through executive action; FWS is also authorized to add lands to its system without specific congressional action pursuant to authority vested in the agency through other federal laws (primarily the Migratory Bird Treaty Act of 1929, which authorizes FWS acquisition of lands that are "necessary for the conservation of migratory birds"), and the vast majority of lands managed by FWS have been incorporated in the system in this way.[60]

U.S. Forest Service. The only FLMA housed within the Department of Agriculture, rather than Department of the Interior, the USFS, manages national forests and national grasslands.[61] There are 155 national forests (totaling 188 million acres) and twenty national grasslands (totaling 3.8 million acres) within the USFS system, as well as a handful of other categories of public lands administered by the agency.[62] Historically, designation of public lands as national forests, or grassland, resulted from Congress granting the President the

54. *See, e.g.*, 16 U.S.C. § 410jjj (establishing Congaree Swamp National Monument, now Congaree National Park).

55. *See* FLMA BACKGROUND, *supra* note 43, at 49.

56. *Id.* at 39–40.

57. 16 U.S.C. § 668dd(a)(2).

58. *Id.* § 668dd(d)(1)(A).

59. *Id.* § 668dd.

60. FLMA BACKGROUND, *supra* note 43, at 43–44 (noting that other federal laws providing authority for lands to be added to the FWS system include the ESA, the Fish and Wildlife Coordination Act, and the Fish and Wildlife Act of 1956).

61. *See generally* JOHN CLAYTON, NATURAL RIVALS: JOHN MUIR, GIFFORD PINCHOT, AND THE CREATION OF AMERICA'S PUBLIC LANDS (2019) (providing a detailed account of the history of the division of authority over federal public lands between the two agencies).

62. FLMA BACKGROUND, *supra* note 43, at 21.

authority to establish forest reserves from the public domain.[63] However, Congress eventually repealed this executive authority and enacted the Weeks Act of 1911,[64] which authorized the acquisition and expansion of the USFS system through agency acquisitions from non-federal landowners as well as through land transfers from other FLMAs.[65]

The original organic act for the USFS, the Organic Administration Act of 1897, authorized only two purposes for lands under its administration: timber production and watershed protection.[66] However, the Multiple-Use, Sustained-Yield Act of 1960 ("MUSYA") later broadened the scope of the Forest Service mandate, providing that in addition to the two original purposes of timber and watershed management, lands managed by the USFS should also be managed for outdoor recreation, livestock grazing, and wildlife and fish habitats.[67]

As numerous scholars have documented, balancing multiple uses that are often incompatible with each other—such as timber production and recreation, or wildlife habitat protection and livestock grazing—has proven to be an ongoing challenge.[68] In an effort to try to bring some organizing principles and specific parameters to how the USFS should comply with the multiple-use and sustained-yield mandates, Congress enacted the Forest and Rangeland Renewable Resources Planning Act of 1974,[69] amended in part by the National Forest Management Act of 1976.[70] These federal laws provide the basic framework for planning and land management of public lands administered by the USFS and require the preparation of a comprehensive land and resource management plan for each unit within the system.[71]

Bureau of Land Management. BLM manages the portions of the public domain that have not been reserved for other purposes under the jurisdiction of

63. *Id.* at 20–21 (describing how the Roosevelt administration exercised this authority in the early 1900s).

64. Ch. 186, 36 Stat. 961.

65. FLMA BACKGROUND, *supra* note 43, at 21.

66. Organic Administration Act of 1897, ch. 2, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473, 475).

67. Multiple-Use Sustained-Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528–531).

68. *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunction of Multiple Use Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009); Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405 (1994); Sarah Bates, *Discussion Paper: The Changing Management Philosophies of the Public Lands*, NAT. RES. L. CTR., UNIV. COLO. SCH. LAW (1993), https://perma.cc/2P5H-MYDW.

69. Pub. L. No. 93-378, 88 Stat. 476 (codified as amended at 16 U.S.C. §§ 1600–1614).

70. Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1600, 1611–14, 472a, 521b); *see also* Timothy Pryor Mulhern, *The National Forest Management Act of 1976: A Critical Examination*, 7 B.C. ENV'T AFFS. L. REV. 99 (1978) (providing an analysis of the legal landscape for public lands managed by the USFS prior to and after the passage of these federal laws).

71. *See id.*

one of the other three FLMAs.[72] Created by merging two preexisting federal agencies whose roles focused more on the disposal of public lands to private interests rather than the management of public lands in the public interest, BLM has a more complicated legacy than the other three FLMAs.[73]

In 1976, Congress passed the Federal Land Policy and Management Act of 1976 ("FLPMA").[74] While it did not create BLM, the law is considered to be the agency's organic act, since it established the agency's primary role as a manager of public lands and required that all federal lands administered by BLM were to be retained in federal ownership unless disposal of a particular parcel is determined to serve the public interest.[75] FLPMA also requires that all BLM-managed public lands be managed "on the basis of multiple use and sustained yield unless otherwise specified by law,"[76] similar to the multiple-use mandate that the USFS operates under.[77] As with the USFS, BLM's multiple-use mandate has proved challenging to administer in practice, as different users on BLM lands seek to engage in activities which, while legally allowable as a permissible multiple use under FLPMA, may be practically incompatible with each other.[78]

Because BLM serves as the residual manager for public lands, there is significant variety in the types of land it manages and the land use objectives

72. *See* 43 U.S.C. §§ 1701, 1731; *see also* FLMA BACKGROUND *supra* note 43, at 6–7 (noting that 95% of federally-managed public land is managed by one of the four FLMAs).

73. FLMA BACKGROUND, *supra* note 43, at 5; *see also* Robert B. Keiter, *Towards a National Conservation Network Act: Transforming Landscape Conservation on the Public Lands into Law*, 42 HARV. ENVTL. L. REV. 61, 74 (2018) (describing how for the first few decades of its existence (from the 1940s through the mid-1970s), BLM had a fundamentally different role than the other three FLMAs: "Among the federal land management agencies, BLM is a relative latecomer to preservation").

74. Pub. L. 94–579, 90 Stat. 2743, (codified as amended in scattered sections of 16 and 42 U.S.C.).

75. *See* CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 4 n.17 (2020), https://perma.cc/K7DU-SFV5 ("FLPMA is sometimes called the BLM Organic Act.").

76. 43 U.S.C. § 1701; *see also* Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 833 (1993) ("In 1976, FLPMA was Congress's attempt to establish the new status of the agency. Although grazing and mineral functions remain strong elements of its role, the Act for the first time acknowledges that the BLM should do what its non-acronym title implies: it should be a land manager.")

77. There are, however, some differences in the details in how different statutes providing for multiple use mandates operate for the two agencies. For example, unlike MUSYA, FLMPA specifically allows for BLM to manage particular lands under its jurisdiction for a predominant use, as well as grants the agency the authority to withdraw particular lands under its jurisdiction from being used for uses otherwise allowed (for example, mining) if statutory requirements for withdrawal are satisfied. 43 U.S.C. § 1712.

78. *See* Biber, *supra* note 68, at 8; Blumm, *supra* note 68, at 408–15; Bates, *supra* note 68, at 15.

the lands are managed for.[79] To guide its land management across its system, BLM develops resource management plans ("RMPs") for the public lands under its administration, which are grouped into 187 plan areas.[80] Individual RMPs—which are developed in conjunction with applicable NEPA analysis and subject to extensive public comment—lay out the key management objectives, implementation methods, and plans for ongoing monitoring, evaluation, and adaptive management.[81]

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In addition to the agency-specific federal laws discussed above, numerous other federal laws—from the National Historic Preservation Act,[82] to the Wilderness Act of 1964,[83] to the Wild Free-Roaming Horses and Burro Act of 1971 ("WFRHBA")[84]—affect land management decisions for particular public lands.[85] Furthermore, geographically-specific federal laws apply to land management of certain public lands; for example, the federal Southern Nevada Public Land Management Act sets out specific land management processes applicable only to certain public lands in its eponymous region,[86] while public lands in Alaska are subject to a number of Alaska-specific federal laws.[87] A full discussion of these federal laws is beyond the scope of this Article, but where

79. *See What We Manage*, BUREAU OF LAND MGMT., https://perma.cc/PD7C-8XAP ("The BLM manages one in every 10 acres of land in the United States . . . ."); *Who We Are, What We Do*, BUREAU OF LAND MGMT., https://perma.cc/LT7D-9CXH ("Congress tasked the BLM with a mandate of managing public lands for a variety of uses such as energy development, livestock grazing, recreation, and timber harvesting while ensuring natural, cultural, and historic resources are maintained for present and future use. To do this, we manage public lands to maximize opportunities for commercial, recreational, and conservation activities.").

80. *Approved Land Use Plans 07/31/2020*, BUREAU OF LAND MGMT., https://perma.cc/J88G-4ZSM.

81. Individual RMPs are highly individualized and lengthy documents, the result of a multi-year planning process. *See, e.g.*, BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, RECORD OF DECISION (ROD) AND APPROVED RESOURCE MANAGEMENT PLAN (APPROVED PLAN) FOR CANYONS OF THE ANCIENTS NATIONAL MONUMENT (2010), https://perma.cc/UD8X-6GMB.

82. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended in scattered sections of 54 U.S.C.).

83. 16 U.S.C. §§ 1131–1136.

84. *Id.* §§ 1331–1340.

85. *See* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW (7th ed. 2014) (discussing these and other federal laws that can affect public lands management).

86. Southern Nevada Public Land Management Act of 1998, Pub. L. No. 105-236, 112 Stat. 2343.

87. The Alaska National Interest Lands Conservation Act ("ANILCA") is the keystone federal law that controls public lands management in Alaska. *See* USDA, PUBLIC LAND LAWS AFFECTING NATIONAL FORESTS IN ALASKA (2010), https://perma.cc/D2GS-53YS.

applicable, they may add additional regulatory layers to the land management of public lands surrounding inholdings.[88]

B. A Primer on Inholdings

The seemingly straightforward definition of inholdings—non-federally owned land surrounded by federally managed public lands[89]—belies the level of complexity involved in identifying what types of property interests are considered inholdings, as well as the diversity in the places and people associated with inholdings. This Section unpacks this complexity by analyzing four key questions: (1) what are inholdings; (2) why do inholdings exist; (3) where are inholdings located; and (4) who owns inholdings.

1. What Are Inholdings?

Inholdings are defined as non-federally owned land surrounded by federally managed public lands.[90] This definition includes not only privately-owned inholdings, but also inholdings owned by other non-federal public entities, such as states and Native American tribes.[91] The definition of inholdings, however, does not include a number of other property or quasi-property interests that can also exist within federally managed public lands, such as subsurface rights (i.e., mineral rights), grazing permits, timber leases, Forest Service cabin permits, and other use and occupancy rights that private parties may have pursuant to short- or long-term leases or licenses.[92] While these private interests can also

88. For example, access to inholdings within public lands in Alaska is subject to specific provisions of ANICLA. *See* NAT'L PARK SERV., AN INTERIM USER'S GUIDE TO ACCESSING INHOLDINGS IN NATIONAL PARK SYSTEM UNITS IN ALASKA (2007), https://perma.cc/49BY-WV8J.

89. *See* FEDERAL LAND OWNERSHIP, *supra* note 11, at 1 n.5 ("An inholding can be characterized as private, state, or other nonfederal lands that are surrounded by federal lands, typically within a unit of a federal land management agency.").

90. *Id.*

91. While posing some of the same land use challenges as privately-owned inholdings, state and tribal-owned inholdings largely fall outside of the scope of the governance model described in this Article because the legal doctrines that operate uniquely on these types of inholdings (specifically, state trust requirements for state-owned inholdings and the sovereignty of Native American tribes and federal Indian law doctrines for tribal-owned inholdings) often operate to make local governance inapplicable. *See* Uma Outka, *State Lands in Modern Public Land Law*, 36 STAN. ENV'T L.J. 147, 148 (2017) (providing an overview of state trust obligations for state-owned public lands); Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape* 5 J.L. PROP. & SOC. 1 (2019) (providing an overview of legal doctrines affecting Native American property ownership).

92. *See* Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991 (2014) (discussing a variety of private interests on public lands); Sally K. Fairfax, *The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands*, 25 ECOLOGY

raise concerns about negative externalities on surrounding public lands,[93] these types of private interests are governed by a distinct set of federal laws and legal frameworks, which form part of the federal public lands canon.[94] In contrast, land use activities that occur on inholdings are governed primarily through local land use regulations, and as a result, their governance has been less well-explored in the public lands literature.

2. Why Do Inholdings Exist?

The existence of inholdings within public lands is largely the legacy of early federal policies, which encouraged private development and settlement on the public domain, and later shifts in federal policy that led to federal reservations,[95] acquisitions, and re-acquisitions forming the basis of the public lands system today.[96] The origins of public lands within the federal system—and the inholdings within their boundaries—vary somewhat, depending on the type and location of the public lands at issue. Most public lands managed today by BLM and the Forest Service in the western half of the country are the result of the federal reservations of vast swaths of the public domain in the 1800s before there was significant non-indigenous settlement of these areas.[97] However, these federal withdrawals generally did not extinguish any pre-existing ownership interests, such as homesteading claims, state trust grants, railroad grants,

L.Q. 630, 634, 640 (1998) ("[T]here are three significant kinds of interruptions to federal ownership: (1) intermixed ownership; (2) easements, leases, and partial titles; and (3) informal claims. . . . The block of federal land on the map is largely a myth.").

93. *See* Huber, *supra* note 92, at 994 ("Once established, private claims to public lands—of which there are hundreds of thousands—seem, in many instances, to take on a life of their own . . . as these are often extended, expanded, renewed, and protected by law and by agency managerial practices in ways that shape, and often trump, other policy objectives with respect to federal land.").

94. For example, the federal Mineral Leasing Act of 1920 and Mining Law of 1872 provide the legal framework that applies to subsurface rights on federal public lands. *See* COGGINS ET AL., *supra* note 85, at 99–100, 124.

95. In the context of federal public land law, the terms "reserve" or "reservation" is often used synonymously with the terms "withdraw" or "withdrawal" to refer to the legal act of the federal government reserving the land for federal purposes (and thereby withdrawing it from non-federal purposes). *See, e.g.*, United States v. New Mexico, 438 U.S. 696, 699 (1978) ("Substantial portions of the public domain have been withdrawn and reserved by the United States for use as Indian reservations, forest reserves, national parks, and national monuments."); *see also* 16 U.S.C. § 48 ("The tracts of land embracing the Yosemite Valley and the Mariposa Big Tree Grove . . . are reserved and withdrawn from settlement, occupancy or sale under the laws of the United States and set apart as a national forest . . . and shall hereafter form a part of the Yosemite National Park." (describing federal lands congressionally authorized to become part of Yosemite National Park)).

96. *See* Stuebner, *supra* note 19 (discussing various shifting federal policies over the past two centuries and how they implicate inholdings).

97. *See* COGGINS ET AL., *supra* note 85, at 45, 108–29.

or mining claims.[98] Unless extinguished through processes such as eminent domain, those prior existing rights remained in existence, even as the surrounding lands were designated as public.[99] While some of these properties have come into federal ownership over time through a variety of legal means, those that remain in non-federal ownership exist as inholdings today.

Most other public lands—particularly national forests in the eastern half of the country, as well as many units within the National Park System and the National Wildlife Refuge System nationwide—were designated as federal public lands long after the area had already been settled by non-indigenous populations and after significant private ownership had already been established.[100] Congress typically has designated such public lands through an individual act of legislation authorizing the creation of a new unit within the public lands system.[101] The enabling statutes will typically include a legal description or acreage quantification regarding the outer boundaries, or maximum acreage authorized for the unit, and exempt all valid preexisting rights (which includes inholdings, as well as other types of private interests such as those discussed above).[102] His-

98. *See id.*

99. *See id.* It is worth noting how the somewhat unique legal treatment of one type of prior existing right, mining claims, can result in the establishment of an inholding. As noted above, subsurface rights like mining claims on federal lands do not fall within the definition of inholdings. However, if certain legal requirements are met, what started as a mining claim can ripen into an inholding. Due to a variety of legal concerns raised by patented mining claims, there has been a federal moratorium on any new patented mining claims since 1994. *See Patents,* BUREAU OF LAND MGMT., https://perma.cc/D8Y4-UWAD ("A patented mining claim is one for which the Federal Government has passed its title to the claimant, giving him or her exclusive title to the locatable minerals and, in most cases, the surface and all resources."); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 33 (describing patented mining claims, which vest the claimant with title to public lands and convert it into private property, freely transferrable and usable for any purpose, not just mining use); Blevins, *supra* note 30 ("It's conservatively estimated that there are about 13,000 acres of private land, or inholdings, nestled into Colorado's 14.5 million acres of Forest Service land. Most of those are mining claims patented before 1900.").

100. *See Land Acquisition History*, NAT'L PARK SERV., https://perma.cc/Y8EK-DEHY ("In the mid-1960s Congress started to create new units called "recreational areas" and "national seashores" within the Park System to meet the growing recreation needs of citizens. . . . Growth continued and most new parks were created with the land being in private ownership. It soon became apparent that a funding source was needed to acquire land at these new units. There was no public domain land in the Eastern United States to carve out parks and donation did not fill the void.").

101. *See* MARTIN NIE, THE GOVERNANCE OF WESTERN PUBLIC LANDS: MAPPING ITS PRESENT AND FUTURE 212 (2008).

102. *See, e.g.*, Act of Aug. 9, 1916, ch. 302, 39 Stat. 442 (providing a metes and bounds legal description in the enabling legislation for Lassen Volcanic National Park); Act of Oct. 23, 1972, Pub. L. No. 92-536, 86 Stat. 1066 (referring to a publicly recorded map showing the outer boundaries of the property to be included in the unit in the enabling legislation for Cumberland Island National Seashore).

torically, congressional expectation was that the federal land management agency with management responsibility for the particular unit would acquire the non-federal land[103] within the designated boundaries over time, parcel by parcel, through specific legal mechanisms Congress had authorized in the enabling statute for that particular unit of the federal public lands system.[104] However, for various reasons—fiscal, political, or a combination—acquisition of all non-federally owned parcels within congressionally designated boundaries often proved infeasible, and parcels that remained in private ownership and isolated within federal public lands continue to exist as inholdings today.

3. Where Are Inholdings Located?

A precise account of the locations and total numbers or acreage of inholdings across all public lands is unknown because of a lack of coordinated data reporting across federal land management agencies. However, inholdings are found on federally managed public land nationwide,[105] and agency-specific data provides a sense of the extent of inholdings within specific categories of public lands.[106]

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103. In some cases, the lands within the congressionally designated boundaries might have already been federally owned but managed by a different FLMA than the one Congress designated the unit for management by, requiring transfer of federal oversight over the lands from one agency to another. *See* William E. Shands, *The Origins and Significance of the National Forest System*, *in* ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM, *supra* note 40, at 29 (describing transfer of BLM land to the USFS under the Weeks Act).

104. *Id.* at 34–35 ("The federal government could not buy only the most productive land, or the most scenic, or land that protected valuable wildlife habitat. Basically, federal buyers had to take what was offered and collect enough land into a unit that could become a viable national forest." (describing Forest Service acquisitions of non-federal land that came to form the basis of many of the national forests in the eastern United States)). More recent congressional designations of public lands have recognized that complete federal ownership of all property within the outer boundaries was explicitly never intended to be achieved. *See, e.g.*, Sturgeon v. Frost, 139 S. Ct. 1066, 1069–71 (2019) (discussing the history of ANILCA, which created a number of national parks and preserves in Alaska, but which specifically provided for legal protections to allow for the continued existence of non-federally owned lands within the boundaries of the units); *see also* CONG. RSCH. SERV., R42125, NATIONAL PARK SYSTEM: UNITS MANAGED THROUGH PARTNERSHIPS (2016) [hereinafter NPS: UNITS MANAGED THROUGH PARTNERSHIPS], https://perma.cc/DBC3-NLCQ (describing the modern "partnership park" model, which specifically envisioning the ongoing existence of non-federally owned land within the unit's boundaries).

105. *See Mapping the Land and Water Conservation Fund (LWCF)*, WILDERNESS SOC'Y, https://perma.cc/6N96-6Z3G (indicating funds from the LWCF have been used to purchase inholdings and other property around public lands in all fifty states).

106. *See* Stuebner, *supra* note 19 ("We don't even know the scale of the problem at a national level because the inholding data from the National Wilderness Preservation System are not reported consistently among the four agencies with wilderness responsibility." (quoting Peter Landres, research ecologist, USFS Aldo Leopold Wilderness Research Institute)).

Inholdings are most prevalent on public lands managed by the Forest Service (which includes both national forests and national grasslands): Approximately 40 million acres—equating to 17%—of the approximately 232 million acres of the land within national forest boundaries is non-federally owned land.[107] The extent of inholdings within other public lands—such as those managed by the NPS (which includes not only national parks, but also national seashores, national recreation areas, national historic parks, and other types of sites), as well as within wildlife refuges managed by FWS[108] and BLM lands[109]—varies by both type of public land and geographic location. Within the National Park System itself, private inholdings make up 3% of the system's 84 million total acres, equating to approximately 2.6 million acres of developable private property within the park system.[110] Other types of public lands managed by the NPS have much higher concentrations of inholdings: For example, in NPS-managed national recreation areas ("NRA") near major urban areas, such as Golden Gate NRA in San Francisco, and Santa Monica Mountains NRA near Los Angeles, the amount of privately-owned property within the NRAs equals or exceeds the acreage in federal ownership.[111]

In terms of geography, because the western continental states and Alaska have a significantly greater amount of federally managed public lands within their boundaries overall, these states also have the highest total acreage of inholdings.[112] But because many public lands in the East were created after signif-

107. *See* FLMA BACKGROUND, *supra* note 43 (providing a tabulation of the acreage of all inholdings with public lands managed by the Forest Service broken down by region of the country).

108. *National Wildlife Refuge System Land Protection Projects*, U.S. FISH & WILDLIFE SERV. (Mar. 2013), https://perma.cc/EM4B-KMGL (providing a tabulation of the acreage of all inholdings on public lands managed by FWS).

109. Private ownership within BLM-managed public lands presents a somewhat different scenario than public lands managed by the other three FMLA agencies, because of the unique role BLM plays as the manager of "residual" public lands. *See* Sally K. Fairfax, *Beyond the Sagebrush Rebellion: The BLM as Neighbor and Manager in the Western States*, *in* WESTERN PUBLIC LANDS 88 (John G. Francis & Richard Ganzel eds., 1984). Although some true inholdings do exist on BLM-managed public lands, often it is federally-owned BLM parcels that are isolated and surrounded by state, tribal, or privately-owned lands. *See* Fairfax, *supra* note 41, at 975 ("The BLM has occasional areas of contiguous or 'blocked in' ownership, but more typically, BLM lands are fragmented parcels that are admixed with state, private, and other categories of reserved lands. The result is not 'federal lands' but a crazy quilt of landowners, management goals, resources, and constraints.").

110. *See National Park Service – Listing of Acreage*, NAT'L PARK SERV. (Sept. 30, 2018), https://perma.cc/KB88-2YRN (providing a tabulation of the acreage of all private property located within public lands managed by the NPS).

111. *See* BRANCHING OUT, *supra* note 49.

112. Alaska, as the state with the most federal land, also has the most inholdings of any state by acreage. *See* NAT'L PARK SERV., *supra* note 88, at 3–4 (noting that there are "approximately 1,666,500 acres of private, state, and municipal lands within the boundaries of National Park System units in Alaska").

icant private development had already occurred, the relative percentage of land held as inholdings is actually higher on public lands in the eastern half of the country.[113] For example, while the nationwide average for privately owned lands within national forests and national grasslands is 17%, in many eastern national forests, the percentage of privately-owned land within the forest boundaries approaches 50%.[114]

The spatial characteristics of inholdings also vary considerably, and parcels may range from less than one acre to multi-thousand acre properties, with no prototypical shape or size.[115] When viewed on a map, individual inholdings most often appear as isolated islands scattered randomly within surrounding public lands.[116] However, within certain public lands, settlement patterns and the timing of federal public lands designations has resulted in concentrated areas of multiple, separately-owned inholdings that collectively form an entire community of inholdings, such as Wawona, California (located within Yosemite National Park); McCarthy, Alaska (located within Wrangell-St. Elias National Park and Preserve); Stehekin Valley, Washington (located within North Cascades National Park); and Wilsonia, California (located within Sequoia National Park).[117]

113. *See* FEDERAL LAND OWNERSHIP, *supra* note 11, at 5 ("The NFS contains substantial acreage of nonfederal lands within the proclaimed boundaries of the system, particularly in the east, where national forests were established after extensive settlement. NFS units in the Eastern and Southern Regions average about 46% nonfederal land within their boundaries, while Western Region NFS units average about 10%.").

114. *Id.*

115. Inholdings resulting from patented mining claims, in particular, often have irregular boundaries, orientations, and sizes, due to their genesis as property claims in subsurface minerals. *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, MINING CLAIMS AND SITES ON FEDERAL LANDS 8–9 (2021), https://perma.cc/3G6Y-A8JE (illustrating the configurations and legal descriptions of sample mining claims, and noting that certain types of mining claims (lode claims) are often elongated parallelograms, while other types (placer claims) can be a variety of sizes and shapes).

116. *See supra* notes 99–100 and accompanying text.

117. *See Celebrating Yosemite Part 10: Yosemite's Unlikely Role in the Sage Brush Rebellion*, BLOGWEST, https://perma.cc/5AJJ-2CWC (noting the history of Wawona and its relationship with Yosemite National Park); WRANGELL-ST. ELIAS, NAT'L PARK SERV., https://perma.cc/4C5C-N9RS (describing McCarthy, Alaska, as a "private inholding . . . within Wrangell-St.Elias National Park and Preserve"); David Louter, *Land Use and Protection*, *in* CONTESTED TERRAIN (1998), https://perma.cc/Z36Y-XU7E; NAT'L PARK SERV., U.S. DEP'T OF INTERIOR, DISPOSITION PLAN FOR NATIONAL PARK SERVICE-OWNED STRUCTURES IN WILSONIA 1 (2013), ("Wilsonia's setting wholly surrounded by a National Park is uncommon.").

4. Who Owns Inholdings?

As noted above, inholdings may be privately-owned or owned by states or Native American tribes.[118] With respect to private inholdings, the owners—inholders—are diverse as any other group of property owners. Thus, some inholders are conservation-minded stewards of the land,[119] while others are opportunistic real estate speculators who have acquired inholdings for use as leverage in federal land exchanges and who threaten to develop the inholding to its maximum intensity if they do not get what they want.[120] Many inholders likely fall somewhere in between.[121] While individual inholders come in all po-

118. *See* FEDERAL LAND OWNERSHIP, *supra* note 11, at 1 (defining an inholding as private, state, or other nonfederally-owned land).

119. *See, e.g.*, *The Nature Conservancy Acquires Superior National Forest Inholdings*, NATURE CONSERVANCY (Oct. 7, 2020), https://perma.cc/4NP8-4QNQ ("Mike Freed, a retired forestry professor who resides in Minnesota, bought the land . . . back in 1994 when a land development company listed it for sale as sites for new cabins . . . Freed was particularly taken by its proximity to the Boundary Waters and its wild lakes. 'This area is very important to the psyche and the emotional needs of a lot of people in Minnesota. I've been privileged to take care of this land and I want to pass it onto someone who can continue to care for it.' Freed sold the property to TNC for significantly less than the appraised value." (describing The Nature Conservancy's purchase of inholdings in the Boundary Waters Canoe Wilderness Area from a private owner)).

120. *See* Blevins, *supra* note 30 ("[W]hat they are trying to benefit from is the investment of the public to protect those lands that surround them . . . . Most people would characterize that as being opportunistic at best and extortion at its worst." (describing real estate speculators who own inholdings)). Federal land exchanges involving inholdings—and the controversies associated with them—are discussed in more detail in Part II *infra*. One real estate developer, Tom Chapman, has gained notoriety for his tactics involving inholdings as leverage in land exchanges that appear to have resulted in massive windfalls to him and his investors, and significant losses to the American public. *See, e.g.*, Kelley McMillan, *Backcountry Monopoly*, OUTSIDE (Nov. 29, 2011), https://perma.cc/5XSE-HHHC (describing Chapman's exchange of an inholding within a national forest in Colorado valued at $640,000 for a parcel of national forest land near Telluride valued at the same amount for purposes of the exchange, but which Chapman subsequently sold for $4.2 million less than two years later); Taylor, *supra* note 3 (describing an attempt by Chapman to sell the NPS an inholding in Black Canyon of the Gunnison National Park, which he had acquired for $250,000, for $14 million, and his decision to build a mega-mansion on the inholding when the NPS—which is prohibited under federal law from buying land at above-market prices—rejected his offer).

121. *See, e.g.*, Greg Parlier, *Cumberland in Crisis*, BLUE RIDGE OUTDOORS (Dec. 11, 2017), https://perma.cc/X8MZ-EMG7 (describing a plan by the owner of an inholding within the Cumberland Island National Seashore to build "ten homes for his current and future family"; when members of the public voiced concerns about the impacts on surrounding public lands, the owner responded that he and his family "have been instrumental in preserving the island's natural majesty, and for that reason, people should trust that relationship will continue"); Erika Brown, *Reminisces of East Fork,* SAN JUAN CITIZENS ALL. (Dec. 13, 2016), https://perma.cc/G54W-T6KL (describing an owner's plan to develop an inholding in National Forest in Colorado with "a private luxury club with several dozen trophy homes, hundreds of timeshare condos, a golf course and private ski slope," but noting that after

litical stripes, to the extent that inholders have a collective identity, it is one that has become associated with the property rights movement: The National Park Inholders Association was founded in 1978 by property owners in Wawona, California (an inholding community within Yosemite National Park) "to protect private property landowners from unwanted acquisition by the National Park Service."[122] The organization evolved over the next few decades to add grazing permit holders as well as owners of mining claims to its ranks, and eventually changed its name to the American Land Rights Association, which advocates for a variety of property rights causes.[123]

C. The Land Use Challenges Posed by Inholdings

The previous section has shown that management of federal public lands is an enormously complex endeavor shaped by numerous federal statutes reflecting multi-layered policy considerations that are often in tension with each other. Further complicating this already challenging legal landscape are tens of thousands of inholdings. From the perspective of the FLMAs, inholdings are effectively what the Supreme Court has referred to as "regulatory outholdings."[124] As such, inholdings can pose a number of land use challenges to the management of surrounding public lands. While the specific complications posed by any particular inholding will necessarily vary, the land use challenges posed by inholdings tend to fall into six categories: (1) inholder access; (2) boundary disputes; (3) burdens on efficient federal public lands management; (4) barriers to public access; (5) adverse impacts from incompatible development; and (6) real estate speculation.

1. Inholder Access

A variety of federal laws impose legal requirements that owners of inholdings within many types of public lands be provided with "adequate" or "reasonable" access to their inholdings across surrounding federal lands.[125] At the same

significant community opposition to the project, "a decade later, the ranch owner (a Chicago real estate developer) finally saw the wisdom of just leaving the valley as is, and his family placed a conservation easement on the property").

122. *Mission & History*, Am. Land Rts. Assoc., https://perma.cc/9DUN-K32K.

123. *Id.*

124. *See* Sturgeon v. Frost, 139 S. Ct. 1066, 1082 (2019) ("Geographic inholdings thus become regulatory outholdings . . . .").

125. A variety of statutes set out access requirements for inholdings located within public lands managed by BLM and the USFS, as well as for inholdings located within any type of public land designated as Wilderness pursuant to the Wilderness Act of 1964 and any type of public land in Alaska covered by ANILCA. *See* 43 U.S.C. § 1761 (FLPMA); 16 U.S.C. § 1134(b) (Wilderness Act of 1964); *id.* § 3170(b) (ANILCA). The inholder access provisions in ANILCA have been held to be applicable to inholdings within public lands man-

time, federal laws also reserve to federal agencies varying levels of discretion to reasonably regulate such access to protect the values of surrounding public lands.[126] Thus, inholders' rights of access are not unconditional and can be reasonably regulated to minimize damage or disturbance to public lands.[127] Even with such conditions, inholder access requirements frequently complicate and undermine land management goals on surrounding public lands, such as habitat protection, watershed conservation, and non-motorized recreation.[128] Furthermore, determining what constitutes adequate access and what regulation is reasonable often results in costly and time-consuming litigation;[129] and because the outcomes of these cases are extremely fact specific,[130] they often provide little clear guidance to federal land managers or other inholders going forward.

2. Boundary Disputes

As with any property line between two adjacent owners, disputes may arise between inholders and the FLMA that administers surrounding public lands

aged by the USFS outside of Alaska. *See* Mont. Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951, 957 (9th Cir. 1981). There are no statutory access provision specifically requiring that either the NPS or FWS provide access for inholdings located within public lands under their administration (excepting those public lands under NFS or FWS administration that are subject to the Wilderness Act or ANILCA), but both agencies have discretionary authority to grant such access. *See* Tanner, *supra* note 40, at 12 (describing the statutory provisions that provide for such discretionary authority).

126. *See, e.g.*, 43 U.S.C. § 1761 (FLPMA); 16 U.S.C. § 1134 (Wilderness Act of 1964); *id.* § 3170 (ANILCA).

127. Cabinet Res. Grp. v. U.S. Forest Serv., 2004 U.S. Dist. LEXIS 11449, at *10–11 (D. Mont. Mar. 29, 2004) ("A landowner's right of access is not unconditional, however; it is subject to regulation by the Forest Service.").

128. *See, e.g.*, *Habitat Protection: Weber Gulch*, VITAL GROUND FOUND., https://perma.cc/ZD3X-247S ("[The] Cabinet-Yaak Ecosystem and federally-designated grizzly bear recovery zone, surrounds the parcel. And beyond disrupting wildlife connectivity, private development of the property—namely, road construction to it—would have taxed the Forest Service hugely, requiring many hours of federal oversight and necessitating road closures elsewhere in the grizzly bear recovery zone in order to maintain density requirements for the protected area.").

129. *Compare, e.g.*, Ctr. for Biological Diversity v. BLM, No. C 00-00927, 2007 U.S. Dist. LEXIS 71658, at *4 (N.D. Cal. Sept. 17, 2007) (holding that inholding owners in Death Valley National Park did not have a right to motorized access across surrounding federally managed BLM land, where evidence indicated that having "100 motorized vehicles . . . per year" using the access route "adversely affected wildlife habitat, riparian areas, and water quality in the canyon"), *with* Selkirk Conserv. All. v. Forsgren, 336 F.3d 944, 949, 956 (2003) (holding that the Forest Service did not act arbitrarily and capriciously when it granted an inholder access to their property by authorizing the "construction of 1.88 miles of new road and reconstruction of 0.81 miles of old road on Forest Service land within the Colville" National Forest, despite the potential for the access to negatively impact grizzly bear habitat and other threatened and endangered species).

130. *See, e.g.*, *Forsgren*, 336 F.3d at 949.

about boundaries. These boundary disputes, even if resolved in the federal government's favor, create a costly and time-consuming administrative task that would not occur but for the existence of inholdings.[131] And unlike the typical boundary dispute between two private property owners, boundary disputes involving inholdings often will have negative impacts on the broader public, both in terms of the increased—even if diffuse—costs borne by taxpayers to ensure that the FLMAs have adequate budgets to respond to boundary disputes, and in terms of the potential loss of public access if the dispute is not resolved in the federal government's favor. Even without a judicial determination against the federal government, the threat of litigation over boundaries with non-federal lands has led FLMAs to close off access to public trails through disputed areas and incur expenses in re-routing public trails.[132]

3. Burdens on Efficient Land Management

Even if there are no disputed boundaries or concerns posed by access to inholdings across surrounding public lands, the simple existence of an inholding within public lands often complicates federal land management responsibilities and increases the cost of FLMA compliance with federal laws. For example, inholdings can complicate fire mitigation activities; it often will be more expensive, time-consuming, and dangerous to conduct a controlled burn that would be beneficial on public lands because of the risk of the fire spreading to structures on an inholding located in an otherwise undeveloped area.[133] Similar complications are posed to other types of land management activities that

131. *See* United States v. Kubalak, 365 F. Supp. 2d 677, 688 (W.D.N.C. 2005) (finding for the Forest Service in a boundary dispute involving an inholder within the national forest, in which the inholder removed federal survey monuments and replaced them with false survey markers); James B. Snow, *Implementing the Weeks Act: A Lawyer's Perspective*, FOREST HIST. TODAY (Fall/Winter 2011), https://perma.cc/V7MU-Z58W (noting that although the federal government prevailed in *Kubalak*, [the] "case took hundreds of hours of work to prosecute [and] the costs of litigation were substantial").

132. *See, e.g.*, Matthew Beaudin, *Wilson Peak: Open Again,* NORWOOD POST (Apr. 5, 2011), https://perma.cc/BTB8-J2K6 (describing the 2011 reopening of a trail through a national forest to the summit of one of Colorado's "fourteener" mountains, Wilson Peak: "Since 2004, a private-property dispute held the peak hostage . . . . Its main access and the easiest way to the top, Silver Pick Trail, wound through land owned by Rusty Nichols, a Texas landowner who gained infamy for his treatment of those he caught trespassing.").

133. *See The National Parks: Whose Backyard?,* TR. FOR PUB. LAND (July 22, 2015), https://perma.cc/KJ8K-C8EF ("Inholdings can also pose a challenge to efficient management of public land, for example, by driving up the cost of building infrastructure and controlling wildfires."); *5 Big Myths About Wildfire*, WILDERNESS SOC'Y (Nov. 19, 2018), https://perma.cc/MZT8-JTB4 ("One costly aspect of fighting fires is protecting 'inholdings.' These are usually privately owned homes that are surrounded by national forest land. Protecting such property is a high priority for the Forest Service, but it is also extremely expensive and dangerous.").

the FLMAs may have statutory responsibilities to conduct on public lands (such as timber production in national forests) but which the presence of inholdings challenges.[134]

4. Barriers to Public Access

Owners of inholdings are generally entitled to the same common law property protections as other private property owners.[135] Thus, unless the owner of an inholding has granted an easement or other form of permissive use to the public (which they are generally not obligated to do), members of the public on surrounding public land have no right to access the inholding, even if only to reach public lands on the other side; doing so, even accidentally, would be considered trespass.[136] In a sense, this result is simply an application of the owner's right to exclude, a bedrock principle of property law.[137] But it also has broader implications in the context of inholdings: The owner's right to exclude may operate to do more than just exclude the public from the private property owned by the inholder: it may also have the practical effect of excluding the public from access to portions of surrounding public lands, which the public is otherwise entitled to access.[138]

134. Snow, *supra* note 131 ("The existence of private homes within the forest boundaries exacerbates issues such as fire fighting, insect and disease control, and timber management. A not in my back-yard mentality often prevails among private landowners when the Forest Service proposes management activities such as logging that are unpopular with nearby residents.").

135. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO/RCED-92-116BR, FEDERAL LANDS REASONS FOR AND EFFECTS OF INADEQUATE PUBLIC ACCESS 20 (1992), https://perma.cc/92BN-A4UK (describing access concerns raised by privately owned property intermixed with federal public lands and noting that non-federal owners of land within or adjacent to federal public lands deny public access to their private property in a variety of ways, with "some private landowners physically block the access routes; others erect[ing] warning signs; and still others threaten[ing] trespassers with guns or attack dogs"); *see also* Jason Blevins, *Notorious Colorado Developer Cuts Off Ski Route Outside Telluride*, DENV. POST (Apr. 2, 2010) (describing an inholding owner "enforc[ing] its right to exclude people from its private property by using Colorado trespass law if necessary").

136. *See, e.g.*, *2018 Idaho Trespass Law*, STATE OF IDAHO, https://perma.cc/4W9D-YSB4 (describing aspects of Idaho's recently enacted trespass law specifically addressing trespass liability for members of the public accessing public lands for hunting and fishing and describing their liability for trespass on nearby private property—whether an inholding or externally adjoining private property—even if the entry is unintentional).

137. *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY CONCISE 39 (2d ed. 2017) ("It is often said that the right to exclude is one of the most important incidents of ownership.").

138. *See* Marshall Swearington, *Private Property Blocks Access to Public Lands*, HIGH COUNTRY NEWS (Feb. 2, 2015), https://perma.cc/CEY5-U9Q2 (citing a 1992 GAO report finding "that more than 50 million acres of Forest Service and BLM lands—about 14 percent of their holdings in the contiguous U.S., mostly in the West—had 'inadequate' access"). Inholdings are not the only potential barrier to public access; a potentially even greater barrier is posed by privately-owned property along the outer boundaries of public lands, with result-

This can particularly be an issue with larger inholdings in more remote, rural areas of the country, where there may be limited public access points to public lands, and where an inholder is under no obligation to grant an easement for public access. Broker listings for inholdings for sale highlight this feature of inholdings as a selling point to would-be purchasers, with one listing for a 40-acre inholding stating that "[a] favorite part of this [40-acre] property is the ability to walk out the back door and be in National Forest plus the fact it is mostly private property between the highway and the forest keeps the public from frequenting that part of the forest."[139] The near-exclusive access that owners of such inholdings gain to surrounding public lands comes at a cost to the public, which effectively loses access to a portion of the public lands.

5. Adverse Impacts from Incompatible Land Uses

As noted above, land use activities on an inholding are primarily regulated through applicable land use regulations of the local government within whose boundaries the particular inholding is located, as well as any other generally applicable laws.[140] Because local land use regulation almost invariably permits more intensive land use activities on an inholding than would be allowed on surrounding public lands,[141] land use activities on inholdings can impose a

ing land ownership patterns creating isolated islands of public lands surrounded by privately-owned land. *See* John W. Sheridan, *The Legal Landscape of America's Landlocked Property*, 37 UCLA J. ENV'T L. & POL'Y 229 (2019) (describing the origin of the landlocked public lands throughout much of the Western United States); Shelby D. Green, *No Entry to the Public Lands: Towards a Theory of a Public Trust Servitude for a Way Over Abutting Private Land*, 14 WYO. L. REV. 19 (2014) (exploring the issue of inadequate access to public lands because of abutting private property).

139. *See* ZILLOW, https://perma.cc/883R-WEW6.

140. *See generally supra* notes 13–14.

141. Although this Article focuses primarily on the adverse impacts posed to surrounding public lands by development on inholdings permitted under local land use regulation (since local land use law is the primary mechanism used to regulate land use activities on private property), activities permitted on inholdings pursuant to state law can also impose adverse impacts on surrounding public lands. *See, e.g.*, Ben Goldfarb, *Who Should Manage Grand Teton's Private Inholdings?*, HIGH COUNTRY NEWS (Apr. 2, 2015), https://perma.cc/N399-BRSA ("Within Grand Teton [National Park], wolves, and virtually all other wildlife, were protected by federal regulations that prohibited hunting or trapping inside park borders. On private land in northwest Wyoming, however, the creatures were now subject to state statutes that allowed landowners to kill wolves that attacked livestock. . . . The inholdings' long history of private ownership effectively trumped their location. . . . Federal wildlife regulations, Wyoming's U.S. Attorney Office decided, didn't apply to Grand Teton's private inholdings." (describing activities that are permitted on inholdings within a public lands in Wyoming pursuant to state law)). The U.S. Attorney's Office decision was challenged by a coalition of environmental groups. *Id.* As they and former NPS staff pointed out, allowing hunting on inholdings potentially undermines management goals for surrounding public lands: "People come to parks to view wildlife in its native habitat, unmolested," "[it seems

number of adverse impacts.[142] These impacts will necessarily vary with the type of land use activity permitted on a particular inholding as well as with the type of public land surrounding the inholding,[143] but can include habitat fragmentation, loss of wildlife connectivity and diversity, adverse impacts on watersheds and ecosystem services, and degradation of aesthetic resources and viewsheds.[144]

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like] an unmanageable situation if you have people able to shoot and kill species as soon as they step onto private land," and "expanded hunting within park boundaries could disrupt the ecology of predators." *Id.* (internal quotes omitted). Despite legal challenges, a 2020 Tenth Circuit decision affirmed the decision by the U.S. Attorney's Office (and parallel decision by the NPS), finding that NPS regulations prohibiting hunting did not apply to inholdings within the Grand Teton National Park and therefore hunting was allowed. *See* Defs. of Wildlife v. Everson, 984 F.3d 918, 944 (10th Cir. 2020).

142. Because land uses on public lands are typically regulated more restrictively than those on inholdings, the negative externalities from inconsistent land uses typically flow from inholdings onto surrounding public lands. However, the reverse scenario, although less likely, is also possible, if public lands are used more intensively than an inholding. For example, if an inholding is located in a portion of public lands managed by BLM or the USFS where highly intensive extractive uses are permitted, such as active hardrock mining or clearcut logging operations, the negative externalities can flow from the land use activities occurring on the public lands to the inholding.

143. Developments on inholdings will tend to have different impacts depending on the type of public land that surrounds the inholding. For example, designated wilderness areas have the highest level of land protections and limitations on uses, and thus are at heightened risk of being impacted by any development on inholdings. *See* 16 U.S.C. § 1133(c) ("[T]here shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter . . . there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area."); *id.* §§ 1131, 1134; *Wilderness Designation FAQs*, WILDERNESS SOC'Y, https://perma.cc/GC9V-H7M7 ("A designated wilderness area receives the government's highest level of land protection and becomes part of the National Wilderness Preservation System.").

144. *See generally* AMERICA'S HERITAGE FOR SALE, *supra* note 25 (providing case studies of several inholdings across a variety of public lands identified at high priority for acquisition and describing a variety of specific adverse impacts that would be posed to surrounding public lands were the inholding to be developed); *The Nature Conservancy Acquires Superior National Forest Inholdings*, *supra* note 119 ("If we start punching holes in intact forests you create barriers for the movement of wildlife . . . . You need these large blocks of forest to give species that kind of opportunity."); Jim Burnett, *Desert Lands in Three California Parks Being Protected Through Partnership Efforts*, NAT'L PARKS TRAVELER (Jan. 19, 2015), https://perma.cc/M84J ("Development of these lands for rural home sites, commercial and solar facilities, and off-road-vehicle recreational areas threaten adjacent national park lands. Uncontrolled land use activities, such as dumping and land clearing, also adversely impact these ecosystems and the wild and scenic nature of these vast national parks."); Brian Maffly, *Zion National Park Will Acquire a Private Parcel to Fend Off Development—But 3,400 Acres Remain at Risk*, SALT LAKE TRIB. (Oct. 8, 2018), https://www.sltrib.com/news/environment/2018/10/08/zion-national-park-will/ ("Spread across Zion National Park is a patchwork of private parcels, complicating park management and enabling potential trophy homes to rise in otherwise wild landscapes. . . . one inholding covers the Hop Valley Trail, potentially

Inholdings are not the only type of property which can pose these types of adverse impacts: Development on any non-federally owned property near public lands—whether occurring on an inholding within the public land boundaries, or on adjacent property just outside those boundaries, or even further afield in the metropolitan regions surrounding public lands—potentially raises some of the same concerns.[145] Yet while encroaching development outside the external boundaries of public lands presents land use challenges that overlap to a certain extent with those posed by inholdings, the adverse impacts of land use activities on inholdings pose a distinct set of complications for two reasons.

First, the isolated nature of many inholdings means that development and land use activities on inholdings can have an outsized impact in terms of fragmentation of ecosystems and landscapes compared to development on private property outside the external boundaries of public lands. As one Forest Service biologist observed about proposed construction of a cabin on an inholding located within a "federally-designated grizzly bear recovery zone" considered key habitat for grizzlies: "'It's only forty acres . . . but the negatives of a road or house up there would affect a lot more than forty acres."[146] In general, the larger and more intensive the development on an inholding is, the greater the impacts are likely to be on surrounding public lands;[147] however, as the foregoing example illustrates, even relatively low-intensity developments on inholdings can

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obstructing the so-called Trans-Zion trek, the only route connecting Kolob Canyons with the rest of the park."); Phil Brown, *The Future of Open Space*, ADIRONDACK EXPLORER (Mar. 25, 2014), https://perma.cc/JT6A-UP2V ("Development in the backcountry also has aesthetic impacts. . . . Sometimes it takes only one house, plopped in the middle of a vista or on a ridge, to spoil a postcard view.").

145. *See, e.g.*, Craig L. Shafer, *The Unspoken Option to Help Safeguard America's National Parks: An Examination of Expanding U.S. National Park Boundaries by Annexing Adjacent Federal Lands*, 35 COLUM. J. ENV'T L. 57, 119 (2010) ("By 2030, there will be a projected large increase in housing density on 21.7 million acres of private land located within ten miles of a national forest or national grassland. This means there will be more pressure to utilize multiple use USFS land now lying adjacent to national parks, and such use may not be harmonious with park biota."); *Land Use Changes in Areas Surrounding Wilderness*, ALDO LEOPOLD WILDERNESS RSCH. INST., https://perma.cc/EJ53-ZU9J (follow "story map" hyperlink) ("Impacts [from land use changes] will be most acute on wilderness areas that are small in size or adjacent to non-federal lands. . . . [L]and use change around wilderness areas can alter the preservation and character of wilderness by influencing ecological processes, natural habitat, wildlife populations, and recreational experiences. . . .").

146. *See Habitat Protection: Weber Gulch, supra* note 128 ("[P]rivate development of the property—namely, road construction to it—would have taxed the Forest Service hugely, requiring many hours of federal oversight and necessitating road closures elsewhere in the grizzly bear recovery zone in order to maintain density requirements for the protected area." (describing the impacts from development of a cabin on an inholding)).

147. *See, e.g.*, *Village at Wolf Creek — Privatization of Public Lands*, WILDEARTH GUARDIANS, https://perma.cc/ZJ6U-VWST (critiquing a development proposal for an inholding within the Rio Grande National Forest in Colorado and noting that "the proposal grew from 200 residential units to more than 1,700 units and 220,000 square feet of commercial space,

have significant adverse impacts to the ability of the FLMAs to achieve congressionally-mandated protections for surrounding public lands. Such risks are especially heightened if local land use regulations allow for subdivision of an inholding into multiple smaller parcels: even if underlying zoning only allows for relatively low-intensity uses, the intensity of the use will be multiplied across the subdivided parcels.[148] Furthermore, development on inholdings almost invariably requires access through surrounding public lands, whether from the heavy construction equipment used to transport construction materials to the inholding or the road widening or snow plowing done to facilitate vehicle travel to and from the developed inholding.[149]

Second, land use activities on an inholding can impact the sense of place associated with public lands in a way that differs in kind from the impact that the same development might have were it located outside public land boundaries.[150] Particularly for inholdings within national parks and other types of public lands which have been designated to protect their cultural and aesthetic values, development of the types described in the examples in the Introduction—luxury private mansions perched along a canyon rim inside a National Park, housing developments within the grounds of a historic battlefield, or shopping centers within a National Forest—can have a cognizable, if difficult

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magnifying the proposed resort's harmful impacts on wildlife, wetlands, water, and air quality").

148. Stephen Steubner, *Wilderness vs. Houses in the Idaho Wilderness,* N.Y. TIMES (Oct. 20, 1996), https://perma.cc/7PHU-BSN4 (describing proposed subdivisions of inholdings within the Sawtooth National Recreation Area); DAVID LOUTER, *Land Use and Protection*, *in* CONTESTED TERRAIN: NORTH CASCADES NATIONAL PARK SERVICE COMPLEX AN ADMINISTRATIVE HISTORY (1998) [hereinafter NORTH CASCADES], https://perma.cc/49FX-NVUX ("The main issue continued to be subdivision . . . the entire valley was zoned for "General Use," a classification that allowed property owners to subdivide and build on a minimum one-acre parcel using a septic tank and private water supply. . . . Ownerships splintered and multiplied, and improved properties continued to grow." (describing the challenges posed with respect to inholdings in Stehekin Valley area within North Cascades National Park)).

149. *See, e.g.*, Hale v. Norton, 476 F.3d 694, 700 (9th Cir. 2007) (discussing concerns posed by an inholder using a bulldozer to access an inholding); High Country Citizens' All. v. U.S. Forest Serv., No. 97-1373, 2000 U.S. App. LEXIS 5516, at *3–4 (10th Cir. Feb. 7, 2000) (discussing concerns posed by snow plowing for access to inholdings).

150. *See, e.g.*, JENNIFER FARNUM ET AL., U.S. FOREST SERV., SENSE OF PLACE IN NATURAL RESOURCE RECREATION AND TOURISM: AN EVALUATION AND ASSESSMENT OF RESEARCH FINDINGS 1 (2005), https://perma.cc/5SGG-HMAY ("Until recently, the importance individuals attach to places was not considered directly relevant to management of public lands. . . . Today, resource managers, planners, and researchers are beginning to view sense of place as a critical concept both in understanding how to provide optimal recreation experiences and in understanding the public's reaction to and proper role in management decisions." (citations omitted)).

to quantify, negative impact on the public's experience of the protected landscape.[151]

6. Real Estate Speculation

The development potential of inholdings not only creates a risk of adverse impacts on surrounding public lands such as those described above, but also a risk of real estate speculation. Because the owner of an inholding can develop the property as intensively as local land use regulations (and any other generally applicable laws) allow, and because such development would often have significant adverse impacts on surrounding public lands, inholdings function as a monopolistic form of property ownership. As one economist has observed, inholdings represent "a classic holdout problem in land assembly, only in this case the assembler is the federal government rather than a private developer."[152]

The result is a scenario ripe for speculation, with investors acquiring inholdings at relatively low prices (from prior inholding owners who had no plans for development expansion), and then turning around and threatening to develop unless the federal government pays them not to (either by purchasing the inholding or development rights, or by exchanging it through the federal land exchange process).[153] While this type of trading in inholdings can be seen as just another form of free market arbitrage that capitalizes on the speculative value of inholdings,[154] such a view fails to take into account the public investment in

151. *Cf. id.* at 33 ("Although this intangibility is understandable to some extent—sense of place is indeed a rather ephemeral concept—the time has come to truly scrutinize through what avenues and to what end sense of place should be a part of recreation and tourism management."); Michael J. Tranel & Adrienne Hall, *Parks as Battlegrounds*, *in* THE FULL VALUE OF PARKS: FROM ECONOMICS TO INTANGIBLES 259 (David Harmon & Allen D. Putney eds. 2003) ("[I]ntangible values defy measurement but are equally as important as, and in some cases more important than tangible values." (discussing management decisions in the NPS)).

152. *See* McMillan, *supra* note 120. William Wheaton, the real estate economist at MIT, further explained: "When the government assembles raw land into large contiguous areas, it all becomes more valuable. It's that wilderness premium, rather than the usefulness or beauty of his own holdings, that [speculators] trade on." *Id.*

153. *See, e.g.*, Stuebner, *supra* note 19 ("Real estate developers are speculating on inholdings to make a fast buck, while inholders often hold out for a high price for prime wilderness or park property. Some threaten the worst kind of development to force slow-moving bureaucrats into action. 'People are trying to milk these things. We call it environmental extortion.'"); Taylor, *supra* note 3 (describing an offer by the developer of the luxury mansion on the inholding in Black Canyon National Park to sell the parcel, which he had acquired for $250,000, to the NPS "for $14.6 million, far above the Park Service's appraisal of the property . . . . 'Our number isn't anywhere near his number,' [a NPS official] said. 'He has essentially told the National Park Service that we'd never agree on a price' [since] the government is prohibited by law from buying land at above-market prices.").

154. *See* Stuebner, *supra* note 19 ("Inholders have legitimate property rights like anyone else. These guys know they've got a hammer; they've got a private right." (quotations omitted)).

what makes inholdings valuable. Although some of the value assigned to inholdings stems from their relative scarcity,[155] much of the value assigned to an inholding is not based on any particularly useful or unique features of the inholding itself. Rather, its value is tied in large part to "the taxpayer-funded protection that blankets the land surrounding the private parcels."[156] Yet fair market values and land exchange valuations often fail to factor in this public contribution, resulting in windfalls to speculators and uncompensated losses to the public.[157]

II. The Inholdings Governance Gap

Part I has shown how the disjuncture in ownership and regulatory authority over inholdings and surrounding public lands creates numerous land use challenges. This Part unpacks the governance approaches that have been deployed to address these challenges, and demonstrates how the infirmities of local governance paired with the limitations of federal and private law responses has created an inholdings governance gap. Part II.A begins with a discussion of why the status quo of local regulatory authority over inholdings often fails to align with federal management of surrounding public lands. Part II.B then turns to the federal and private law approaches that have been developed in response to the shortcomings of local governance of inholdings, unpacking the merits and drawbacks of each.

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155. *Id.* ("The scarcity and popularity of prime recreation property in the West have sent property values—including those of inholdings—into the stratosphere.").

156. *See* Blevins, *supra* note 30. Doug Robotham, the Colorado director of the Trust for Public Lands, stated: "Many individuals in this speculative business of buying inholdings and then developing or reselling, what they are trying to benefit from is the investment of the public to protect those lands that surround them." *Id.* While the author is not aware of any empirical studies specifically focused on property values of inholdings, numerous empirical studies have shown that private property values are higher for private property located in close proximity to public lands. *See* Susan Culp & Joe Marlow, Lincoln Inst. of Land Pol'y, Conserving State Trust Lands 50 (2015), https://perma.cc/DX3L-WTUR (discussing "a rich body of research about how the value of open space is capitalized into private property values"); Ray Rasker et al., Sonoran Inst., Prosperity in the 21st Century West: The Role of Protected Public Lands 28 (2004), https://perma.cc/QJ2D-TTFE (discussing the rise in real estate values in communities in Utah since the designation of Grand Staircase-Escalante National Monument in 1996); Laura O. Taylor, Xiangping Liu & Timothy Hamilton, Ctr. for Env't & Res. Econ. Pol'y, Amenity Values of National Wildlife Refuges 1 (2012), https://perma.cc/Q4PM-RMX7 ("[O]n average, being in close proximity to a NWR [National Wildlife Refuge] increases the value of homes in urbanized areas, all else equal. Specifically, we find that homes located within 0.5 miles of an NWR and within 8 miles of an urban center are valued: 4%–5% higher in the Northeast region; 7%–9% higher in the Southeast region; and 3%–6% higher in California/Nevada region.").

157. *See infra* Part II.

A. The Status Quo: The Infirmities of Local Governance of Inholdings

As noted in the Introduction, inholdings are subject to generally applicable laws that apply to all private property.[158] Such laws may include state and federal laws, but the primary form of legal regulation for private property, including inholdings, is local land use law.[159] And as the examples in the Introduction illustrate—and as numerous other controversies involving proposed development on inholdings confirm—local governance often exacerbates rather than mitigates adverse impacts of inholding land uses on surrounding public lands.[160] This Part unpacks why this occurs by identifying how numerous structural constraints—legal, fiscal, and political—shape the incentives of local governments with regulatory authority over inholdings in ways that are unlikely to align with the federal management of surrounding public lands.

The starting point for understanding the structural constraints that shape local governance of inholdings is the fundamentally different role played by government regulation of private property versus public property.[161] While the governance of public lands allows for the existence of limited private interests,[162] federal regulation of public lands is fundamentally tied to values articulated in the federal statutes—including conservation, recreation, and resource management—that not only reflect what might be considered the collective public's self-interest as landowner of the public lands, but that also foster other aims of public ownership, such as fairness and intergenerational equity.[163] In contrast, local regulatory authority over private property has a fundamentally different orientation: Land use law, the primary public law method of regulating private

158. This analysis focuses on privately-owned inholdings. As discussed *supra* note 91, state- and tribal-owned inholdings largely fall outside of the scope of the governance model described in this Article because of unique legal doctrines that operate on these types of inholdings, which have the effect of making local land use regulation largely inapplicable.

159. *See* STERK ET AL., *supra* note 13, at 6 ("Although state and federal governments play a role in the regulatory process, local governments—villages, towns, cities, and counties—bear the primary responsibility for land use regulation.").

160. *See* AMERICA'S HERITAGE FOR SALE, *supra* note 25 (describing inholdings within several NPS-managed public lands which are at risk of being developed with land uses that would adversely impact surrounding public lands).

161. *See* Eric T. Freyfogle, *Goodbye to the Public-Private Divide*, 36 ENV'T L. 7, 15 (2006) ("The biggest difference between private and public land has to do with management power over the land.").

162. *See generally* Huber, *supra* note 92 (describing a variety of private property interests that exist within public lands); *see also* Sarah Light, *National Parks, Incorporated*, 169 U. PA. L. REV. 33 (2020) (analyzing the implications of corporate activities within national parks).

163. *See generally* Freyfogle, *supra* note 161, at 20 ("Public ownership . . . consider[s] the long-term and can assess land uses in broader spatial contexts. Government can resist market pressures to misuse land, and it can manage lands to provide an array of public goods that make little economic sense for individual owners.").

property, is by definition about the "use" of land and serves as "a means to guide growth, rather than a means of strict preservation."[164]

One implication of this difference in the underlying orientation of federal public lands management compared to local land use regulation of private property is that a subset of the land use challenges posed by inholdings are simply outside the reach of local governance. For example, boundary disputes between inholders and FLMAs or obstruction of public access onto an inholding cannot be resolved by the local government applying zoning or subdivision regulation to the inholding. In such situations, local land use regulation is simply the wrong tool for the problem at hand; instead, federal governance tools are needed, such as a fee purchase or land exchange (which would eliminate any public-private boundary, thereby also eliminating any boundary dispute) or acquisition of an easement (which would provide legal public access across the inholding).

More broadly, a number of structural features of the political economy of local governments operate against a neat alignment between their regulatory authority over inholdings and federal management of surrounding public lands. In particular, the goals of federal public land management discussed above will often be impacted by extraterritorial actions such as development activities on non-federal property governed by local land use law. Local governments are typically under no legal obligation to take extraterritorial impacts into account when making land use decisions,[165] and there are often fiscal and political disincentives for voluntarily doing so.[166] Thus, even if localities recognize that their

164. *See* Lambert, *supra* note 40, at 39 (describing zoning specifically). Zoning is a major facet of land use law, but land use law also includes other types of non-zoning regulation. *See, e.g.*, STERK ET AL., *supra* note 13, at 119 (discussing subdivision regulations and site plan review processes as part of land use law and explaining how such regulations also regulate the use of land).

165. The question of how to get local governments to internalize the externalities of their land use decisions is a pervasive and long-standing challenge; courts and legislatures in a handful of states have mandated that localities do have extraterritorial obligations in limited contexts, but enforcing these obligations have proven difficult in practice. *See, e.g.*, Associated Home Builders, etc. Inc. v. City of Livermore, 557 P.2d 473, 487 (1976) (holding that if a local ordinance might "strongly influence the supply and distribution of housing for an entire metropolitan region," it must reasonably relate to the regional welfare); S. Burlington Cnty. NAACP v. Mount Laurel, 336 A.2d 713, 716–18 (N.J. 1975) (finding that local governments have a duty to consider regional welfare in the context of adequate housing); Save a Valuable Env't v. City of Bothell, 576 P.2d 401, 405 (Wash. 1978) ("Where the potential exists that a zoning action will cause a serious environmental effect outside jurisdictional borders, the zoning body must serve the welfare of the entire affected community.").

166. While inholdings may represent a relatively small portion of the developable land available in any particular local jurisdiction, in light of the numerous revenue-raising constraints local governments operate under, every additional source of tax dollars can matter. Particularly in western states, where a high percentage of land within some counties is federally owned, local governments may be particularly sensitive to any reduction in property taxes that results

regulation of inholdings (or lack thereof) may cause adverse impacts on surrounding public lands, as long as they perceive the benefits of permitting development or other land use activities on an inholding as outweighing the often diffuse costs, they will rationally choose to do so. While there is ample evidence for the positive long-term impacts that can flow to local finances from land use regulations that protect public lands and limit incompatible development,[167] often these benefits are perceived by local decision-makers (and their constituents) as diffuse, non-immediate, and non-tangible, particularly when compared to the short-term and direct fiscal benefits (in the forms of property taxes and other revenues) that result from approving development on inholdings.[168]

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from privately-owned inholdings being acquired by the federal government. *See*, *e.g.*, Brian Maffly, *Private Land in Grand Staircase Trickling to BLM*, SALT LAKE TRIB. (Jan. 3, 2013), https://perma.cc/GDG8-YR3H ("Garfield County, where only 3 percent of the land base is privately owned, maintains a policy of opposition to further government ownership, [County] Chairman Clare Ramsay said. 'Every bit we lose, that will cost us in property taxes,' Ramsay said. 'We can't afford to lose anymore.'").

167. *See, e.g.*, *Federal Lands in the West: Liability or Asset?*, HEADWATERS ECON. (2017), https://perma.cc/3RY7-4BW7 (analyzing four decades of data from the 1970s through the 2010s and finding that "rural counties in the West with more federal lands performed better on average than their peers with less federal lands in four key economic measures [population, employment, personal income growth, and per capita income]"); RASKER ET AL., *supra* note 156, at ii (discussing the authors' peer-reviewed findings, which "belie the old mythology that conservation is incompatible with economic prosperity. In fact, the opposite is true: protected natural places are vital economic assets for those local economies in the West that are prospering the most," although the degree of economic benefit a community experiences from public lands depends "on additional factors, such as access to airport and the education of its workforce."); CATHERINE CULLINANE THOMAS ET AL., NAT'L PARK SERV., 2017 NATIONAL PARKS VISITOR SPENDING EFFECTS, at v (Apr. 2018), https://perma.cc/A8MD-LNRY (finding that for the fiscal year 2017, "[v]isitors to National Parks spent an estimated $18.2 billion in local gateway regions (defined as communities within 60 miles of a park). The contribution of this spending to the national economy was 306 thousand jobs, $11.9 billion in labor income, $20.3 billion in value added, and $35.8 billion in economic output.").

168. *See, e.g.*, Brian Maffly, *With Redraw of Bears Ears, Grand Staircase Looming, Utah State University Study Says National Monuments Are Neither Economic 'Boon nor Bane'*, SALT LAKE TRIB. (Aug. 23, 2017), https://www.sltrib.com/news/environment/2017/08/23/utah-state-university-study-national-monuments-are-neither-economic-boon-nor-bane/ (describing the opposition of Kane and Garfield county commissioners to federal national monument designations in Utah and noting that the counties' elected leaders passed resolutions contending that the increased protections to federal lands (and concomitant limits on private development) "'had a negative impact on the prosperity, development, economy, custom, culture, heritage, educational opportunities, health, and well-being of local communities,' and pushed Escalante High School enrollment down 44 percent"). Even where the calculus is close, there can be limited political payoff to a regulatory decision that has the effect of making something not happen. As one local government official observed about the efforts of the local government in Pitkin County, Colorado, to limit incompatible development on inholdings: "The work accomplished by the [county open space] program staff is often taken for granted because many times it results in something not being built in the backcountry."

Furthermore, the political economy disincentives to take extraterritorial impacts into account that exist in any cross-jurisdictional governance scenario are likely to be further amplified in the context of inholdings because of where the extraterritorial impacts fall: on the federal government, which manages public lands on behalf of the public. Particularly in some parts of the western U.S., where there is a strain of long-running hostility to government regulation and perception of it infringing on property rights, as well as a history of contentious relationships between local communities and the federal government,[169] the adverse impacts on surrounding public lands that result from local regulation of inholdings may be an intended part of the decision-making calculus itself.[170] In addition, there are endemic features of land use law, the primary legal tool available to local governments for regulating private property, that make it difficult to depend on it as a backstop for regulation of inholdings. These include the inherently discretionary nature of most land use decision-making;[171] the outsized influence that both homevoters and developers can play

Scott Condon, *Pitkin County Acquisition Will Snuff Development in Castle Creek, Provide Access to Open Space*, ASPEN TIMES (Dec. 19, 2019), https://perma.cc/C8AM-ZA4N.

169. *See, e.g.*, Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647, 660 (1997) ("Hostility to regulatory constraints on the use of private property is particularly strong in some areas of the West. Nye County, for example, has no zoning laws."); RASKER, *supra* note 156, at 7 ("When federal agencies set aside public land for conservation, the local response is often negative, even hostile."); *See* NORTH CASCADES, *supra* note 148 (describing Stehekin Valley, an area within North Cascades National Park with a high concentration of inholdings: "In the late 1970s and early 1980s, Park Service and Chelan County officials never arrived at mutually agreeable land-use controls for the Stehekin Valley. Without an agreement between the Park Service and the county, private development and expansion of existing facilities in the valley continued with only 'minimal county regulation or oversight.' . . . 'Stehekin became a tiny mountain outpost of the Sagebrush Rebellion.'" (citations omitted)).

170. *See* Joseph L. Sax & Robert B. Keiter, *The Realities of Regional Resource Management: Glacier National Park and Its Neighbors Revisited*, 33 ECOLOGY L.Q. 233, 263 (2006) (describing the response of a Flathead County commissioner when asked about whether local planning decisions took into account the impacts that development could have on neighboring Glacier National Park: "'[T]he park is huge; how much can development impact it? If private development is negatively impacting them, why don't they buy it?' When we asked whether people in the community were concerned about the park, which was in a sense the source of the amenities that had brought them to the Flathead, he replied, 'Some would say, "the hell with the park."'").

171. For example, the variance process—a core component of most local zoning and subdivision regulations—has been recognized as providing an administrative safety valve in situations where it is not feasible for an owner to comply with the strict terms of an ordinance, but it has also been criticized as providing problematic opportunities for arbitrary decision-making. *See* Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U. L.Q. 60, 61–65 (1963).

in overshadowing more diffuse public interests;[172] and the risk that any land use regulation may trigger a regulatory takings challenge.[173]

Even apart from such political disincentives, the ability of local governments to regulate inholdings is also constrained by state law legal doctrines that operate to limit the scope of local authority generally, not just in the context of inholdings. Local governments are considered creatures of the state, and the scope of their legal authority depends on a variety of factors that vary by state (as well as within states, for different types of local governments), such as whether they have home rule or another source of state-delegated authority to act, and whether state law preempts local government regulation.[174] Thus, even where a particular local community might want to regulate inholdings in ways that align with management of surrounding public lands, the local government may lack the legal authority to do so. This may particularly be an issue for counties, which often are the local governmental entity with primary regulatory authority over inholdings (since many federal public lands where inholdings are located are often found in unincorporated areas rather than in incorporated municipalities).[175] Unlike incorporated municipalities, which in most states are

172. For an analysis of the relative influence of homevoters and developers, see generally Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014).

173. The prospect of takings lawsuits, even if unlikely to be successful, can chill otherwise lawful local government action. *See, e.g.*, John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENV'T L.J. 439, 462–63 (2009) ("There are two kinds of evidence for this chilling effect: examples of regulatory proposals that communities put forward and later abandoned in the face of a threat that the regulation might generate claims . . . and direct assertions by public officials as well as by developers and their attorneys that such a chilling effect exists.").

174. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 9–16 (8th ed. 2016). The state-local relationship is complex and questions of the extent of local government authority to regulate (whether with regard to the specific issue of local land use regulation, or with regard to any of the myriad of other subject areas that local governments regulate) implicate doctrines at the core of local government law, such as Dillon's Rule, home rule, and preemption. While beyond the scope of this Article, other scholarship provides valuable insights into these issues and the legal and policy tensions associated with them. *See, e.g.*, Richard Briffault, *Our Localism*, 90 COLUM. L. REV. 1 (1990); Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 872 (2018).

175. The author is unaware on any definitive empirical data on delineating what percentage of total federal public lands are located within the boundaries of incorporated municipalities versus within the unincorporated areas of counties. However, due to the relatively undeveloped nature of many public lands (particularly national forests, national parks, national wildlife refuges, and BLM land, particularly in the western United States), it is likely that those public lands (and any inholdings within them) will more often be located in unincorporated areas of counties. Furthermore, anecdotally, while there are some exceptions, most of the sources the author has come across in her own research concerning disputes over inholding development or local regulation of inholdings also tend to involve a county as the relevant local authority, rather than an incorporated municipality.

endowed with broad home rule authority or specific grants of authority to regulate land use, counties may not be granted such powers by their state.[176]

Even where localities have legal authority to regulate inholdings, operational capacity considerations may operate as further constraint. While there is variation across local governments, many localities rely on part-time, volunteer elected officials and have limited staffing and resources available for an almost unlimited number of issues that require attention.[177] Although development proposed for a particular inholding may occasionally rise to the top of the local agenda, rethinking planning regulations for inholdings may simply not merit the attention that more immediate needs—from ongoing issues with roads or public safety to acute matters such as natural disasters or global pandemics—pose to local governments. Capacity limitations are particularly likely in rural areas, where many public lands and inholdings are located. For example, the planning department in Montrose County, Colorado (where the inholding within Black Canyon of the Gunnison National Park described in the Introduction is located), handles the administration of land use regulations across a 2,243 square mile county with a staff of four people.[178] Even taking into account the relatively lower total populations, compared to larger cities (which often have hundreds of staff members in their planning departments),[179] smaller localities like Montrose County simply may not have the capacity to engage in the bureaucratic lift required to respond to the land use challenges of inholdings—even if they have the legal authority and political support for doing so.

B. Responding to the Status Quo: Federal and Private Law Governance

Due to the structural constraints discussed in the previous section, the status quo of local regulatory authority over inholdings often fails to mitigate the land use challenges posed by inholdings, and may in fact exacerbate those challenges. However, there are alternatives to local governance that can essentially sidestep the regulatory authority that local governments otherwise would have over inholdings. This section unpacks these governance responses, beginning with a variety of federal law approaches, then turning to private law mecha-

176. *See* BRIFFAULT, *supra* note 174, at 330; *cf.* MATTHEW SELLERS, NAT'L ASSOC. OF CNTYS., COUNTY AUTHORITY: A STATE BY STATE REPORT (Dec. 2010), https://perma.cc/XG5R-BFAV (providing a fifty-state survey of whether states have granted home rule authority to counties).

177. *See* Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987 (2019) (describing the part-time status of most elected municipal officials and analyzing the associated limitations on municipalities' capacity to address governance needs).

178. *Planning & Development*, MONTROSE CNTY., COLO., https://perma.cc/7QLG-F2XA.

179. For example, San Francisco's planning department has over 200 staff members administering the city's land use regulations in its forty-seven square mile territory. *Staff Directory*, S.F. PLAN. DEP'T, https://perma.cc/5SME-BT95.

nisms often deployed in coordination with federal law. It concludes with a discussion of the limitations of each of these governance tools.

1. Federal Acquisition

Federal acquisition offers the most robust method for responding to the land use challenges posed by inholdings, since federal acquisition completely eliminates non-federal ownership of inholdings, thereby also eliminating local regulatory authority over inholdings. Once acquired by the federal government, the inholdings are simply incorporated into the surrounding public lands and the area as a whole can be managed in accordance with the federal land management goals.

The mechanics of federal acquisition of inholdings vary by federal agency, and are based in part on the requirements set out in the organic legislation for each of the four FLMAs, as well as on individual agency regulations enacted pursuant to those acts.[180] In addition, because most individual units within the National Park System (as well as some units within the FWS system) have been authorized through specific Congressional legislation, any provisions about acquisition in individual enabling legislation will also govern acquisition of non-federal land for that unit.[181] Thus, if specific enabling legislation for a national park or wildlife refuge limits the methods that the federal government can employ to acquire property for that unit—for example, by prohibiting the use of eminent domain, or by only allowing for donations from certain specified non-federal landowners—those specific terms will govern over the more general provisions in the agency's organic legislation.[182] Enabling legislation may also create additional tools related to federal acquisition for individual units beyond that provided for in the agency's organic legislation, such as authorization of a federal right of first refusal on sales of any inholdings in that unit, or authorization for the federal government to acquire a future interest in the fee estate of inholdings in that unit subject to the inholder being granted a possessory estate in life or leasehold.[183]

180. *See Land Acquisition Process,* NAT'L PARK SERV., https://perma.cc/PCX9-R7PY ("Land protection in all areas of the National Park System is executed in accordance with the enabling act of each unit, appropriation act requirements, and provisions of other applicable legislation. The land acquisition process includes multiple planning and compliance steps.").

181. *Id.*

182. *See* FEDERAL LAND OWNERSHIP, *supra* note 11, at 5 (explaining that because most individual units within the National Park System were authorized by individual acts of Congress, those individual acts should be consulted to determine on what terms acquisitions may occur: "[T]he law creating a park unit typically includes specific authority for the NPS to acquire nonfederal inholdings within the identified boundaries of that park").

183. *See, e.g.*, Minnesota v. Block, 660 F.2d 1255, 1256 (1981) (upholding the right of first refusal included in the federal enabling legislation for the Boundary Waters Canoe Area Wilderness against a challenge that the provision was an unconstitutional taking); *see also* Act of

There are three primary methods for the federal government to acquire a fee estate in inholdings:[184] (a) voluntary purchase and sale; (b) the federal land exchange process; (c) eminent domain. An overview of each of these approaches is provided below.

a. Voluntary Purchase and Sale

Federal acquisition of inholdings through voluntary purchase and sale involves situations where an owner of an inholding enters into an agreement with the FLMA to sell their inholding to the federal government. Such transactions may be initiated by either party or may be triggered by a right of first refusal provision if the particular unit of public lands where the inholding is located is subject to such provisions.[185] As with any purchase and sale transaction in real estate, the buyer (the particular FLMA involved) and seller (the inholder) will negotiate at arm's length over the sales price and other terms of the sale.[186] However, because federal law sets out the procedures that FLMAs must comply with in any purchase transaction, the purchase-and-sale process for inholdings is typically more time-consuming than the typical private real estate transaction.[187] Federal law also prohibits FLMAs from paying more than fair market value for acquisitions, and federal regulations for each agency proscribe specific procedures for property appraisals.[188]

Oct. 23, 1972, Pub. L. No. 92-536, 86 Stat. 1066 (providing that the federal government may acquire a future interest in fee estate, subject to property owner's possessory estate in life or for a term of years).

184. Methods for federal acquisition of non-fee interests in inholdings are discussed *infra* Part II.

185. *See, e.g.*, *Acquisitions*, WILDERNESS CONNECT FOR PRACTITIONERS, https://perma.cc/B6K6-M7EX ("The Wilderness Act provides authority to acquire inholdings from willing sellers."); *see also* Peter Damrosch, *Public Rights of First Refusal*, 129 YALE L.J. 812, 818–26 (2020) (describing the mechanics of a right of first refusal provision).

186. *See Acquisitions*, *supra* note 185 ("Though there are processes to rank the importance of inholding acquisitions that can be useful in some circumstances, prioritization is normally based on an owner putting the property on the market (i.e. its availability). When a landowner approaches the agency for access, that is also an important prioritization prompt at which time discussions of acquisition should occur. Sometimes the owner of a particularly important parcel to a wilderness can be identified by the agency and approached. All inholdings are important to wilderness character, and inholdings don't become available frequently, so take advantage of opportunities when they occur.").

187. *Cf.* U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF AGRIC., NATIONAL LAND ACQUISITION PLAN 41 (2005) [hereinafter NATIONAL LAND ACQUISITION PLAN], https://perma.cc/MT4P-C78W (noting the "time-consuming and structured process for interagency land exchange efforts").

188. *See, e.g.*, FEDERAL LAND OWNERSHIP, *supra* note 11, at 9–11 (describing procedures and restrictions on NFS acquisition of land); *Land Acquisition Process, supra* note 180 ("Land protection in all areas of the National Park System is executed in accordance with the enabling act of each unit, appropriation act requirements, and provisions of other applicable legislation. The land acquisition process includes multiple planning and compliance steps

The source of funding for federal purchases of inholdings from willing sellers is the LWCF.[189] This fund was created by Congress in 1965 to provide funding for acquisition of land for public recreation, as well as to provide matching grants to states for outdoor recreation programs and other natural resource–related purposes.[190] The LWCF is authorized to accrue $900 million annually for these purposes, with no less than 40% of annual funding to be used for federal purposes and no less than 40% to be used for state financial assistance.[191] LWCF funding designated for federal purposes may be applied to both ongoing costs related to maintenance of existing federal properties as well as federal acquisition of inholdings and other non-federal lands.[192] The LWCF is funded primarily through royalties paid by energy companies drilling for oil and gas on the Outer Continental Shelf.[193]

Although the LWCF has always been authorized to be funded at $900 million annually, for decades, Congress failed to appropriate the full level of annual funding in the annual appropriations process, resulting in a substantial backlog of acquisition needs.[194] In 2019, Congress permanently reauthorized the LWCF, and then in 2020, bipartisan legislation providing for mandatory annual appropriation of the $900 million to the fund was enacted through the GAOA.[195] Thus, each year from 2020 on, at least 40% and no more than 60% of an annual $900 million allocation will be available for the federal purposes that the LWCF is authorized to support—assuming that revenues from oil and

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and is dependent on the availability of funds for purchase. The entire process can take up to 3 years from the time funding is obtained.").

189. *Federal Land Acquisition Program*, LAND & WATER CONSERVATION FUND COAL., https://perma.cc/HPM5-REHL ("Within the current boundaries of our national parks, national forests, national wildlife refuges, and many other public lands units, there is still a great deal of privately owned land. While not all of this land can or should be acquired, many such inholdings are critically important to enhance public access to recreation and/or to protect natural or cultural resources. LWCF provides funds for agency purchases of property in fee or using permanent conservation easements from willing sellers . . . .").

190. 54 U.S.C. §§ 200301–200310.

191. *Id.* §§ 200302, 200304.

192. *Id.* § 200306.

193. CAROL HARDY VINCENT, CONG. RSCH. SERV., RL33531, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY, AND ISSUES (2019), https://perma.cc/85MW-FHKZ ("Under the LWCF Act, the fund is authorized to accrue $900 million annually from multiple sources. However, nearly all of the revenue is derived from oil and gas leasing in the Outer Continental Shelf . . . .")

194. *See #FundLWCF*, LAND & WATER CONSERV. FUND COAL., https://perma.cc/6CZL-DCTC ("Over the 55 year of the program, billions of dollars have been siphoned from the fund for other non-conservation purposes. . . . That means the money that should have gone to . . . protecting our national parks from being sold off to the highest bidder . . . went somewhere else.").

195. 54 U.S.C. §§ 200401, 200402.

gas leasing activities that fund the LWCF continue to amount to at least $900 million annually.[196]

b. Federal Land Exchange

A second method for federal acquisition of inholdings is through the federal land exchange process, a statutorily authorized mechanism by which the federal government can acquire a privately-owned inholding in exchange for the inholder acquiring a federally-owned parcel of comparative value.[197] BLM and the USFS are both authorized to engage in land exchanges pursuant to FLPMA.[198] In contrast, federal law does not provide the NPS and FWS with similar authority, and land exchange is thus rarely utilized to acquire inholdings within public lands managed by these two agencies.[199]

As with voluntary purchase and sale of inholdings, the land exchange process may be initiated by either an inholding owner or BLM or the USFS.[200] The procedures for land exchanges set out in FLPMA are complex and have been addressed in detail elsewhere,[201] but for purposes of understanding how

196. *How Revenue Works: Land and Water Conservation Fund*, U.S. DEP'T OF THE INTERIOR, NATURAL RESOURCE REVENUE DATA, https://perma.cc/9MS6-UKNB ("The [GAOA] Act permanently and fully funds the LWCF at the full amount deposited into the fund, beginning with amounts deposited during Fiscal Year 2020. While this Act means that annual appropriations are no longer necessary, the fund could still receive less than $900 million a year if its funding source does not result in enough revenues to meet that limit."). Thus, for example, if policy decisions are made in future years to reduce dependence on fossil fuels derived from offshore drilling—a move otherwise supported by many environmental and conservation groups—the result may be less funding for the LWCF and the conservation purposes it supports. This tension inherent in the structure of the LWCF—land conservation activities being funding by offshore oil and gas drilling activities that pose negative environmental impacts—has not gone unnoticed. *See* Rachel Frazin, *Conservation Bill Creates Strange Bedfellows*, HILL (June 25, 2020), https://perma.cc/7STA-TC3L ("We obviously oppose incentivizing oil and gas drilling . . . . But the fact is, as it currently functions, LWCF is funded by existing offshore oil and gas revenue. As long as existing oil and gas leases are operating, directing fees to these vital conservation purposes makes sense." (quoting Natural Resources Defense Council)).

197. *See generally* CAROL HARDY VINCENT, CONG. RSCH. SERV., R41509, LAND EXCHANGES: BUREAU OF LAND MANAGEMENT (BLM) PROCESS AND ISSUES (2016) [hereinafter LAND EXCHANGES], https://perma.cc/MY3C-LXSF.

198. 43 U.S.C. § 1716.

199. *See* FEDERAL LAND OWNERSHIP, *supra* note 11, at 2 ("The exchange authorities for the NPS and the FWS are relatively narrow. [FLPMA] provides broader exchange authority and is the main authority governing exchanges by the BLM and the FS.").

200. *See* LAND EXCHANGES, *supra* note 197, at 6; *see also* 36 C.F.R. § 254.4(a) (2021) ("Exchanges may be proposed by the Forest Service or by any person, State, or local government.").

201. *See* 36 C.F.R. § 254 (2021); *see also* GIANCARLO PANAGIA, PUBLIC POLICY AND LAND EXCHANGE: CHOICE, LAW, AND PRAXIS (2015); SALLY K. FAIRFAX ET AL., BUYING NA-

the process operates in the context of inholdings, a few key aspects are worth highlighting. First, the land exchange must be determined to be in the public interest.[202] Second, the federal and nonfederal land to be exchanged must be located in the same state.[203] Third, the properties being exchanged must be of equal value, as measured by standard methods of determining market value.[204] However, because such equalization may be difficult to achieve in practice because of inherent differences in the types of land being exchanged,[205] equalization payments of up to 25% of the value of the federal land are permitted and waivers of the equalization requirement or adjustments to equalization standards are also permitted under certain statutorily prescribed conditions.[206]

In recognition of the uneven record of the land exchange process and history of problematic land exchanges involving undervaluation of the federal lands (to be acquired by private owners) and overvaluation of the private parcels (to be acquired by the federal government), FLPMA and USFS- and BLM-enabling regulations regarding land exchanges incorporate numerous procedural checks as part of the land exchange process.[207] Land exchanges also are subject to additional procedural requirements imposed by other federal laws, such as NEPA.[208] As a result, completing a land transaction through the federal land exchange process is more costly than other forms of federal acquisition and takes a significant amount of time—three to five years on average.[209]

TURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY 1780–2004 (2005).

202. 43 U.S.C. § 1716(a).

203. *Id.* § 1716(b).

204. *Id.*; *see also* 36 C.F.R. § 254.3(c) (2021) ("An exchange of lands or interests shall be based on market value as determined by the Secretary through appraisal(s), through bargaining based on appraisal(s), through other acceptable and commonly recognized methods of determining market value, or through arbitration.").

205. *See* CULP & MARLOW, *supra* note 156, at 59–60 ("An inherent problem at the conceptual level is that exchanged land parcels are required to have equal value as measured by fair market value. This standard is often difficult to meet, especially when locations, characteristics, and attributes of the parcels are radically different from one another, such as when land with high conservation value is being exchanged for land with high development value.").

206. *See* LAND EXCHANGES, *supra* note 197, at 5.

207. *Id.* at 6–8 (describing BLM requirements); *see also* 36 C.F.R. § 254.3(a)–(k) (2021) (describing USFS requirements); U.S. FOREST SERV., A GUIDE TO LAND EXCHANGES ON NATIONAL FOREST LAND, https://perma.cc/WU8M-CNEB (providing an overview of the multiple procedural steps in the exchange process).

208. 36 C.F.R. § 254.3(g) (2021).

209. *See* NATIONAL LAND ACQUISITION PLAN, *supra* note 187, at 36 ("[A]dministrative costs of exchanges are typically approximately twice as much to accomplish as a normal purchase of a conservation easement or a fee title acquisition . . . ."); LAND EXCHANGES, *supra* note 197, at 6 ("The average time to complete BLM's exchanges was about four years.").

c. Eminent Domain

The final method for federal acquisition of inholdings is through eminent domain. While eminent domain is generally authorized within the four FLMAs, there are both legal and political limitations on its use.[210] For example, specific enabling acts for individual units within the National Park System may prohibit acquisition by eminent domain, and such prohibitions in the specific enabling acts supersede the more general terms of other federal laws that otherwise authorize the use of eminent domain.[211] In addition, specific procedural requirements set out in agency regulations for each FLMA may pose additional constraints and govern any condemnation actions initiated by each agency.[212]

Where authorized, acquisition of an inholding by a FLMA by eminent domain must satisfy the Fifth Amendment requirements of public purpose and just compensation. Courts have consistently found the public purpose requirement is readily satisfied when FLMAs are acquiring private property surrounded by public lands.[213] Just compensation is based on the fair market value of the property, which is calculated based on standard appraisal formulas—although the unique nature of some inholdings and lack of comparable properties can make valuation calculations challenging.[214]

Even where eminent domain is legally permissible, it often triggers intense political opposition.[215] As a result, some FLMAs have promulgated agency reg-

210. *See* FEDERAL LAND OWNERSHIP, *supra* note 11, at 3 (noting each of the FLMAs "generally is authorized to use eminent domain—taking private property, through condemnation, for public use—while compensating the landowner. However, this practice is controversial, and it is rarely used by the land management agencies"); *see also Acquisitions*, *supra* note 185 ("Normally, acquisitions will only occur through purchase, exchange, or donation from willing owners. . . . The agencies generally shun condemnation, and do not support acquisition work that is not from willing sellers."); JACKIE DIETRICH ET AL., INTERAGENCY WILD & SCENIC RIVERS COORDINATING COUNCIL, WILD AND SCENIC RIVERS AND THE USE OF EMINENT DOMAIN 1–3 (1998), https://perma.cc/UZ2P-EAWA (documenting how infrequently eminent domain has been used by each of the four FLMAs for acquisitions associated with the federal Wild and Scenic Rivers System).

211. *See, e.g.*, National Parks and Recreation Act of 1978, § 508, Pub. L. No. 95-625, 92 Stat. 3467, 3507–09 (prohibiting the use of eminent domain for acquisition of any non-federal lands within Ebey's Landing National Historical Reserve); Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, Pub. L. No. 106-76, 90 Stat. 2692 (prohibiting the use of eminent domain for acquisition of any non-federal lands within Black Canyon of the Gunnison National Park).

212. *See generally* Steven A. Hemmat, *Parks, People, and Private Property: The National Park Service and Eminent Domain*, 16 ENV'T L. 935 (1986) (providing an overview of pertinent eminent domain procedures).

213. *Id.* at 938.

214. *See* Culp & Marlow, *supra* note 156, at 52–53.

215. *See* FEDERAL LAND OWNERSHIP, *supra* note 11, at 3 (noting that the use of eminent domain by the FLMAs "is controversial, and it is rarely used.").

ulations or established agency policies that disclaim their intent to utilize eminent domain for acquisition of inholdings, even where Congress has otherwise authorized it.[216] Similarly, some individual units within the National Park System that have legal authority to utilize eminent domain may adopt policies against exercising this authority and only pursue acquisition of inholdings through voluntary sale transactions from willing sellers.[217]

2. Federal Acquisition of Non-Fee Interests

In lieu of outright acquisition of an inholding through one of the methods described above, a FLMA may acquire a less-than-fee interest in an inholding. This option is most likely to be utilized in scenarios where there are no significant concerns about inholder access, boundary disputes, or barriers to public access, but there are concerns about an inholding potentially being developed for more intensive uses that might impose adverse impacts on surrounding public lands.[218] In such scenarios, the purchase of a scenic easement or development rights subjects the property to appurtenant restrictions that remove the rights of development or certain other types of activities considered detrimental to scenic or aesthetic values from the bundle of sticks associated with ownership of the inholding, while allowing for continued private ownership of the inholding.[219] The legal mechanisms for federal acquisition of non-fee interests mirror the legal mechanisms discussed above for federal acquisition of fee interests, i.e., such interests may be acquired (subject to the limitations discussed above) by voluntary purchase and sale, land exchange, or eminent domain.[220]

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216. *See, e.g.*, U.S. Fish & Wildlife Serv., *supra* note 108, at 7 ("In light of long-standing [FWS] policy, completing any land acquisition project is dependent on the willingness of landowners to negotiate the sale of their properties or interests therein.").

217. *Cf.* Parlier, *supra* note 121 (describing the reluctance of the NPS to use eminent domain to acquire specific inholdings within Cumberland Island National Seashore, although it is authorized by Congress to do so).

218. *See* National Land Acquisition Plan, *supra* note 187, at 35 ("A fee or less-than-fee acquisition may be recommended based on the significance or sensitivity of specific resources, the perceived nature of a current or anticipated threat, and the intended use by the agency. Easements are considered when agency objectives can be met by acquisition of only a portion of the bundle of rights.").

219. A similar result can also be accomplished through an alternate two-step process of federal purchase and sale-back with deed restrictions. *See* Nat'l Park Serv., Alternatives for Land Protection: A Review of Case Studies in Eight National Parks 23 (1982), https://perma.cc/93VN-M8QC (recommending this technique for "'non–critical' lands . . . where neither high resource protection nor visitor access is needed").

220. *See* Federal Land Ownership, *supra* note 11, at 3–9 (noting that both voluntary purchase and sale and eminent domain may be used for the acquisition of less-than-fee interests such as easements); *see also* Land Exchanges, *supra* note 197, at 1 (noting that the land exchange process may be used for acquisition of less-than-fee interests).

Acquisition of non-fee interests can be advantageous to all parties involved. For the FLMA, it may be more cost-effective than outright fee acquisition and allow the agency to stretch the limited funding available for purchases, since it may be less expensive to acquire less-than-fee interests than to purchase an inholding outright.[221] For the inholding owner, it allows them to maintain their ownership with their existing uses, as well as sell the inholding on the private market, subject to the limitations that run with land. Furthermore, it may be perceived as more politically palatable with regard to concerns about federal government overreach or infringement on property rights, as it leaves the underlying property in private ownership. This type of acquisition can also benefit local governments, since it allows for the property to remain on tax rolls, which would not be possible if the federal government purchased the inholding outright, due to the fact that federally owned land is exempt from state and local taxation.[222]

3. Direct Federal Regulation

As the Supreme Court has observed, from the perspective of public lands management, inholdings are effectively "regulatory outholdings,"[223] since the federal land management regulations that apply to the surrounding public lands are generally not applicable to inholdings, as they are primarily regulated (or not) through local land use regulation. As the foregoing discussion indicates, the regulatory outholdings problem can be eliminated or significantly reduced through the acquisition of fee or non-fee interests in inholdings. The Property Clause offers an alternative avenue for addressing the problem by providing a constitutional basis for the federal government to assert direct federal regulatory authority over privately-owned inholdings.

The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State,"[224] and the Clause has been broadly interpreted by the Supreme

221. *But see* NATIONAL LAND ACQUISITION PLAN, *supra* note 187, at 34–35 (noting that the acquisition costs for fee and non-fee interests in inholdings may cost nearly equivalent amounts).

222. *See* Stuebner, *supra* note 19 ("[T]he purchase of a scenic easement may be a preferable approach for the landowner and for the government and counties which count on property tax income from private land . . . both to stretch limited federal budgets farther and to keep property on the tax rolls.").

223. *See* Sturgeon v. Frost, 139 S. Ct. 1066, 1082 (2019) ("Geographic inholdings thus become regulatory outholdings . . . .").

224. U.S. CONST. art. IV, § 3, cl. 2. In addition to the Property Clause, the Enclave Clause provides another constitutional basis for the federal government to exercise regulatory authority over territory if it is considered a federal "enclave." *See* Peter A. Appel, *The Power of*

Court. The Court has repeatedly held that the Property Clause grants the federal government powers as both proprietor and sovereign over federal property, as well as regulatory powers over non-federal property when activities on such property affects federal lands.[225] Thus, in addition to providing the federal government with the power to regulate its own federal lands, the Property Clause also authorizes the federal government to regulate non-federally owned lands when doing so involves a "needful" rule or regulation "respecting" federal property.[226]

While the outer limits of the Property Clause power have yet to be delineated—in particular, whether the broad reading that the Supreme Court has given to the scope of the federal government's power pursuant to the Property Clause applies with equal force to non-federal lands continues to be a matter of debate among scholars[227]—federal regulation of most inholdings has been as-

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Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property, 86 MINN. L. REV. 1, 3–4 (2001).

225. *See, e.g.*, Camfield v. United States, 167 U.S. 518, 527–28 (1897) (holding that under the Property Clause, the federal government could prohibit fencing that was entirely located on private property because the fencing interfered with the congressional policy for federal lands adjacent to the fenced private land); United States v. Alford, 274 U.S. 264, 267 (1927) (upholding the indictment under a federal law enacted pursuant to the Property Clause of an individual who lit a fire on private land near federally owned lands and noting that "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests"); Kleppe v. New Mexico, 426 U.S. 529, 539–43 (1976) (upholding the constitutionality of the federal WFRHBA, which protects the animals regardless of whether they are located on federal or non-federal property, and holding that "[t]he power over the public land thus entrusted to Congress is without limitations" and that "federal legislation [enacted pursuant to the Property Clause] necessarily overrides conflicting state laws under the Supremacy Clause").

226. For example, several of the federal land management agencies, and the NPS in particular, have regulations that apply to all property within unit boundaries, whether public lands or non-federal inholdings, such as regulations about mining and solid-waste disposal. *See, e.g.*, *Sturgeon*, 136 S. Ct. at 1067–68.

227. *See, e.g.*, Sax, *Helpless Giants*, *supra* note 40 (arguing for an expansive understanding of federal power under the Property Clause to regulate private lands adjacent to and inside of national parks); Dale D. Goble, *Constitutional Conflicts on Public Lands*, 75 U. COLO. L. REV. 1195, 1240 (2004) (noting that "[t]he Court's renewed interest in federalism as an extrinsic limitation on federal authority raises questions about the permissibility of using the Property Clause in this manner" but concluding that on the whole, Congress has the power under the Property Clause to regulate activities on non-federal lands if those activities are detrimental to biodiversity and conservation interests on federal lands); Appel, *supra* note 224 (arguing for a broad view of Congressional power under the Property Clause, but distinguishing the scope of that power depending on whether the power is exercised over federal lands or non-federal lands.); Allison H. Eid, *The Property Clause and New Federalism*, 75 U. COLO. L. REV. 1241, 1259 (2004) (critiquing Prof. Goble's and Appel's expansive reading of the Property Clause as insufficiently acknowledging federalism concerns and arguing by analogy to the Supreme Court's takings jurisprudence that federal power over non-federal lands pursuant to the Property Clause at most reaches nuisance-like activity).

sumed to fall squarely within the "needful" rules "respecting federal property" allowed by the Property Clause.[228] In practice, however, FLMAs have actually *not* exercised extensive direct regulatory authority over inholdings.[229] Whether because of political considerations or uncertainty regarding the scope of authority over non-federal lands, direct federal regulation of inholdings by FLMAs is not as common an occurrence as the Court's discussions of the Property Clause suggest it could be.[230]

However, there are specific units within the public land system where Congress has exercised its powers under the Property Clause and explicitly authorized the federal regulation of inholdings by FLMAs. The "Cape Cod model"—so named because the Cape Cod National Seashore is where this federal governance approach was first authorized by Congress—is illustrative of how the Property Clause can serve as the source of authority for federal regulation of non-federal lands.[231]

The Cape Cod National Seashore encompasses a large stretch of Massachusetts coastline, and includes several fairly sizeable towns within its boundaries, thus making inholdings of whole communities.[232] Rather than leaving the land use regulation of these inholding communities to the default of local land use regulation, the enabling legislation for the Cape Cod National Seashore articulates a hybrid regulatory regime: The NPS voluntarily abstains from using its power to exercise eminent domain over the inholdings within the National Seashore as long as the local governments with land use authority over said inholdings promulgate local land use regulations that meet specific, federally-defined requirements.[233] If, however, local governments failed to enact or enforce such local land use laws, then the enabling legislation allows for the NPS to reactivate its eminent domain power.[234] By providing that local land use reg-

228. *See, e.g.*, High Point, LLP v. Nat'l Park Serv., 850 F.3d 1185, 1198–99 (2017) ("As several of our sister circuits have recognized, this regulatory authority extends to non-federally owned land encompassed within national park boundaries": "The Park Service's establishing law . . . extended the Park Service's regulatory power to federal "areas"; it did not mention federal ownership."). The "most" qualifier ("most inholdings") in the text above is necessary because of § 103(c) of ANILCA, which has been interpreted by the Supreme Court as a complete prohibition on NPS regulation of inholdings located within public lands in Alaska subject to ANILCA, whereas in non-Alaska public lands managed by the NPS, non-federally owned land within the boundaries of the units could potentially become subject to NPS regulation. *See generally Sturgeon*, 139 S. Ct. 1066.

229. *See* Scott K. Miller, *Missing the Forest and the Trees: Lost Opportunities for Federal Land Exchanges*, 38 COLUM. J. ENV'T L. 197, 202 (2013) (describing the reluctance of the Forest Service to regulate land use activities on inholdings).

230. *Id.*

231. For an in-depth analysis of the Cape Cod legislation, see Thomas, *supra* note 40. The model was subsequently adopted in a handful of other NPS-managed public lands. *Id.* at 239.

232. *Id.* at 228.

233. *Id.* at 233–36.

234. *Id.* at 234–35.

ulations (and enforcement of those regulations) meet federally defined requirements, the Cape Cod model strikes a compromise between direct federal regulation over inholdings and the status quo approach of assigning primary regulatory authority over land use on inholdings to local governments.

Another example of the Property Clause serving as the source of authority for federal regulation of non-federal lands is found in a handful of areas within public lands managed by the USFS, where Congress has specifically authorized FLMA regulation of non-federal lands. For example, the enabling legislation for Sawtooth National Recreation Area ("Sawtooth NRA") in Idaho requires the USFS to "make and publish regulations stating standards for the use, subdivision, and development of privately owned property within the boundaries of the [unit]."[235] If "designated communities" (defined as incorporated towns within the national recreation area) adopt land use regulations that meet specific federally-defined requirements, then the USFS will defer to the land use decisions made by local governments pursuant to those regulations.[236] Thus, this aspect of the Sawtooth NRA program operates much like the Cape Cod quasi-direct model of federal regulation. However, the enabling legislation for Sawtooth NRA actually goes further: For inholdings and other privately-owned property located in the unincorporated areas of the county, the federal land use regulations promulgated by the USFS actually serve as the "local" land use system for these properties.[237] Thus, federal regulations operate directly as zoning and land use control for privately-owned inholdings within certain territorial areas of the Sawtooth NRA.

4. Other Federal Governance

Although inholdings are generally not subject to the federal land management regulations that apply to surrounding public lands, they are subject to other generally applicable federal laws, such as the ESA and Clean Water Act.[238] If conditions on an inholding trigger the provisions of these generally

235. 16 U.S.C. § 460aa-3(a); *see, e.g.*, 36 C.F.R. §§ 292.14–16 (2021); *see also* U.S. Forest Serv. & The Sawtooth Soc'y, What You Should Know About Private Land Ownership in the Sawtooth National Recreation Area (2009), https://perma.cc/4RWX-B4GB (describing the federal zoning and subdivision regulations that apply to privately owned inholdings within unincorporated areas of Sawtooth NRA).

236. 36 C.F.R. § 292.16(d) (2021).

237. *See* 16 U.S.C. § 460aa-3(a) ("The Secretary shall make and publish regulations setting standards for the use, subdivision, and development of privately owned property within the boundaries of the recreation area."); *see also* 36 C.F.R. §§ 292.11–13 (2021) (describing similar federal regulatory regime for privately-owned properties in the Shasta-Trinity National Recreation Area).

238. Similarly, if federally-defined criteria are shown to be satisfied, inholdings (or structures on them) may be eligible for designation on the National Register of Historic Places. Such designation itself does not limit land use activities but may operate to do so indirectly

applicable federal laws, such federal laws may operate to reduce some adverse impacts that might otherwise be posed by land use activities on inholdings.[239] In addition, if inholdings are located in areas where Congress has approved interstate compacts creating regional planning entities tasked with implementing regional planning goals and coordinating regulation of land uses of private property across multiple jurisdictions in the region (such as the Tahoe Regional Planning Agency), inholdings will be subject to the congressionally-delegated land use authority of such agencies.[240]

Federal authority to impose reasonable restrictions on inholder access can also potentially operate as an indirect form of federal regulation over land use activities on the inholding itself. While certain federal laws require that inholders be granted adequate access to their inholdings across surrounding public lands,[241] FLMAs are also required to balance the impacts of such access on public lands and may impose reasonable restrictions on inholder access if necessary.[242] Thus, even though FLMAs have no direct regulatory authority over land uses on inholdings, their oversight of access to inholdings may practically preclude certain types of intensive development on inholdings themselves, if it is not practicable with the extent of access the FLMA grants.[243]

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through federal tax disincentives. *See* 54 U.S.C. §§ 302103, 302105, 306107, 306131 (delineating criteria and regulations relating to the National Register of Historic Places, and providing no prohibitions regarding any specific land use activities); 36 C.F.R. § 60.2(c) (2021) ("These [tax] provisions encourage the preservation of depreciable historic structures by allowing favorable tax treatments for rehabilitation, and discourage destruction of historic buildings by eliminating certain otherwise available Federal tax provisions both for demolition of historic structures and for new construction on the site of demolished historic buildings.").

239. The public trust doctrine and common law nuisance are in theory additional potential avenues to limit the adverse impacts posed to public lands by activities on non-federal lands, including inholdings, but in practice, neither approach has offered much traction. *See, e.g.*, Sierra Club v. Dep't of the Interior, 398 F. Supp. 284, 287 (N.D. Cal. 1975) (raising the possibility that an affirmative public trust duty might exist on the part of the FLMAs to protect public land resources); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 273–77 (1980) (suggesting that the public trust doctrine has limitations as a tool to provide significant protection to public lands); United States v. Cnty. Bd. of Arlington, 487 F. Supp. 137 (E.D. Va. 1979) (rejecting a nuisance lawsuit by NPS against private development occurring just outside the boundaries of NPS-managed public lands).

240. *See, e.g.*, *How We Operate*, TAHOE REG'L PLAN. AGENCY, https://perma.cc/AFQ4-N5QK.

241. *See supra* note 125 and accompanying text.

242. *See supra* Part I.C.

243. *See, e.g.*, Hale v. Norton, 476 F.3d 694, 700 (9th Cir. 2007) (holding that it was reasonable for the NPS to require an Environmental Assessment under NEPA before determining whether to grant an inholder access for "sixteen trips with a bulldozer and trailer during the pre-freeze up period" because such access "threatened to cause significantly more environmental damage than would be caused by the more usual postfreeze up runs").

5. Private Governance

In addition to the federal governance approaches described above, certain types of private law mechanisms also can be utilized to respond to the land use challenges posed by inholdings. The two private law mechanisms that are often used in conjunction with or in anticipation of federal governance are: (i) acquisition of inholdings by land trusts or other non-profits, and (ii) the use of conservation easements.

a. Acquisition of Inholdings By Land Trusts or Other Non-Profits

Inholdings are regularly acquired by non-profit organizations such as land trusts for preservation purposes.[244] Acquisitions by non-profits are often made in coordination with, and in anticipation of the inholding eventually being acquired by, the FLMA that manages the surrounding public lands, with the non-profit stepping in to acquire the property and hold it until federal funds become available.[245] Acquisitions by land trusts and other non-profits may also occur independently of plans for eventual federal acquisition, with non-profits maintaining the inholding in private ownership but managing it for conservation and other purposes that tend to align with the land management goals for the surrounding public lands.[246] Alternately, within certain units of the public land system, private acquisition of property inside the boundaries of federally designated public lands by land trusts or other non-profits may be specifically mandated under the unit's enabling legislation.[247] This approach keeps the

244. *See, e.g.*, *Acquisitions*, *supra* note 185 (describing the "vital assistance" that can be provided by non-governmental organizations such as The Wilderness Land Trust and the Trust for Public Lands in acquiring inholdings); *see also* AMERICA'S HERITAGE FOR SALE, *supra* note 25, at 4 (providing several examples of the role played by non-profits in acquiring inholdings, while also cautioning that "while public and private partnerships provide a complementary means for acquiring privately owned land inside park boundaries, they cannot, and should not, replace the Land and Water Conservation Fund as the primary source for federal land acquisition").

245. *See, e.g.*, Emily Hayes, *Sweetwater Lake Purchased by National Environmental Nonprofit,* JOURNAL (July 3, 2020), https://perma.cc/G6AQ-MV35 (describing the purchase in 2020 of a 488-acre property known as the Sweetwater Lake property by "The Conservation Fund, an environmental nonprofit. . . . The Conservation Fund will hold onto the land until the U.S. Forest Service obtains the necessary federal funding to purchase it as additional acreage for the neighboring White River National Forest.").

246. *See, e.g.*, *The Nature Conservancy Acquires Superior National Forest Inholdings, supra* note 119 (describing how the Nature Conservancy "will explore different alternatives for long-term conservation ownership and management of the [inholding] property including holding onto select tracts to study and demonstrate how to best sustainably manage timber production in a changing climate").

247. *See* BRANCHING OUT, *supra* note 49 (describing Tallgrass Prairie National Preserve in the Flint Hills of Kansas: "In an unusual private-public partnership . . . the National Park Ser-

property on the local tax rolls while also providing for coordinated land management with federal agencies.[248]

b. Conservation Easements

In addition to acquiring a fee interest in an inholding, land trusts may also acquire conservation easements on inholdings, either through purchase or donation. Conservation easements are statutorily authorized, private land use restrictions used to preserve open space and protect a variety of conservation-related land interests.[249] Conservation easements are by no means limited to inholdings; they have been utilized widely and successfully for many types of conservation goals, such as preserving open space and wildlife habitat, safeguarding water resources, and protecting agricultural land.[250] In the specific context of inholdings, conservation easements allow for inholdings to remain in private ownership while limiting the permissible land uses on the inholding to less intensive uses than that which would otherwise be allowed under local land use regulations and otherwise generally applicable laws. Thus, the terms of a conservation easement can be drafted in a way to ensure that land use activities on the inholding are more compatible with the management of the particular surrounding public lands.

Owners of property subject to conservation easements retain title to the property and can continue to use the land subject to the restrictions imposed by the easement, which run with the land and are typically perpetual unless expressly provided otherwise.[251] While conservation easements are a creature of state statutes, their use has been incentivized through federal laws providing tax incentives for the donation of qualified conservation easements.[252] Thus, while conservation easements can be purchased at market value from landowners, federal income tax incentives mean that conservation easements are often donated.[253]

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vice serves as the primary managing agency through a cooperative agreement. Of the nearly 11,000 acres in the preserve, by law the National Park Service can acquire, by donation, only up to 180 acres, to include the core historic structures of the 19th-century Spring Hill Ranch. The National Park Trust, a land conservancy, retains the rest. As a private landowner, the trust pays local taxes to support community services.").

248. *Id.*

249. There is an extensive body of literature on conservation easements. For an overview of the subject, see generally Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENV'T L. 10,223 (2004).

250. *Id.*

251. *Id.* at 10,226.

252. *Id.* at 10,225–26; *see also Income Tax Incentives for Land Conservation*, LAND TRUST ALL., https://perma.cc/8H6E-VKYN (describing federal conservation easement tax incentives).

253. *Income Tax Incentives for Land Conservation*, *supra* note 252.

6. Limitations of Existing Governance

The governance tools described above have been crucial in addressing the land use challenges posed by inholdings. Yet even as these tools have facilitated the federal acquisition of many inholdings and reduced the development potential of inholdings that remain in non-federal ownership, there are limitations to each.

For example, federal acquisition is inherently limited by the fact that the cost of acquiring all inholdings (or even just the non-fee interests in their development rights) far exceeds the amount of funds available. Even with the full funding of the LWCF at $900 million annually as required by GAOA's 2020 passage, the combination of a backlog of acquisition needs—due to decades of underfunding—and rising land prices means that even a fully funded LWCF is unlikely to be able to provide enough funds for all desired acquisitions. Furthermore, because LWCF is dependent on royalties from offshore oil and gas leasing, the revenue stream for the LWCF may be reduced as climate change impacts shift policy priorities towards reducing offshore drilling.[254] And although acquisition of less-than-fee interests offers the potential for LWCF funds to be stretched further, in practice, the cost of purchasing less-than-fee interests such as development rights or scenic easements is often nearly equal to the costs of outright acquisition.[255]

Shifting political priorities may also limit the ability of FLMAs to utilize LWCF for acquisitions. For example, although former President Trump signed the GAOA into law and campaigned on his support of it, shortly after he lost the November 2020 election, his Secretary of the Interior issued a secretarial order that imposed a host of restrictions on any future FLMA acquisitions using LWCF funds.[256] These restrictions included giving state and local governments veto power over any federal acquisition of inholdings, even where private

254. *See* Frazin, *supra* note 196 ("The idea has always been that the government will take the proceeds, the royalties, from offshore drilling, which is an activity that's harmful for the environment, and then reinvest those proceeds into conservation efforts. . . . Will there be a day when that source dries up? We sure hope so. But until then, it's a practical solution that's endured for decades.").

255. *See* NATIONAL LAND ACQUISITION PLAN, *supra* note 187, at 35–36 ("[T]he appraised value can range from as little as half of the fee value, to in some cases, almost equal the fee value. For example, in areas of residential development, just compensation for an easement which extinguishes the use of the land for development may be nearly as much as 90–95 percent of a fee title purchase, but with comparatively fewer rights ultimately vested in the Federal estate.").

256. U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER 3388, LAND AND WATER CONSERVATION FUND IMPLEMENTATION (Nov. 13, 2020), https://perma.cc/U5PK-APLP.

owners wanted to sell to the federal government.[257] While this secretarial order was subsequently rescinded by the Biden administration in February 2021,[258] it is illustrative of the type of political gamesmanship that can undercut federal acquisition efforts.

Furthermore, past experience indicates that other limitations of federal acquisition are likely to persist, despite the influx of available funding the GAOA authorizes. For example, some private owners will continue to simply be uninterested in selling their property to the government,[259] while others will have reserve prices that far exceed the property's fair market value, which FLMAs are legally barred from purchasing.[260] Even where a price is agreed on, depending on the seller's motivations and circumstances, such as whether they have competing offers from private investors or time constraints necessitating a quick sale, the federal acquisition process may simply take too long.[261]

Because acquisition of inholdings via eminent domain also relies on LWCF funding, this approach is limited by the same set of considerations that limit voluntary acquisition discussed above. In addition, as noted above, enabling legislation for a number of units within the public lands system prohibit the use of eminent domain for acquisitions within those units; and even where legally authorized, a number of FLMAs as well as individual units within the agencies have policies against using eminent domain because it is often a politically fraught issue.[262]

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257. *Id.*; *see also LWCF Policy Update: Implementation of the GAOA*, LAND & WATER CONSERVATION FUND COAL. (Mar. 18, 2021), https://perma.cc/6DRE-VZMJ (describing additional restrictions which the Nov. 13, 2020 secretarial order imposed on federal acquisitions).

258. U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER 3396, RESCISSION OF SECRETARY'S ORDER 3388 (Feb. 11, 2021), https://perma.cc/6B7B-G4TZ ("This Order rescinds Secretary's Order No. 3388 (SO 3388), entitled Land and Water Conservation Fund Implementation by the U.S. Department of the Interior.").

259. *See, e.g.*, Parlier, *supra* note 121 (describing the response of an inholder to a proposal by the NPS to purchase his inholding: "Candler says he is not interested in selling. 'That property . . . remains in the hands of families who have had a long-standing and sensitive history of caring for the island; I believe that is fortunate for the island.'").

260. *See, e.g.*, NORTH CASCADES, *supra* note 148 (describing the challenge the National Park Service faced in trying to acquire an inholding in North Cascades National Park, which was appraised at a fair market value of $38,800, but which the private owner believed was worth between $3 and $50 million).

261. *See, e.g.*, AMERICA'S HERITAGE FOR SALE, *supra* note 25, at 13 ("Although there are multiple landowners motivated to sell or trade their property, some are quite rightfully getting tired of waiting for the government to supply the funds and may start to look elsewhere for a buyer."); *see also* Michael Janofsky, *Private Acres in Public Parks Fuel Battles on Development*, N.Y. TIMES (Nov. 2, 1999), https://perma.cc/D6KU-BGQV ("'It has become a major concern,' Interior Secretary Bruce Babbitt said of private development inside federally owned lands. 'We need the resources to buy them out before problems start, and there are willing sellers for most of them. But we don't have the money, so the willing seller decides to sell on the open commercial market.'").

262. *See supra* notes 195–96 and accompanying text.

The federal land exchange process is also limited in the extent to which it can address the land use challenges posed by inholdings. As discussed above, the process is available only for inholdings located within public lands managed by BLM and the USFS, and thus is simply inapplicable to inholdings within public lands managed by the NPS and FWS. This limitation, however, may be a blessing in disguise, since the land exchange process for public lands managed by BLM and the USFS has been plagued for decades by problematic—and in some cases, outright corrupt—exchanges in which public lands to be exchanged and passed into private ownership were significantly undervalued, while the private lands to be exchanged and come under public ownership were significantly overvalued, resulting in a windfall to private landowners and collective loss to the American taxpayer.[263]

Furthermore, reforms to the land exchange process have created a new set of challenges.[264] For example, additional procedural steps have been incorporated into the land exchange process, in response to concerns raised around corruption and lack of transparency in that process.[265] However, this has tended to lengthen the timeline of the process, with the result that land exchanges can take three to five years, and the procedural costs can range from $50,000 to $100,000, with the inholding owner typically responsible for some share of those costs.[266] This timetable and procedural expense may deter some inholders from engaging in the process.[267] Other aspects of the land exchange program, such as the same state requirement, have also been criticized as unduly limiting

263. *See* McMillan, *supra* note 120 (describing a scheme in which the value of the privately-owned inholding was knowingly inflated by the investor-owner by helicoptering in building supplies for a never-intended-to-be-constructed residence, and the value of the publicly-owned land which was exchanged was grossly undervalued: it was assessed at $640,000 for purposes of the exchange, but it was sold for $4.2 million less than two years later by the private investor who had acquired it in the exchange). The shortcomings of the federal land exchange process have been recognized not only by outside observers, but also by the FLMAs themselves. *See* LAND EXCHANGES, *supra* note 197 ("BLM land exchanges [have been] controversial. Concerns during the 2000-2009 decade centered on benefits to the public, determinations of market value, contradictions in policies and procedures, delays in appraisals, and various aspects of the exchange process. These topics were the subject of various governmental and nongovernmental reports.").

264. *See* LAND EXCHANGES, *supra* note 197 (discussing past problems with and reforms to the land exchange process and the different set of challenges raised by some of the reforms).

265. *Id.* at 9–15.

266. *See* U.S. FOREST SERV. & RUCKELSHAUS INST. OF ENV'T & NAT. RES., UNIV. OF WYO., *supra* note 30, at 9 ("[C]onsiderable time and expense are required to complete the land exchange process, including National Environmental Policy Act (NEPA) requirements, public notification and comment, land surveys, appraisals, and title reviews.").

267. *Id.*

the scope of the program and resulting in lost opportunities for exchanges that would be in the public interest.[268]

Federal regulation of inholdings, through programs such as the Cape Cod model, while providing a valuable governance tool for parts of the public lands system with high concentrations of private ownership, also has its limitations. For instance, the Cape Cod model depends on the "stick" in its institutional design: If the local governments with land use authority over inholdings within the unit fail to enforce local land use regulations that meet specific, federally-defined requirements, then the National Park Service will reactivate its eminent domain power.[269] In practice, however, this stick may prove ineffective, due to funding constraints that mean the FLMA cannot actually exercise this power due to a lack of funds. As one observer noted of the situation of inholders within the Cape Cod National Seashore: "For many years people followed those [NPS-approved local land use] guidelines until a few wealthy people and their lawyers realized that the government couldn't afford such acquisitions and the guidelines were only 'paper tigers.'"[270]

Furthermore, there are both political and legal reasons to doubt that the Cape Cod model or other forms of direct regulation of inholdings will be significantly expanded to other parts of the federal public lands system. Politically, there appears to be little appetite—in either Congress or executive branch agencies—for expending political capital on something that has long been framed by opponents as federal overreach.[271] While some scholars have argued that FLMAs could act to regulate inholdings pursuant to the Property Clause

268. *See* Ian Rosenthal, Note, *The Case for Interstate Land Exchanges*, 15 VA. ENV'T L.J. 357, 358 (1995) (arguing that "benefits of facilitating interstate exchanges dramatically outweigh any objections").

269. *See supra* notes 231–34 and accompanying text (describing the Cape Cod model).

270. *See* John Marksbury & Chuck Steinman, *Truro, Massachusetts*, ONE BIG HOME, https://perma.cc/D4WX-78V3; *see also Greed, Special Interests Threaten National Park*, CAPE COD TIMES (Oct. 5, 2008), https://perma.cc/T38L-65YX ("By law, the Secretary of the Interior can condemn private properties that are contrary to park values. But the federal government must then purchase them at market value. Today, the government cannot afford properties that now run into the millions of dollars" and that local planning regulations fail to provide the protection the NPS intended, giving as an example the lack of repercussions when a "958-square-foot cottage on six-tenths of an acre on Coast Guard Path in Truro that was torn down in 2003 and replaced by a 5,465-square-foot home.").

271. While the Cape Cod model has been replicated in a handful of other units within the federal public lands system, it has not been the prevailing model for most public lands designated since the time of its creation. *See generally* BRANCHING OUT, *supra* note 49 (describing other models of management used in a variety of public lands); NPS: UNITS MANAGED THROUGH PARTNERSHIPS, *supra* note 104 (noting that partnership parks have been a more common model in recent decades in part because that model can "address concerns of Members of Congress and others about federal land acquisition by allowing nonfederal partners to own significant portions of a park unit").

without direct congressional authorization,[272] FLMAs have indicated that they do not intend to test this legal proposition.[273] Congressional action to provide such authority more broadly also appears unlikely, both in the near term because of the current bare majority of Democrats in Congress, and, in the longer term, because of concerns lawmakers of both parties may have about imposing a significant new administrative task (and allocating the funding to pay for that task) onto FLMAs.

A handful of federal cases, including the unanimous Supreme Court decision in *Sturgeon v. Frost*[274] in 2019, also expose potential vulnerabilities in the presumed legal authority of FLMAs to regulate inholdings pursuant to the Property Clause. In *Sturgeon*, the Court held that the NPS lacked authority under the Property Clause to apply a system-wide regulation that banned the use of hovercraft on rivers within NPS-managed lands and to prohibit the use of hovercraft on a particular type of non-federal property within Yukon-Charley National Preserve in Alaska.[275] To some extent, the *Sturgeon* decision is likely to have limited repercussions, both because of the unique factual and legal issues at play in the decision (the non-federal lands at issue in Sturgeon were state-owned waterways—not privately-owned inholdings—and the outcome in the case turned on the interplay between the Property Clause and ANILCA, a federal law specific to Alaska), and because the Court itself in *Sturgeon* signaled in a footnote that it did not intend the decision to have broader implications: "None of the parties here have questioned the constitutional validity of the above statutory grants [contained in the organic acts for each FLMA to promulgate regulations necessary for the management of the public lands] as applied to inholdings, and we therefore do not address the issue."[276]

While the *Sturgeon* court emphasized that "Alaska is different" in reaching its decision,[277] there is precedent for applying provisions of ANILCA to inholdings within all federal public lands (not just those in Alaska), raising the question of whether the reasoning of the *Sturgeon* decision could provide support for future legal challenges to FLMA regulation of inholdings outside of Alaska.[278] Whether such challenges would be successful is far from certain, but

272. *See supra* note 227 and sources cited therein.

273. *See* Miller, *supra* note 229 (discussing how the Forest Service has declined to utilize deed restrictions even where Congress has authorized it to do so: "[T]he Forest Service has long taken the position that zoning and regulation of uses on private land are within the responsibility of state and local government.").

274. 139 S. Ct. 1066, 1080–87 (2019).

275. *Id.*

276. *Id.* at 1076 n.1.

277. *Id.* at 1072.

278. *See* Mont. Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951, 957 (9th Cir. 1981) (holding that the inholder access rights provided in § 3210(a) of ANILCA are applicable to inholdings within national forests nationwide, not just inholdings in Alaska).

it illustrates a potential chink in the presumptive regulatory power of FLMAs under the Property Clause. Furthermore, although courts have generally assumed that FLMAs have regulatory powers over inholdings coextensive with that over federal lands, under certain circumstances, a lack of authority under the Property Clause has been found to operate to bar FLMAs from applying system-wide regulations promulgated pursuant to their statutory grants to inholdings.[279]

Further, while it is possible that other federal governance approaches, such as those mentioned in Part II.B.4 above, could incidentally have the effect of limiting development or other activities on the inholding that could negatively impact surrounding public lands (for example, if an inholding is in a particular location or characterized by specific conditions that make it subject to other

279. For example, depending on the specific terms of the enabling legislation for particular units within the public lands system, FLMAs may be found to lack regulatory authority pursuant to the Property Clause over inholdings within that unit. *See* Herr v. U.S. Forest Serv., 865 F.3d 351, 358 (6th Cir. 2017) (holding that Forest Service regulations regarding maximum boat speeds on bodies of water within the Sylvania Wilderness Area in Michigan exceeded the Forest Service's power as applied to private property owners with littoral rights within the Wilderness Area, since Congressional enabling legislation did not grant the Forest Service "power coextensive with Congress' plenary authority under the Property Clause. It instead delegates a power limited by existing rights—'subject to valid existing rights.' For that reason, any 'police power' the Forest Service may have must respect pre-existing property rights, not just the limits of state power."). The dissent in *Herr* would have found the challenged Forest Service's regulations within the scope of regulatory authority that Congress had granted the Forest Service and not to infringe on the littoral rights of the plaintiffs: "This authority, 'subject to valid existing rights,' is coextensive with Congress' own authority under the Property Clause when the Forest Service acts to preserve the wilderness character of the Sylvania Wilderness. It thus follows that the Forest Service possesses a power that is 'analogous to the police power of the several states,' and where the Forest Service does not exceed the scope of the permissible police power of the state, it may exercise this power." *Id.* at 359 (Donald, J., dissenting).

Federal courts have found also found that FLMAs lack authority to regulate inholdings under the Property Clause in situations involving fact-specific legal determinations of whether the state that would otherwise have police power over the territory ceded their legislative authority to the federal government when the particular public lands at issue were created. *See* Defs. of Wildlife v. Everson, 984 F.3d 918, 935 (10th Cir. 2020) (holding that the NPS did not act arbitrarily and capriciously in violation of the federal Administrative Procedure Act in determining that a system-wide NPS regulation prohibiting most hunting within the "lands and waters of national parks under the legislative jurisdiction of the United States" was not applicable to hunting that occurred on an inholding within Grand Teton National Park because it was reasonable for the NPS to conclude that the inholding was not "under the legislative jurisdiction" of the United States since none of the three means by which a state cedes its legislative jurisdiction had occurred when Grand Teton National Park was created; as a result, a Wyoming statute that permitted killing of wildlife on private property did not conflict with federal law). The court distinguished cases that had found that inholdings were subject to system-wide FLMA regulations because those cases involved units within the public lands system where the state had ceded legislative jurisdiction to the federal government. *Id.* at 941.

laws, such as the ESA or a federal interstate compact agreement), the lack of comprehensiveness of such approach—and the likely random nature of what inholdings are affected—makes reliance on such governance at best a backstop.

Finally, private law tools to address the land use challenges posed by inholdings—such as acquisition by land trusts or the use of conservation easements—have their own set of limitations. Although land trusts and non-profits are not constrained by the fair market value cap on purchase price that can prove an obstacle to federal acquisition of inholdings, they have their own funding limitations. While many land trusts that work to acquire inholdings are well-resourced national organizations with extensive networks of major donors, others are smaller regional or local organizations without a deep well of funding to draw on.[280] Even the relatively well-resourced among these organizations must make trade-offs in where to allocate their funds, since when a land trust purchases inholdings anticipating that they will hold the land only until the funds are authorized to purchase the land by the federal government, the land trust takes on the financial risk of ownership if the federal government does not ultimately fund that acquisition.[281]

In addition, land trusts and other non-profits are limited to working with owners who are willing to sell or donate their inholding, or the development rights associated with it. While some owners might be more willing to work with private organizations than with the federal government, ideological opposition to any perceived limitation on property rights may pose a barrier to the extent that land trusts and other non-profits may be able to make inroads. For example, in interviews with local planning officials and NPS staff in and around Glacier National Park in Montana, a 2006 analysis found that "in Montana there is opposition even to voluntary easements" and that the "Nature Conservancy (which buys land and conservation easements) had shut down its local office."[282]

280. In addition to funding constraints, land trusts may face capacity constraints, since not all such organizations will have members able and willing to sustain the often time-consuming fundraising efforts or the public relations efforts needed to incentivize owners to donate or sell conservation easements. *See* Brown, *supra* note 121 (reflecting on the decade-long community efforts to oppose development on an inholding in a national forest in Colorado).

281. *See* Hayes, *supra* note 245 (quoting a project leader at The Conservation Fund, which acquired an inholding in White River National Forest to hold until the U.S. Forest Service obtains the necessary federal funding to purchase it: "[A]dding Sweetwater Lake to the White River National Forest is not a done deal, Spring said. "We are taking a risk and hoping that Congress funds the project," Spring said.").

282. *See* Sax & Keiter, *supra* note 170, at 264 ("[T]he press vilifies people who talk about smart growth," and . . . "the biggest undercurrent is property rights." (quoting park officials interviewed by the authors)).

* * *

In highlighting the limitations of the various federal and private law governance responses to inholdings, this Part does not intend to suggest these tools are ineffective or that they should be replaced wholesale with a different governance model. Rather, recognizing these limitations, along with the infirmities of local land use regulation, allows us to more clearly see the scope of the inholdings governance gap. Doing so invites further inquiry into how to narrow that gap, a question which the next Part turns to.

III. Narrowing the Inholdings Governance Gap

The foregoing discussion has shown that there is a governance gap in addressing the land use challenges posed by inholdings, due to both the infirmities of local governance and to the limitations of federal and private law tools. While completely eliminating the inholdings governance gap is unlikely—since doing so would likely require a wholesale, mandated federal acquisition of all inholdings nationwide, an unrealistic prospect for the fiscal and political reasons discussed above—there are possibilities for narrowing that gap.

One set of options involves efforts to make existing federal and private law governance tools more effective in addressing the land use challenges posed by inholdings. Noteworthy progress has been made on this front with the passage of the GAOA in 2020, which by mandating full funding of $900 million annually into the LWCF, will allow FLMAs to acquire more inholdings.[283] There have also been discussions among legal scholars and policy experts about how other federal and private law tools, such as the federal land exchange program and direct federal regulation of non-federal lands, could be reformed; although not focused solely on the context of inholdings, these discussions provide valuable insights into how such governance tools might be reimagined in ways that could also serve to narrow the inholdings governance gap.[284]

However, another option for narrowing the inholdings governance gap has been given less attention: whether the infirmities of local land use regulation in this context are inevitable, or whether local governance potentially could be leveraged to mitigate—rather than exacerbate—the adverse impacts of inholdings on surrounding public lands. While local land use regulation cannot eliminate the inholdings governance gap nor replace the federal and private law approaches described in Part II, this Part contends that it offers under-leveraged opportunities for narrowing the inholdings governance gap. Part III.A begins by developing the normative case for why—despite its shortcomings—local governance of inholdings should not be dismissed, and it identifies the

283. *See* Great American Outdoors Act, Pub. L. No. 116-152, 134 Stat. 682 (codified as 54 U.S.C. §§ 100101, 200302–200306, 200401–200402).

284. *See supra* notes 227–29.

strategic advantages local land use regulation offers, in terms of implementation potential, flexibility, sustainability, fiscal efficiencies, and amplifying effects. Part III.B catalogues the numerous legal tools available to local governments that could mitigate the land use challenges posed by inholdings, demonstrating that this governance model is more than just a theoretical possibility. Part III.C grapples with how the legal, fiscal, and political structural constraints that operate to limit the effectiveness of local governance of inholdings could be realigned and offers three concrete policy proposals to do so.

A. Rethinking the Merits of Local Governance

This section makes the normative case for why it is worth rethinking the role that local governance could play in addressing the land use challenges posed by inholdings and argues that making it a more meaningful component of the inholdings governance model could offer numerous strategic advantages, in terms of implementability, flexibility, sustainability, fiscal efficiencies, and amplifying effects.

1. Implementation Potential

As the status quo regulatory regime, regulating inholdings through local land use law offers a straightforward advantage of high implementation potential: Local regulations can be effected without any changes in ownership of inholdings (in contrast to federal or private acquisition) or shifts in regulatory authority over inholdings (in contrast to direct federal regulation). Furthermore, the types of legal tools localities can use to regulate inholdings will typically not require the adoption of entirely new regulatory schemes. As the next section will discuss in more detail, inholdings can be regulated through land use laws that are already widely used in many communities, such as zoning and subdivision regulations, and which have been upheld as valid exercises of the police power and as not implicating Fifth Amendment concerns.[285]

Compared to federal reforms, such as the recent passage of the GAOA and its permanent funding of the LWCF, local governance occurring on a smaller jurisdictional scale is admittedly a more incremental lever for narrowing the inholdings governance gap. However, this incrementalism may actually provide more political traction for implementation. While any government regulation of inholdings is likely to face resistance from some quarters as an intrusion on private property rights, attempting to narrow the inholdings gap through federal action—such as if Congress were to attempt to more broadly wield its Property Clause powers over non-federal property—is likely to incur far more resistance than a local government revising its zoning ordinances or

285. *See infra* Part III.

adopting a transferrable-development-rights program.[286] Even the recent success of the passage of GAOA in 2020 is an exception that proves the rule: The fact that it took decades to accomplish this goal despite widespread bipartisan support indicates just how rare and infrequent such reforms at the federal level are likely to be.

2. Flexibility

As noted in Part I, there is enormous variation in the types of public lands that surround inholdings. While the existence of inholdings invariably complicates public land management to a certain extent regardless of where the inholding is located, there are also parts of the public lands system where the existence of inholdings may, on the whole, contribute to or work in concert with the values that surrounding public lands are managed to protect. For example, a handful of national parks contain small inholder communities—McCarthy in Wrangell-St. Elias in Alaska, and Stehekin Valley in North Cascades are two of the most notable examples—which have been recognized by park management and visitors alike as contributing to the historical and cultural legacy of the parks.[287] While more intensive private development in such communities might be detrimental, local land use regulation can allow for continuation of existing privately-owned uses that may be resources worth of protection as part of the overall landscape.[288] More effectively leveraging land use regulation

286. *See* Arthur Middleton & Justin Brashares, *More Than Twice the Size of Texas,* N.Y. TIMES (Dec. 21, 2020), https://perma.cc/7L5Z-E4EH ("Top-down declarations and land-use restrictions from Washington risk alienating rural Americans who otherwise support healthy lands, waters and wildlife. Instead of taking shortcuts to protect federal lands in ways that could antagonize nearby communities, the administration should work with state, local and tribal governments and the private sector to build on proven models of landscape conservation."); Sally K. Fairfax, *Takings, Public Trust, Unhappy Truths, and Helpless Giants: A Review of Professor Joseph Sax's Defense of the Environment Through Academic Scholarship*, 25 ECOLOGY L.Q. 385, 393 (1998) ("[E]xercising every shred of potential authority will not make the NPS popular as a neighbor in towns where it must live, manage, and cooperate. Nor will it make NPS programs popular in Congress, where the agency must seek both new park designations and annual appropriations for management of designated units.").

287. This is not to say there are not differences of opinion on the matter. *See, e.g.*, NAT'L PARK SERV., KEEPING IT WILD IN THE NATIONAL PARK SERVICE 167 (2014), https://perma.cc/SCV7-JX5W ("Cultural resources such as historic cabins can negatively impact one's ability to feel free from the reminders of civilization and connect to the larger community of life; however, for others, the presence of that same cabin enhances the connection to place and the meanings associated with it bolster appreciation and enjoyment of the area.").

288. *See, e.g.*, Maffly, *supra* note 144 ("Agricultural uses are fairly compatible with the rural nature and wilderness values of the park . . . . Many [parcels] have been in families for decade and decades and are much cherished by the families and are managed in ways that take care of those parklike qualities." (quoting the superintendent of Zion National Park)); U.S. DEP'T OF THE INTERIOR, NEW TOOLS FOR LAND PROTECTION: AN INTRODUCTORY HANDBOOK 4 (1982) [hereinater NEW TOOLS FOR LAND PROTECTION] ("In the Sawtooth Na-

as part of the inholdings governance toolkit thus can provide the flexibility needed in a public lands system that encompasses a diverse range of landscapes and protection objectives.

Some of the federal governance models discussed in Part II that explicitly provide for the use of local land use regulation as part of public lands management illustrate the flexibility it offers in areas with intermixed public-private ownership, such as the Cape Cod National Seashore and Sawtooth NRA.[289] Similarly, the enabling legislation for a number of other units within the NPS with higher levels of intermixed public-private land ownership, often referred to as "partnership parks," specifically provides for coordinated management between the NPS and local governments, with partnership agreements specifying how privately-owned property within the park will be managed.[290]

Equity and fairness values can also be advanced through the flexibility that local governance of inholdings offers. While the public lands managed by FLMAs have traditionally encompassed vast and remote natural landscapes, these types of public lands are not necessarily accessible to much of the public, because of distance and the cost and time needed to experience them.[291] Partly

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tional Recreation Area, for example, some of the outstanding scenic values are created by the combination of forested slopes, rugged mountains, and grazing cattle. Although subdivision of existing ranches and extensive residential development would disrupt the scene, private ranching uses may be a part of the resource worthy of protection."); JOSEPH SAX, KEEPING SPECIAL PLACES SPECIAL: MCCARTHY–KENNICOTT AND WRANGELL-ST. ELIAS NATIONAL PARK – A GREAT CHALLENGE, A UNIQUE OPPORTUNITY 22 (1990), https://perma.cc/4H6D-QKHU ("Here in a single place three intertwined eras in Alaska's history lay almost literally atop one another – the pristine wilderness, the intrepid exploration of mineral wealth, and bush Alaska in its authentic late-twentieth century form . . . The risk is to fail to see the whole and thereby miss what is special here.").

289. *See supra* Part II.

290. *See* NPS: UNITS MANAGED THROUGH PARTNERSHIPS, *supra* note 104 (describing partnership parks: "The arrangements may aim to save costs for both NPS and nonfederal stakeholders, combining investments so that neither partner carries the entire burden for park administration. Partnerships may also address concerns of Members of Congress and others about federal land acquisition by allowing nonfederal partners to own significant portions of a park unit, and they may address concerns about local input into decisionmaking."); BRANCHING OUT, *supra* note 49, at 14 (discussing Ebey's Landing National Historical Reserve: "Through an interlocal agreement, the National Park Service, state, county, and town share responsibility for carrying out the intent of the legislation and for providing visitor services."); NEW TOOLS FOR LAND PROTECTION, *supra* note 288, at 59–60 (describing how land use regulation of private property within the Lowell National Historical Park is managed through a Commission made up of members representing local, state, and federal interests and reporting directly to the Secretary of the Interior).

291. NAT'L PARK SERV., URBAN MATTERS: THE CALL TO URBAN ACTION (Mar. 2015), https://perma.cc/8LQP-CQ6V (discussing why it is important for the NPS "to look for new models, policies and approaches beyond the traditional experiences born of the large western landscapes: . . . especially [for] those who may not be able to access the more distant park lands like Yellowstone, Yosemite, and the Grand Canyon").

in recognition of equity considerations, many parts of the public land system—particularly units managed by the NPS—are increasingly found in more urbanized, "lived-in" areas.[292] Such locations are more likely to have inholdings within their boundaries (and enabling legislation often expressly providing that inholdings are to remain in private ownership), making local land use regulation strategically important.[293]

3. Fiscal Efficiencies

Leveraging local land use regulations to mitigate the land use challenges posed by inholdings can also offer fiscal efficiencies to both FLMAs and local governments. For the FLMAs, if local land use regulation of inholdings aligns with (or is at least non-detrimental to) surrounding public land management, they can direct their limited acquisition funding towards inholdings where acquisition is critical—such as those needed for public access or essential to preserving the ecological, aesthetic, or historic resources that the public lands are intended to protect.[294] As for local governments, if local land use regulation sufficiently addresses the FLMAs' concerns about potential development on inholdings, then FLMAs are less likely to pursue acquisition of the inholding and it will be more likely to remain in private ownership and thus on local tax rolls.[295]

4. Sustainability

Inholdings are a particularly acute example of a larger challenge referred to in public land scholarship as the "external threats" problem. This problem, broadly conceived, involves activities on non-federal property, whether on an inholding or encroaching suburbanization on adjacent lands—or more distant but transmissible threats such as air or water pollution—that complicate and frustrate public land management goals.[296] While federal acquisition or federal

292. *See* BRANCHING OUT, *supra* note 49, at 2 ("Today the park idea also embraces the preservation of hundreds of historic sites, shoreline and urban recreation areas, long-distance trails, rivers, and many large-scale "lived-in" heritage landscapes.").

293. *Id.*

294. *See Federal Land Acquisition,* NAT'L PARK SERV., https://perma.cc/H52B-T9SM ("Acquisition of all privately owned land within a given park boundary is not always necessary and, in some cases, not feasible.").

295. *See* Maffly, *supra* note 167.

296. *See, e.g.*, Sax, *Helpless Giants*, *supra* note 40, at 266; W.J. Lockhart, *External Threats to Our National Parks: An Argument for Substantive Protection*, 16 STANFORD ENV'T L.J. 3, 39–43 (1997); George Cameron Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1, 7 (1987); *see also* Harry R. Bader, *Not So Helpless: Application of the U.S. Constitution Property Clause to Protect Federal Parklands from External Threats*, 39 NAT. RES. J. 193, 201–05 (1999) (outlining conditions under which the

regulation can reduce the extent of such external threats, no matter how much land is acquired for federal protection or which is directly regulated by the federal government, non-federally owned property or non-federally regulated land will always be on the other side of the public lands boundary.

There has thus been increased recognition of "the need to consider protected areas in the context of their larger ecosystems," and an extensive body of scholarship exploring the principles of ecosystem planning and landscape conservation has been incorporated into public lands law.[297] While cross-jurisdictional landscape conservation and ecosystem planning does not obviate the importance of setting aside public lands under federal management, or the need for federal acquisition of inholdings, it does suggest that local governance of inholdings could be reframed as an opportunity for advancing shared sustainability goals across jurisdictional boundaries.[298]

5. Amplifying Effects

Finally, many of the legal tools in the local governance toolkit described in the next section could not only directly address the adverse impacts posed by land use activities on inholdings but could also indirectly amplify the efficacy of other governance approaches. For example, by limiting the intensity of permissible land use activities on inholdings and thereby lowering the speculative value of inholdings, local land use regulation can reduce the attractiveness of inholdings to real estate speculators. For instance, if a local zoning code limits the size of structures or intensity of uses on inholdings, or if local subdivision regulations limit how many separate parcels a property may be subdivided into, those regulatory baselines will factor into—and usually lower—appraisals of the property's fair market value. Although using land use regulation to intentionally

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Property Clause allows regulation of private and state land to protect federal lands); Robert B. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 355, 415 (1985) (discussing the possibility of a congressionally-implemented federal zoning scheme to address private lands external threats).

297. BRANCHING OUT, supra note 49, at 2. Because "[t]he scale and complexity of these landscapes often requires innovative cooperative approaches to conservation . . . [p]artnerships that combine a landscape perspective with a growing community-based commitment to stewardship have become critical factors in the sustainability of all national park areas." *Id.* at 2–3. There is a vast literature on the concepts of landscape conservation and ecosystem management, both generally and in the more specific context of public lands law. *See, e.g.*, J.B. Ruhl & James Salzman, *Ecosystem Services and Federal Public Lands: A Quiet Revolution in Natural Resources Management*, 91 U. COLO. L. REV. 677 (2020).

298. *Cf. National Wildlife Refuge System Land Protection Projects*, *supra* note 108, at 9 (noting that the "current trajectory for adding lands to the Refuge System is unsustainable and may not reflect the highest priority acquisitions that contribute to landscape conservation" and suggesting that the Refuge System might move towards "refuges as anchor points and portals to conservation actions that could be accomplished in collaboration with communities and partners").

lower the costs of federal acquisition would be unlawful,[299] if the land use regulation was adopted for otherwise valid reasons (for example, to protect ecologically sensitive lands or aesthetic viewsheds), its lowering effect on the inholding's fair market value could operate to indirectly make federal acquisition (whether through voluntary purchase or condemnation) more fiscally feasible, were it to be pursued at a future date.

* * *

While local land use regulation cannot eliminate the inholdings governance gap or obviate the continued need for federal and private law to address the land use challenges posed by inholdings, this section has shown that it offers promising strategic advantages. Realizing these advantages, however, requires both identifying the specific legal tools local governments could use to mitigate the land use challenges posed by inholdings, and realigning the underlying structural constraints that shape the incentives of local governments in ways that make it more likely these tools will be used. The next two sections examine each of these issues in turn.

B. The Local Governance Toolkit

This Section sets forth a non-exhaustive catalogue of land use law mechanisms available to local governments to regulate inholdings. While these legal tools cannot eliminate all the negative externalities posed by inholdings, collectively, they represent a significant source of regulatory authority to narrow the inholdings governance gap and demonstrate that local governance of inholdings is more than just a theoretical possibility.

Zoning. Zoning is at the core of most land use regimes and plays a key role in how intensively any privately-owned property may be developed. Zoning decisions enjoy a presumption of constitutionality and will be upheld as long as they are reasonably related to the public welfare.[300] Zoning tools that are relevant to the context of inholdings include the general legal mechanism of rezon-

299. *See* Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process,* 57 U. CINN. L. REV. 1, 68 & nn.202–03 (citing numerous cases supporting the proposition that "[t]he government may not downzone land it intends to condemn in the future for the purpose of depressing its value and thereby reducing the eventual cost of acquiring the property"); *cf.* NEW TOOLS FOR LAND PROTECTION, *supra* note 288, at 22 ("[A]gency officials should make a clear distinction between what land may be protected by existing local regulations and land intended for acquisition . . . and [should] be coordinated with sound legal advice to avoid charges of efforts to reduce property values on land that is planned for public purchase.").

300. *See* 4 CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE § 60.113 (2019) ("A zoning ordinance will be upheld if it is reasonably related to the public welfare. Zoning regulations are presumed constitutional.").

ing, as well as two specific types of zoning, conservation zoning and cluster zoning.

- Rezoning. If the applicable zoning for a parcel does not serve the public interest, local governments have the authority to rezone property.[301] Rezoning can be used to either "upzone"—allow more intensive uses or extensive physical development in the rezoned area—or "downzone"—reduce the intensity of uses permitted or extent of physical development.[302] While local government rezoning power is limited by certain legal doctrines for developed property, as well as for some undeveloped property for which the development approval process has already been initiated,[303] for most undeveloped property—as many inholdings are—local governments have wide discretion to "downzone."[304] Such downzoning may take a variety of forms, from limiting allowable uses to less intensive types, to lowering the allowable density, size, or height, to requiring greater setbacks from environmentally sensitive

301. *See* STERK ET AL., *supra* note 13, at 33–34 ("The municipal legislature cannot always anticipate the effect the ordinance will have on every parcel within the municipal borders. . . . Most [state zoning enabling] statutes require the local legislature to conduct a public hearing on proposed amendments to the zoning ordinance. Interested parties are typically free to appear at the hearing to voice their opinions, and to submit written materials in support of (or in opposition to) any proposed amendment."); *see, e.g.*, LAKEPORT, CAL., MUN. CODE, § 17.32.010 ("Zoning Amendments. The zoning ordinance may be amended by changing the boundaries of districts, or by changing the text whenever the public convenience, necessity, and general welfare requires such an amendment by following the procedures set forth in this chapter.").

302. AM. PLAN. ASSOC., A PLANNER'S DICTIONARY 148, 432 (Michael Davidson & Fay Dolnick eds., 2004), https://perma.cc/SRX2-EB3B.

303. Both the non-conforming use doctrine and vested rights can limit the local government's ability to rezone property; however, those doctrines are primarily applicable to already developed property or properties which have obtained certain approvals from land use decision makers. *See* STERK ET AL., *supra* note 13, at 235–36 ("In general, municipalities are free to amend their zoning ordinances to meet changing conditions. . . . [However,] a municipality may not enforce a new and more restrictive ordinance against a pre-existing non-conforming use or structure. . . . [In addition, the] Vested rights doctrine is designed to provide some protection to landowners who have not yet acquired protection as nonconforming uses or structures.").

304. *Id.*; *see also, e.g.*, Griepenburg v. Twp. of Ocean, 105 A.3d 1082, 1097 (N.J. 2015) (unanimously upholding the authority of a local government to downzone property from a zone that allowed residential and commercial use to an "environmentally sensitive" zone that allowed no additional residential or commercial uses other than the pre-existing single-family home on the property); Daniel Shapiro, *A Quick Look at Downzoning*, PLANNERSWEB (May 20, 2014), https://perma.cc/DQR9-CTZG (noting that property owners may complain about downzoning if it reduces their property values and describing some of the legal challenges they may raise to downzoning, but noting that downzoning is a commonly used tool "to preserve neighborhood character and enhance environmental benefits" and "As with any major zoning change, downzoning a portion of a city or town should be based on thorough planning studies, examining the pros and cons of the proposed change").

land features, such as wetlands or ridgelines, all of which can be potentially useful tools for limiting the adverse impacts posed by development on inholdings.[305]

- Conservation zoning/sensitive area zoning. Zoning codes typically contain numerous zoning districts for different types of uses, such as residential, commercial, office, open space, and agricultural, and are often sub-divided further within each category into even greater detail as to types of uses permitted.[306] As part of their zoning codes, many communities have established specific zoning districts or overlay zones for areas with sensitive ecological resources or conservation values.[307] Often referred to as conservation or sensitive area zoning, this type of zoning can serve a variety of land use goals, from protection of ecological resources to preservation of viewsheds, and it allows localities to establish location-specific standards that will apply to any development that occurs in such zoning districts.[308] By the very nature of their location within protected public lands, inholdings are often in areas with high conservation value and ecologically sensitive features; thus, if a locality has established sensitive area zoning districts or overlay zones, many inholdings are likely to be eligible for such designation.
- Cluster zoning. Cluster zoning is a land use tool often utilized in the context of large site development, which allows or requires land uses to be densely clustered together in one part of the site, leaving the re-

305. *See, e.g.*, Mark Esper, *San Juan County Imposes Limits on Size of Cabins,* DURANGO HERALD (Feb. 23, 2012), https://perma.cc/N3BS-Q32K (describing a provision of the San Juan County, Colorado land use code that imposes a maximum 750 square footage for any structures on property located in the mountain zone of the county, defined as above 11,000 feet in elevation, which is where many inholdings in the county are located).

306. *See* STERK ET AL., *supra* note 13, at 24 ("Zoning ordinances typically separate residential, commercial, and industrial uses, . . . [f]or example, a municipality may have several different residential districts.").

307. Conservation zoning can be incorporated into a zoning ordinance either as a stand-alone zone that designates specific physical locations in the zoning map, or as a floating or overlay zone. The former is established as a zoning district in the code but not applied to any particular area on the zoning map until a separate designation is sought to designate certain parcels that the overlay conservation zoning applies to, and then its requirements apply in addition to the underlying zoning that the parcel is subject to. *See* STERK ET AL., *supra* note 13, at 120 (describing floating zoning as a "floating zone, because the description 'floats' in concept until it 'lands' on a parcel").

308. *See* SAN MIGUEL CNTY., SAN MIGUEL COUNTY LAND USE CODE § 5-321, https://perma.cc/FBQ3-EVKK (establishing a "High Country Zone" designation that limits the size and intensity of land uses of property within the zone to protect high-elevation ecosystems); PITKIN CNTY., PITKIN COUNTY LAND USE CODE § 3-40-20 (establishing a "Rural and Remote Zoned District," that limits new development in order to conserve and protect ecological resources in such areas and preserve open space).

mainder of the site undeveloped or less densely developed.[309] By clustering the higher intensity land uses together and leaving the remainder of the site largely undeveloped, cluster zoning allows for the undeveloped portion of the property to continue to provide important ecosystem services—from watershed protections to wildlife habitat to stormwater drainage to open space for human use.[310] In scenarios where underlying zoning permits multiple separately owned residences on an inholding, or where subdivision regulations permit a single inholding to be subdivided into multiple separate legal parcels, cluster zoning can provide a method to channel that development to a limited portion of the inholding site, thereby incrementally reducing adverse impacts on surrounding public lands.

Design Review. Many communities have adopted design review standards in order to achieve a variety of aesthetic-related goals and to guide the visual appearance of development in the community.[311] Such standards typically focus on preservation of scenic resources, and set out requirements regarding tree coverage, open space, and various forms of visual screening (such as natural fencing) that development must comply with.[312] Thus, they could be readily

309. Alec LeSher, *Cluster/Conservation Subdivisions in Rural/Urban Areas,* SUSTAINABLE DEV. CODE, https://perma.cc/47M7-YSKC. The specifics of cluster zoning regulation vary across jurisdictions, but generally, the total allowable density for the site that cluster zoning applies to is unchanged from what underlying subdivision and zoning regulations would permit, although there may be a density bonus or waiver of otherwise applicable minimum lot sizes. *Id. See, e.g.*, SNOHOMISH CNTY., RURAL CLUSTER SUBDIVISIONS, https://perma.cc/QJS7-HTPP (describing the Snohomish County cluster development ordinance, which provides for "a density bonus of 15-35 percent, depending on the developer's commitment to set aside open space").

310. LeSher, *supra* note 309.

311. *See* STERK ET AL., *supra* note 13, at 184 ("Although in the early days of zoning, courts questioned whether municipalities had power to regulate for aesthetic purposes, most courts today find that municipalities have a legitimate interest in promoting an aesthetically pleasing environment. To that end, some municipalities have established architectural review boards to consider design issues associated with large projects or sensitive areas: Other municipalities have incorporated provisions regulating aesthetics in their zoning codes or entrust certain design issues to the local planning board.").

312. *See, e.g.*, CITY OF PIEDMONT, DESIGN GUIDELINES § 2.0, https://perma.cc/5CSU-KQHJ (stating that the design review process "involves" three primary principles used when reviewing the merits of a proposed development); TOWN OF ASHLAND, DESIGN REVIEW GUIDELINES 4–5 (2015), https://perma.cc/U6LC-3KAT (providing an overview of design review criteria and noting that "the design review process is meant to coordinate aesthetically-pleasing and environmentally-friendly development in designated areas of Town through land, site, architectural, sustainable design and sign review").

applied to limit the adverse impacts of development on inholdings to viewsheds and scenic values of surrounding public lands.[313]

Density Dilution. Most land use regulations set out the maximum density of structures that may be built on a parcel in terms of the floor to area ratio ("FAR").[314] For example, a FAR of 0.10 on a one-acre lot means that the total density of the structures on the property cannot exceed one-tenth of an acre (which equals approximately 4350 square feet).[315] Standard FAR calculations do not account for physical differences across parcels in the same zone that can constrain the amount of land that is actually buildable.[316] For example, even if 50% of a one-acre lot is wetlands or a steeply sloping hillside that other provisions of the land use code (or state or federal law) would prohibit building on, standard FAR calculations would still determine the permissible maximum floor area based on the total lot size of one acre.

Some jurisdictions, however, have taken a more nuanced approach, and remove the amount of the property that is legally undevelopable from the total area of the parcel when calculating the maximum permissible FAR.[317] The resulting "diluted density" is then used as the basis for calculating the maximum permissible density, thereby reducing the maximum size of permissible structures. Returning to the example above, if 50% of the one-acre parcel is considered undevelopable, then the legally permissible amount of buildable land is only a half-acre. Applying the same 0.10 FAR to a half-acre would mean the total density of the structures on the property cannot exceed 2,175 square feet (as opposed to 4,350 square feet using standard FAR calculation). Because inholdings are located within protected public lands, which often have unique physical or topographic characteristics, many inholdings are likely to have legally unbuildable areas within their lot lines. In such cases, a density dilution regulation could serve to limit the bulk of structures that could be built on those inholdings.

Subdivision Regulations. Together with zoning, subdivision regulation is one of the core land use controls local governments utilize to regulate develop-

313. *See, e.g.*, SONOMA CNTY., CITY CODE § 26-64-020 (providing that all structures within the Scenic Resources district "be sited below exposed ridgelines" and "use natural landforms and existing vegetation to screen them from view from public roads").

314. *See* STERK ET AL., *supra* note 13, at 27–28 ("Many municipalities have enacted additional restrictions to ensure that the bulk of a building is proportional to the existing fabric. First, floor area ratios ('FARs') limit the total square footage a builder can build on a particular lot.").

315. *Id.*

316. AM. SOC'Y. OF PLAN. OFFS., INFORMATION REPORT NO. 111, at 3 (1958), https://perma.cc/V29J-ASS2 ("In nearly every ordinance in which it is used, a floor area ratio is obtained by the following simple formula: FAR = floor area / lot area.").

317. *See* Brown, *supra* note 121 (describing density dilution regulations applicable to certain private property within Adirondack State Park); *see also* GADSDEN CNTY., LAND DEVELOPMENT CODE § 5102 (2021), https://perma.cc/RCD7-G36T.

ment. Subdivision regulations provide the legal framework for when and how an owner can subdivide a single parcel into multiple separate parcels, and typically address issues related to the impacts that a subdivided parcel will have on a community, often containing provisions such as maximum permissible number of subdivided units, minimum lot sizes, conformance with standards for utility provisions and other infrastructure such as road and emergency access to all subdivided lots.[318] Subdivision regulations are of particular import for inholdings, because even where applicable zoning regulations limit permissible uses on inholdings to relatively lower intensity ones, if subdivision regulations allow for subdivision of a single inholding into multiple, separate legal parcels, not only will there be cumulative impacts from the permitted uses that could be built on each of the subdivided parcels once they are developed, but it also increases the likelihood of real estate speculation in inholdings, since the potential for an inholding to be subdivided typically increases its value.[319] Whereas, if local subdivision regulations limit the extent to which inholdings can be subdivided, it can serve to dampen the likelihood of both negative cumulative impacts and real estate speculation.

TDR Programs. Numerous local governments have enacted transferrable development rights ("TDR") programs to limit development on land that is considered particularly sensitive, due to historic, aesthetic, environmental, or other considerations.[320] Such programs vary in their details, but generally involve restricting the development of property located in areas considered particularly sensitive to development (typically through downzoning), while at the same time giving owners of these restricted parcels a right to sell their "development right" to owners of non-restricted parcels, who can use it to exceed the land use restrictions otherwise applicable on their parcel.[321] By creating a market in alienable development rights, TDR programs can protect restricted sensitive lands, while also reducing the likelihood of opposition from individual owners of restricted lands by granting them a monetizable asset.

TDR programs can be particularly useful in the context of inholdings because the programs are designed to avoid the net loss of development—and tax revenue from that development—that results when a parcel is downzoned without a TDR program. While there may not be a one-for-one equivalence in the value of the development that does not occur on the sending parcel and the

318. *See* STERK ET AL., *supra* note 13, at 136–39 (providing an overview of subdivision controls).

319. *See, e.g.*, MONTROSE CNTY., MONTROSE COUNTY MASTER PLAN 42–43 (2010), https://perma.cc/72AW-H8S6 ("Goal 2: Coordinate with public lands agencies to manage the development of in-holdings within those lands. Objective: Mitigate the impacts of development within public land in-holdings. Action: Implement regulations to prohibit the subdivision (parcels of less than 35 acres) of in-holdings.").

320. *See, e.g.*, PITKIN CNTY., PITKIN COUNTY'S TDR PROGRAM (2016), https://perma.cc/5MNK-DVX5.

321. *Id.*

value of the development that is permitted on the receiving parcel, by shifting where development occurs (rather than eliminating it), TDR programs are likely to be more politically palatable to both inholding owners—who receive a monetary payment when they sell their TDR—and to the municipality itself, which receives the property tax revenue from the receiving parcel once it is developed.[322]

Seasonal Road Maintenance Ordinances. Local governments typically are granted extensive authority over maintenance of roads within their boundaries as part of their police powers.[323] In areas of the country where snow affects seasonal road maintenance, many localities set standards about which types of roads will have winter maintenance (i.e., plowing).[324] Such seasonal road maintenance standards indirectly operate to dampen the intensity of development on any property that is accessed via roads that are not designated for winter road maintenance, since vehicular travel to those properties is foreclosed for a portion of the year. Because inholdings—especially in the western United States—are often found in remote locations within public lands, they are particularly likely to be in areas that only have seasonal road maintenance. While inholding owners could still potentially access their property in the winter via non-vehicular means (via foot, snowmobile, or helicopter, if regulations otherwise allow for such means), the lack of year-round vehicular road access is likely to limit development on at least some such inholdings.

State Actions. Although local governments have primary responsibility for land use regulation, in a number of states, state governments have some level of direct involvement in land use regulation, offering an additional source of legal authority to respond to the land use challenges posed by inholdings.[325] For example, TDR programs can be implemented at the local level or on a statewide or regional basis.[326] Such statewide or regional TDR programs can facilitate a

322. *See* Blevins, *supra* note 30 ("Summit County [Colorado] has also drafted regulations that limit development in the county's Upper Blue, Ten Mile and Snake River basins. Under the new regulations, which are expected to be adopted Monday, owners of inholdings would be able to trade development rights on their property for rights to build in other areas.").

323. *See, e.g.*, TEX. TRANS. CODE § 311.001–311.002 (providing that both home rule and general law municipalities have "exclusive control over and under the public highways, streets, and alleys of the municipality"); N.C.G.S. § 160A-296 ("A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation.").

324. *See, e.g.*, PITKIN CNTY., PITKIN COUNTY LAND USE CODE § 3-40-20 (providing that winter plowing is a prohibited use in rural and remote districts).

325. States have indirect involvement land use regulation in all states, since local governments exercise authority over land use by virtue of delegations of authority from the state. *See supra* Part II.

326. *See* STERK ET AL., *supra* note 13, at 68–70 (describing examples of local and regional TDR programs).

more robust market for TDRs, by expanding the territorial area for operation of the program and the number of possible sending and receiving parcels.[327]

A similar amplifying effect can occur if a state has a state-level planning law. Such laws often impose procedural requirements, which, while not specifying or mandating any particular substantive outcome with regard to land use regulation of inholdings, can serve as the triggering mechanism for more robust local review of certain land use activities. For example, some states have comprehensive planning statutes that require localities to prepare comprehensive plans (sometimes referred to as master plans) and require such plans to contain provisions about protection of natural resources or address the extraterritorial impacts of land use planning.[328] Other state-level planning laws, such as growth management acts and state environmental review laws, set out substantive requirements that can serve to provide an additional layer of review on local permitting decisions regarding inholdings.[329]

State taxation laws also offer a governance mechanism that could be operationalized in the context of inholdings. For example, many states have adopted current-user use value taxation schemes to incentivize the preservation of agricultural land and other types of property that provides open space.[330] The details of such programs vary, but the laws generally provide that as long as the

327. *Id.*

328. *See, e.g.*, CAL. GOV. CODE §§ 65330–65333 (repealed 1965) ("Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning. . . . The plan shall include the following elements . . . a conservation element [which] shall consider the effect of development within the jurisdiction, as described in the land use element, on natural resources located on public lands."); R.I. GEN. LAWS § 45-22.2-6(1), (3) ("The [comprehensive] plan must identify the goals and policies of the municipality for its future growth and development and for the conservation of its natural and cultural resources. . . . The plan must be based on an inventory of significant natural resource [and] . . . must include goals, policies, and implementation techniques for the protection and management of these areas."); N.H. REV. STAT. ANN. § 674:2(II)–(III) ("The master plan shall include . . . a land use section . . . [b]ased on a study of population, economic activity, and natural, historic, and cultural resources, it shall show existing conditions and the proposed location, extent, and intensity of future land use. The master plan may also include . . . [a] natural resources section which identifies and inventories any critical or sensitive areas or resources, not only those in the local community, but also those shared with abutting communities.").

329. *See generally* Kellen Zale, *Changing the Plan: The Challenge of Applying Environmental Review to Land Use Initiatives*, 40 ECOLOGY L.Q. 833 (2013) (providing an overview of how state Growth Management Acts and state environmental review laws—often referred to as "little NEPAs"—function to provide an additional layer of land use regulation in some states).

330. *See, e.g.*, MASS. GEN. LAWS, ch. 61A, §§ 4–4A; WYO. STAT. ANN. § 39-13-103 (West); N.Y. AGRIC. & MKTS. LAW §§ 300–310 (McKinney); VT. STAT. ANN. tit. 32, §§ 3750–3763.

property remains used for its current agricultural or lower-intensity open space use, it will be taxed at the appraised value for that use, not the appraised value for the "highest and best" (i.e., most valuable use) that applicable zoning would allow the property to be used for.[331] By removing the speculative value of the land from tax valuation, such programs can incentivize property owners to engage in land uses that impose fewer adverse impacts on surrounding lands.[332]

Finally, a handful of states have established state agencies that are specifically tasked with coordination and oversight over the management of designated geographic areas within the state that have extensive intermixed public-private land ownership.[333] Two of the most well-known of these state agencies are the Adirondack Park Agency ("APA") in New York and the Santa Monica Mountains Conservancy ("SMMC") in California.[334] The APA was established by the New York state legislature to coordinate land use management for what is the largest public park in the United States outside of Alaska, the six-million-acre Adirondack State Park.[335] The park's territory is nearly evenly divided between state-owned forest reserves and non-state-owned property.[336] Because the Adirondack Park legislation envisions ongoing intermixed land ownership within the park, the regulatory regime overseen by the APA attempts to strike a balance between "limit[ing] development in areas with significant environmental constraints, and . . . channel[ing] growth to areas of the park that can with-

331. *See, e.g.*, VT. STAT. ANN. tit. 32, § 3756. Such state taxation systems often incorporate both a carrot—lower taxes for landowners engaged in lower-intensity uses—and a stick—clawback provisions that are triggered if owner does develop the land (or sell to someone who develops the land), requiring that certain number of years' worth of taxes be repaid at the higher developable value assessment. *Id.* § 3757.

332. State land gains taxes are another state taxation device that can be used to discourage short-term land speculation, although only one state (Vermont) has implemented such a tax. *See generally* R. Lisle Baker & Stephen O. Andersen, *Taxing Speculative Land Gains: The Vermont Experience*, 22 URB. L. ANN. 3 (1981).

333. As noted in Part II. *supra*, the federal government has also established regional coordinating agencies that play a similar role in certain congressionally designated regions. *See* Tahoe Reg'l Plan. Agency, *supra* note 240 and accompanying text.

334. The New Jersey Pinelands Commission is another well-known state coordinating agency that manages a designated geographic area with intermixed public-private land ownership. *See* STERK ET AL., *supra* note 13, at 69 (discussing the Pinelands TDR program).

335. *See About the Adirondack Park Agency*, ADIRONDACK PARK AGENCY, https://perma.cc/35YF-CXNS; *More About the Adirondack Park*, ADIRONDACK PARK AGENCY, https://perma.cc/GX7C-SLVQ; *Adirondack Park Land Use Classification Statistics - May 2014*, ADIRONDACK PARK AGENCY, https://perma.cc/P6CZ-WVXF.

336. *See The Adirondacks,* ADIRONDACK RSCH. CONSORTIUM, https://perma.cc/5JQ2-GAF2 ("The [state-owned] Adirondack Forest Preserve did continue to expand, but today accounts for just under half of the six-million-acre Adirondack Park . . . . Today's Adirondack Park is home to over 135,000 permanent residents in 105 towns and villages, and host to over 200,000 seasonal homes.").

stand it — where infrastructure is already in place."[337] The APA utilizes a variety of legal mechanisms to manage land uses within the park, with privately-owned property classified into six types and varying levels of state oversight as to each.[338]

On the other side of the country, the SMMC was established by the California legislature in 1980 to manage and protect open space across an approximately 75,000 acre zone of intermixed public and private lands in the Santa Monica Mountains of Southern California.[339] The SMMC serves as a coordinating entity in the zone, which includes not only intermixed public and privately-owned lands, but also a conglomeration of different types of public lands—from national forests to state parks to local recreation areas—that are managed by multiple government agencies at the federal, state, and local levels.[340] Unlike the APA, the SMMC does not have direct regulatory authority over land use activities and development on privately-owned land within its territorial boundaries. However, the SMMC has been granted the authority to engage in a variety of actions that can provide incentives to local land use regulators to regulate privately-owned property within the Santa Monica Mountains zone in ways that align with, or are at least less detrimental to, the management of public lands. For example, the SMMC is authorized to award grants to cities and other local governments within its territory "for the acquisition or improvement of natural and scenic resources under the management of the local jurisdiction."[341]

337. *See* Kevin J. Kelley, *WTF: With Both Private and "Forever Wild" Land, How Does Adirondack State Park Work?*, SEVEN DAYS (July 16, 2004), https://perma.cc/5JN4-D9Z2. How to strike this balance, of course, is a subject of debate, and the APA has been criticized for putting greater emphasis on the economic benefits of development and for under-accounting for the impacts of such development on the preservation and conservation goals that agency was established to manage. *See* John S. Banta, *The Adirondack Park Land Use and Development Plan and Vermont's Act 250 After Forty Years*, 45 J. MARSHALL L. REV. 417, 428–32 (describing criticisms of the APA regime).

338. N.Y. EXEC. LAW § 810; *see also* Banta, *supra* note 337, at 422–30 (describing the legal framework that guides APA oversight of land use within the Park). The degree to which APA regulations of private property displace otherwise applicable local land use regulation varies; some localities have developed comprehensive local land use regulation that are linked to APA state standards, which allows the local governments to retain primary control over land use decisions within their jurisdictions, while localities who have not done so are subject to state permit requirements. Banta, *supra* note 337, at 422–30.

339. *Who We Are and What We Do*, SANTA MONICA MOUNTAINS CONSERVANCY, https://perma.cc/3M52-EK3V.

340. *Our Partners*, SANTA MONICA MOUNTAINS CONSERVANCY, https://perma.cc/X95S-53HV.

341. *Id.*

C. Realigning Local Government Incentives

The previous two sections have shown that leveraging local governance to address the land use challenges of inholdings offers a number of strategic advantages, and that there is a robust set of legal tools that could be deployed to mitigate the adverse impacts of development on inholdings. Yet local governments have a mixed record (at best) in this context, due to the various legal, fiscal, and political structural constraints discussed in Part II.A.[342] These constraints tend to shape their incentives with respect to regulating inholdings in ways that are unlikely to align with management of surrounding public lands. As a result, local governments—and the land use authority they exercise—are understandably perceived as undependable partners in the governance of inholdings.

This section considers whether it is possible to reset some of the underlying incentive structures that shape local government decision-making around inholdings in ways that could make local land use regulation a more meaningful component of the inholdings governance model. In thinking about this question, it is useful to begin by recognizing that local governments are not monolithic. Some might be self-incentivized to regulate inholdings in ways that account for adverse impacts on surrounding public lands. And a number of local governments in fact already do limit development on inholdings using the legal tools described in Part III.B, because doing so protects the economic and non-economic values that public lands provide in their community.[343]

Conversely, other localities not only are unlikely to be self-incentivized, they may be essentially immune from any external attempts to realign their incentives. For example, certain localities—particularly in some parts of the western U.S.—have deeply-entrenched ideological opposition to federal ownership of public lands and to any governmental actions perceived to limit private property rights.[344] As a result, external incentives are unlikely to have an effect, since such localities essentially have no reserve price to regulate inholdings in ways that align with the goals of surrounding public lands management.[345]

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342. *See supra* Part II.

343. *See id.* Relatedly, local governments may decide to regulate land use activities on inholdings because costs to the community—in terms of emergency services or infrastructure—of development in remote locations where inholdings are located outweigh the tax benefits that such development might bring. *See* Blevins, *supra* note 30 (quoting Gunnison County, Colorado, officials on why the county adopted zoning changes to limit the size of development in certain high-altitude areas of the county, where a number of inholdings are located: "[T]he logical concern is a proliferation of people wanting to live in remote areas. We need to think about our emergency services . . . and maintaining a lifestyle we enjoy.").

344. *See, e.g.*, Maffly, *supra* note 167; Glicksman, *supra* note 169 and accompanying text.

345. *Id.*

The incentive structures of many local governments, however, are likely to fall somewhere in between; they are not necessarily internally incentivized to regulate inholdings in ways that align with management of surrounding public lands, but they are susceptible to external incentives to exercise their regulatory land use authority over inholdings in ways that complement (or at least are less detrimental to) public lands management. The question then becomes how to realign those incentives and who should be the source of such realignment attempts.

Because the federal government—along with the public in whose interest public lands are managed—has the greatest stake in seeing inholdings regulated in ways that are less detrimental to surrounding public lands, the federal government is the most logical source of these external incentives.[346] And in fact, some of the governance approaches to inholdings described in Part II are examples of Congress deploying external incentives to better coordinate local land use regulation with management objectives for public lands, such as the Cape Cod and Sawtooth models, as well as the interlocal government agreements authorized for management of partnership parks.[347] Formal Congressional authorization, however, is not the only way for the federal government to externally incentivize local land use regulation of inholdings. This section suggests that there are a number of additional avenues that could be considered, and it highlights three such proposals: (i) inholdings inventories; (ii) capacity enhancements; and (iii) downzoning compensation.

1. Inholdings Inventories

Local governments with primary regulatory authority over inholdings may only become aware of that authority—and of the existence of an inholding within their jurisdiction—when the owner of an inholding submits an application to the local planning and zoning department to develop their property.[348]

346. In addition, despite the persistent under-funding of federal land management agencies, as compared to many local planning and zoning departments, the federal government is better positioned (in terms of staffing, funding, and particularized knowledge about inholdings and public land management needs) to offer external incentives to local governments in this context.

347. *See supra* Part II.

348. While the author is not aware of any empirical data discussing the extent to which local government officials and land use staff are aware (or unaware) of the existence of inholdings within their jurisdiction, anecdotal accounts indicate that local officials sometimes learn of the existence of inholdings—and consider whether there is a concomitant need for more robust land use regulation of inholdings—when inholding owners seek approval for development. *See, e.g.*, Blevins, *supra* note 30 (quoting the community development director of Pitkin County, Colorado, about the county's reasons for adopting a Rural and Remote Zoned District applicable to many of the high-elevation inholdings in national forests within the county: "It was real concern that people were wanting to develop in more and more remote

At that point, even if local regulators are concerned about the impacts of the proposed development, if the proposal otherwise complies with applicable zoning requirements and other generally applicable laws, there is little that local regulators can do to stop it.[349] Although other governance tools—such as federal acquisition—can be turned to in this situation, an opportunity for proactive local governance has essentially been lost because of the lack of awareness about the existence of the inholding within the local government's jurisdiction.

If, however, FLMAs were to provide local governments with an inholdings inventory—a basic data compilation containing information about inholdings located within the jurisdiction, such as location, size, and ownership information—there would be an opportunity for local governments to use this data to determine what as-of-right development is permitted on inholdings in their jurisdiction under existing zoning and subdivision regulations. The local government could then assess whether existing land use regulations are appropriate, or whether existing regulations should be updated using one or more of the tools described in Part III.B. While providing local governments with an inholdings inventory would not guarantee that the local government would take any subsequent actions to proactively regulate inholdings, by providing local governments with data they may otherwise be lacking and which might be difficult for local governments to gather on their own, inholdings inventories would provide a modest external incentive towards getting local governments to think proactively about how local land use regulation applies to inholdings.[350]

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locations, and we didn't have the services to accompany that development . . . . We were also concerned about the character of the area and the buffer area around U.S. Forest Service lands and the overall character of the backcountry.").

349. *See* Rubinkam, *supra* note 6 (quoting a local government official responding to questions about why a development proposal was approved for an inholding within Valley Forge National Historical Park: "[T]he board is limited in what it can do, because the land is zoned for residential use. 'If the developer meets all the conditions, it is difficult to really stop it effectively for the long term.'"). Such as-of-right development can be contrasted to a situation where a development proposal requires a discretionary action on the part of land use regulators—such as a variance; in the latter scenario, local government regulators may be able to deny the application or to condition its approval on certain terms. *See* STERK ET AL., *supra* note 13.

350. As noted above, anecdotally, it appears that local governments have been caught off-guard when an inholding owner applied for development and the local government was required to approve it because it satisfied generally applicable land use regulations and no specific regulations had ever been enacted by the locality to address the possible impacts of development on inholdings. Thus, by providing information to local governments which they may be currently lacking, an inholdings inventory would provide local governments with the necessary information to make more fully informed decisions about what land use regulation should be applicable to inholdings in a proactive, rather than reactive, manner. *See* Jason Blevins, *Controversial Real Estate Speculator Alone in the Wilderness,* DENV. POST (May 10, 2010), https://perma.cc/HS56-UAKQ (describing the differing land use regulations applicable to high-country inholdings in different counties in Colorado and noting that Montrose County, which had formerly not had any particular heightened regulations for inholdings, was in the

The provision of inholdings inventories to local governments is unlikely to be particularly costly for FLMAs: Most units within the public lands system keep records about non-federally owned property within their boundaries.[351] Furthermore, channels of communication between FLMAs and local governments already exist for the sharing of information: most units within the public lands system have designated staff who liaise regularly with local officials.[352] Thus, FLMAs could provide an inholding inventory as part of these regular communications, and supplement with updates as necessary, such as on an annual basis. Alternatively, FLMAs could coordinate with state governments or non-profits such as land trusts, providing them with inholding inventories on a statewide or regional basis. Such an approach may allow for efficiencies of scale and could be used to create a statewide or regional database of inholdings by county or other local jurisdiction.

2. Capacity Enhancement

As noted in Part II.B, many local governments where inholdings are located rely on part-time elected officials and often have thinly-staffed planning departments responsible for large territorial areas. Under such conditions, the regulation of inholdings may be fairly far down the list of high-priority tasks. Thus, a lack of capacity—in terms of resources, staffing, and time—may deter some local governments from considering implementation of one or more of

process of amending its master plan to address the issue after an inholding within its jurisdiction was developed in ways that the county had not anticipated: "Montrose County officials, in reaction to Chapman's house and plans for the 79-acre parcel he just sold atop the highest point in Black Canyon of the Gunnison National Park, are tweaking their master plan to address building designs in agricultural zones. Planners in Pitkin, San Miguel, Gunnison, Eagle and Summit counties long ago adopted strict building guidelines for islands of private land surrounded by publicly owned mountains.").

A possible concern raised by this Article's proposal of inholdings inventories might be that the dissemination of an inholdings inventory could perversely serve as the basis for land use regulations or decisions regarding the inholding that do not align with federal land use goals, by letting local authorities know of the existence of inholdings within their boundaries where future development may occur which they may not have previously been aware of. For example, in locations with deeply-entrenched ideological opposition to federal public lands and to any governmental actions perceived to limit private property rights, one could imagine local officials using an inholding inventory in such a manner. However, such localities are likely already predisposed to regulating inholdings in ways that fail to align with federal public lands management goals. *See supra* note 128 and accompanying text. For the majority of local governments which do not fall into this category, an inholdings inventory would simply provide information they are currently lacking; and as scholars have recognized in a wide variety of contexts, government regulation is generally improved through more information, not less. *See, e.g.*, LAWRENCE LESSIG, CODE 39 (Version 2.0 2006) (noting that for any type of regulation to be effective, a regulator needs to know "Who did what, where?").

351. *See supra* notes 101–02.

352. *See* NATIONAL LAND ACQUISITION PLAN, *supra* note 187.

the tools described in Part III.B to regulate inholdings, even where the locality has sufficient legal authority and political will.

The FLMAs, however, could deploy their own more robust institutional capacity in a variety of ways to help address some of the capacity deficits of local governments.[353] For example, FLMAs could serve as an information clearinghouse about legal tools available to localities to regulate inholdings, and could share such information with local governments in an easily digestible and targeted format. While there are already numerous federal publications that provide valuable guidance on how local land use laws and other state and local legal tools might be used to regulate inholdings and other privately-owned property to better align with public land management, as the author discovered in her own research for this paper, such guidance is found in a myriad of different sources, produced by different agencies, and often part of lengthy internal agency studies.[354] While providing valuable analysis and details for researchers, information found in such formats is less likely to be readily utilized by county planners or local officials. A more digestible, user-friendly alternative, such as a short "best practices" handout or bullet-point list on a FLMA website about specific legal tools for exercising regulatory authority over inholdings with links to model local legislation, could provide a low-friction information gateway for local governments, even if details needed to be provided elsewhere. In a similar vein, FLMAs could compile and share first-hand testimony from local governments about why they found it beneficial for their community to use land use law to regulate inholdings, as well as provide updates to local planning departments regarding developments in legal issues related to inholdings.[355]

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353. It should be acknowledged that FLMAs already do engage in many of these types of capacity-enhancing efforts with respect to a wide range of public land issues that impact local communities; the discussion above is intended to highlight how such engagement could be focused specifically on enhancing local capacity in the context of local land use regulation of inholdings.

354. Several of these sources have been invaluable to the author and have been cited throughout this Article. *See, e.g.*, BRANCHING OUT, *supra* note 49; NEW TOOLS FOR LAND PROTECTION, *supra* note 288; ALTERNATIVES FOR LAND PROTECTION, *supra* note 219; NATIONAL LAND ACQUISITION PLAN, *supra* note 187; *National Wildlife Refuge System Land Protection Projects*, *supra* note 108; SUSAN STEIN ET AL., U.S. FOREST SERV., GENERAL TECHNICAL REPORT PNW-GTR-728 (2007), https://perma.cc/95W6-9HCC.

355. This can be a particularly helpful tool for local governments to assess whether their land use regulations suffer from any legal infirmities, and if necessary, amend their regulations to address such concerns. *See* High Country Citizens' All. v. U.S. Forest Serv., 203 F.3d 835 (10th Cir. 2000) (disagreeing with the arguments made by local government regulators that because the county had granted a special use approval for construction of a single-family dwelling on an inholding and the special use approval provided that the property "not to be used for year-round occupation," that the inholder therefore should not be entitled to winter access (and the road plowing over surrounding national forest necessary for winter access); the court held that because the county's special use approval did not specifically eliminate "wintertime" use (even though the county argued it was understood that "not to be used for

Such capacity-enhancing efforts need not be resource- or cost-intensive for the federal government. As noted above, FLMAs typically have dedicated staff who serve as liaisons to local, state, and tribal governments and who are already engaged in ongoing communication with local governments about a broad spectrum of issues affecting both public lands and the surrounding communities. Since different local governments have varying levels of receptiveness to engagement with FLMAs on local land use issues, staff liaisons could use their familiarity with the local community to gauge what type of capacity-enhancing efforts are likely to be most effective.[356]

3. Downzoning Compensation

Inholdings inventories and capacity-enhancing efforts are two types of external incentives that the FLMAs can provide to local governments without congressional authorization and which may be able to nudge local governments to consider adoption of land use tools proactively. However, such incentives are unlikely to be effective in situations where a local government is contemplating a specific development proposal for an inholding and is fully aware of the adverse impacts that development poses for surrounding public lands, but nonetheless rationally acts to approve such development because the benefits to the locality (in terms of tax revenue or fulfillment of other public needs) outweigh the diffuse costs imposed on the broader public.[357] In such cases, although other governance tools—such as federal acquisition—can be deployed to forestall the inholding from ultimately being developed, external incentives like the two proposals described above are unlikely to change the cost-benefit calculus of the local government regarding the specific development proposal.

However, if external incentives were in place *before* a local government made its cost-benefit calculus, localities might enact regulatory schemes that

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year-round occupation" meant not to be used for wintertime use), the Forest Service did not act arbitrarily and capriciously in granting the inholding owner the right to plow the access road to the inholding even over the county's objections).

356. *See, e.g.*, NEW TOOLS FOR LAND PROTECTION, *supra* note 288, at 22 ("Federal participation in local zoning activities can take place at several points in the process. . . . Representatives of the management agency can participate in hearings and meetings on proposed rezonings, variances, or exceptions to explain their concerns. . . . Federal involvement in local zoning matters should be a cooperative effort, not a confrontation."); Sax and Keiter, *supra* note 170, at 264 ("When we asked Glacier [National Park] officials how or whether the park engages with private land development, we were told: 'We don't show up at planning meetings and say, for example, "you should zone the North Fork." For us to show up at planning meetings would be very difficult. And we don't have the empirical and scientific studies to make the case. It is difficult for us to make the case that "it's your house that will make the difference," and we don't have huge developments, it's mostly one house at a time. What we do is education, to alert the public.'").

357. *See supra* Part II.

make it less likely such development proposals are ever advanced. One such external incentive might be congressionally-authorized compensation to local governments who downzone or otherwise limit development (for example, by limiting subdivision) on inholdings in ways that account for the values for which surrounding public lands are managed. Just as the Payment in Lieu of Taxes program ("PILT") provides for federal payments to local governments to help offset losses in property taxes because of the existence of non-taxable federally-owned land within their boundaries, a downzoning compensation program could help offset the (anticipated) losses in property taxes that local governments forego when they downzone or otherwise limit development on inholdings.[358]

This type of downzoning compensation program would be a more costly and legally uncertain approach than the two incentive-shifting proposals discussed above. It raises numerous legal and fiscal questions, including whether such a program would require congressional authorization (probably), whether it would be cost-effective (difficult to determine in advance), and whether it would raise any regulatory takings concerns (unlikely).[359] But together with the previous two proposals, it is offered with a view towards stimulating further discussion about existing opportunities to incentivize local governments to regulate inholdings in ways that better align with management of surrounding public lands.

Conclusion

Inholdings occupy a liminal place, both physically and doctrinally, between public lands and private property. This liminality has created a gap in scholarship and governance, both of which this Article has aimed to address. By

358. *Payment in Lieu of Taxes*, Dep't of the Interior, https://perma.cc/4GLU-KCN4.

359. Such a program would be unlikely to raise any takings concerns because it would explicitly provide for government compensation to property owners. *See* John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment,* 26 J. Land Res. & Env't L. 1, 5–9 (2006) (analyzing regulatory programs such as TDRs and incentive zoning, both of which offer non-Constitutionally required compensation (and thus avoid raising any potential takings concerns) in order to incentivize actions that some landowners might be willing to engage in voluntarily). As to cost effectiveness, adopting such a program would only make sense if the costs of paying local governments to downzone or otherwise limit development on inholdings both adequately addressed the land use challenges posed by the particular inholding and if it cost less than other governance tools that could address the land use challenges to the same extent. For an analysis of some of these questions in the context of other types of compensatory regulatory programs, see David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. Pa. L. Rev. 655, 708 (1995) ("Although compensation for regulatory losses traditionally has been regarded as an impediment to the project of preserving our natural resources, it can be seen as facilitating that project inasmuch as it would reduce or eliminate the race to develop.").

grounding its analysis in land use and local government law, while remaining cognizant of the public lands law and landscapes that form the inextricable backdrop to inholdings, this Article has developed under-theorized connections between these doctrinal areas and, in doing so, has had two central aims. First, by highlighting how the disjuncture in ownership and regulatory authority over inholdings and surrounding public lands creates numerous land use challenges and then unpacking how a variety of governance tools can respond to those land use challenges—and where there are gaps in those governance responses—this Article has offered a structural account of the law of inholdings that has been missing from legal scholarship. And second, by advancing a normative case for greater recognition of the opportunities for leveraging local land use law to narrow the inholdings governance gap, and offering prescriptive policy proposals for how the underlying incentive structures that shape local government decision-making around inholdings might be realigned, this Article has offered a novel perspective on how local land use regulation could be a more meaningful component of the inholdings governance model.